ORIGINAL

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

GENERAL REVIEW OF THE RULES OF PRACTICE

Docket No. RM98–3

INITIAL COMMENTS OF UNