

BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

ORIGINAL

General Review of the Rules of Practice

Docket No. RM98-3

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**COMMENTS OF THE
NEWSPAPER ASSOCIATION OF AMERICA
October 28, 1998**

The Newspaper Association of America ("NAA"), by its attorneys, hereby respectfully submits its comments in response to the Commission's *Request for Suggestions on Improvements in the Commission's Rules of Practice*.¹

NAA's comments will address three topics:

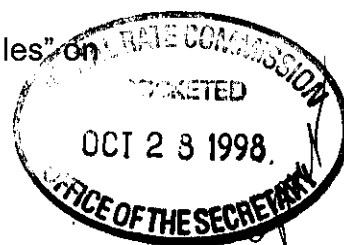
1. General adoption of the Special Rules of Practice;
2. Electronic filing and service; and
3. Motions to Accept Late-Filed Affidavits in support of interrogatory responses.

I. Special Rules of Practice

Special rules of practice routinely apply in omnibus rate cases.² These special rules govern the largest cases before this Commission, are quite familiar to the parties, and in NAA's view generally work well. There is no obvious reason why they should not be incorporated into the general rules. For this reason, NAA urges the Commission to consider amending its standard rules of practice as codified in 39 C.F.R. to reflect at least the vast majority of the Special Rules of Practice.

¹ Order No. 1218, 63 *Fed. Reg.* 46,732 (Sept. 2, 1998) ("*Request*").

² Over the years, the Commission has modified its set of "special rules" on occasion to address specific issues.



In particular, NAA urges the Commission to consider modifying its rules of practice as appropriate to incorporate the following provisions from the Special Rules of Practice adopted in Docket No. R97-1: Sections 1 (evidence), 2 (discovery), 4 (cross-examination), and 5 (general).³

Section 3 (service of documents) raises different issues. Two subsections -- A (two persons on service list) and D (document titles) -- are routine and deserve to be considered for incorporation into the standard rules. However, subsection 3 C (exceptions to general service requirements for certain documents) establishes a convenience stemming from the typically large service lists in omnibus rate cases, and perhaps should continue to be limited to the status of a special rule to be used in only the largest cases. Subsection 3 B, relating to service of documents, is discussed in the next section.

NAA recognizes that some of these provisions provide for more accelerated pleading deadlines than the standard rules. However, parties have demonstrated an ability to meet these time periods in omnibus cases, and the Commission routinely grants exceptions when necessary. Given that these rules routinely apply to the Commission's largest and most important cases, it seems reasonable that they should become the normal rule. If, in a particular proceeding, a larger time period for responses to interrogatories or other pleadings seems appropriate, the Commission can adopt a special rule for that proceeding to accommodate the need.

³ Library references, although part of section 5 of the special rules, are the subject of a separate Commission proceeding.

II. *Electronic Filing and Service*

The Commission has conducted several different experiments with electronic filing and service of documents in ways that commendably take advantage of current communications and information technology and comport with its own internal operations. In particular, in Docket No. R97-1, it allowed parties to file diskettes containing a computer file of a filing and a greatly reduced number of hard copies of the filing in lieu of the original + 24 copies generally required. In the current *Mailing Online Service* proceeding, Docket No. MC98-1, the Commission is experimenting with an *electronic service process which amounts to a notification that computer files of recent filings have been posted on the Commission's website.*

NAA commends the Commission for these initiatives, and believes that the experience to date provide a basis for some preliminary conclusions.

First, the Commission's website has proven to be a useful resource for parties wishing promptly to obtain copies of the most recent filings and documents issued by the Commission or the presiding officer. It has also provided parties with a convenient means of obtaining copies of some documents without having to take the time to make an in-person visit to the Dockets Room. For example, the website proved helpful in Docket No. R97-1 as a means for parties to obtain copies of initial briefs before service copies were received through the mail. The Commission should encourage parties to continue to submit electronic versions of filings in a manner suitable for posting.

Despite the convenience of the Commission's website, the Commission should refrain from making electronic filings a general requirement unless and until it can assure itself that all intervenors are currently capable of submitting files in this manner

or that they wish to do so. Electronic filings should improve the ability of parties to participate, not erect a new obstacle to their doing so. While the continued deployment and evolution of information technology undoubtedly will make electronic filing ever more common, it is not necessarily the case that all participants in Commission proceedings have joined the information superhighway.

Second, experience to date suggests that while posting documents on the Commission's website offers certain significant benefits, it is not, at this stage, a fully satisfactory alternative to hardcopy service. In this regard, NAA is in general agreement with the comments filed by the Major Mailers Association in this docket on October 7, 1998. In particular, NAA agrees that there are costs in time and resources to reviewing the files on the website, choosing which to download, and downloading those files which can more than offset the value derived from obtaining them more quickly.⁴ For these reasons, hardcopy service retains certain advantages. While "website service" may suffice for some proceedings, it is unlikely to serve as an adequate substitute for hardcopy service either now or within the next few years.

Accordingly, NAA would not recommend at this time that the Commission adopt a presumption favoring electronic or website service. While, from the perspective of a participant, there is no reason why the Commission should not continue to provide for

⁴ In NAA's experience, counsel have usually displayed the courtesy of providing either courier or fax (and in one instance, e-mail) service of documents pertaining to NAA in particular, thus providing "same day" (or "first thing the next morning") service of such documents. Thus, NAA has often received same day notice of filings of immediate concern to it. For other filings, a day's delay may be of little concern. These voluntary courtesies are appreciated and provide even more immediate service of documents than even website posting.

website service, NAA would prefer that the general rule continue to provide for hardcopy service as the standard.

III. Motions to Accept Late Filed Affidavits

NAA respectfully offers the following additional suggestion as means to simplify, albeit modestly, these proceedings. This comment addresses the frequent filing by parties to provide a declaration or affidavit of a witness in support of an interrogatory response which, for whatever reason, could not be attached to the response when originally filed. Such a filing typically consists of three pieces: (1) a motion for leave to file, explaining why the declaration/affidavit is untimely; (2) the declaration/affidavit; and (3) the certificate of service. These documents are often produced on at least two, if not three, word processors, and typically consist of at least three separate pieces of paper.

To NAA's knowledge, no such motion has ever been denied. The order granting the motion takes at least one more piece of paper, although the presiding officer often grants several such motions in one order. NAA respectfully suggests that the time and paper devoted to such filings may not be fully warranted.

The affidavit accompanying an interrogatory response serves the purpose of confirming the witness's understanding that the answer is sworn and provides an evidentiary basis for potential impeachment of a witness by means of a prior inconsistent statement made under oath. This may justify retaining the requirement of an affidavit, although the need is obviated to some degree by (1) the fact that witnesses adopt their interrogatory responses under oath as written cross-examination and (2) the practice of changing/amending interrogatory responses as new data or information

become available.⁵ NAA is unaware of any instance in which a witness has refused to adopt an answer on the grounds that the witness had never previously attested under oath to the truth of the answer. However, there may be benefit in witnesses always understanding that their interrogatory responses are to be sworn.

Several alternatives suggest themselves. One, the Commission could encourage parties to file all such "make-up" motions at one time, to reduce the sheer number of them. Two, the Commission could encourage or require parties to put the certificate of service on the same sheet of paper as the motion, thereby reducing the number of sheets of paper. As a third possibility, the Commission could consider adopting a general rule to the effect that all interrogatory responses are deemed to be under oath, thereby dispensing with the need for the document at all.


⁵ Witnesses rarely, if ever, are impeached on oral cross-examination by means of a prior inconsistent statement under oath consisting of a previous version of an interrogatory response. At most, they are asked to reconcile different versions of their answer to particular questions, usually all of which have been designated into the record as written cross-examination. If a witness has changed an interrogatory response several times, the Commission is perfectly capable of determining the proper weight to be given that testimony.

IV. Conclusion

For the foregoing reasons, the Newspaper Association of America respectfully urges the Commission to amend its rules of practice in a manner consistent with these comments.

Respectfully submitted,

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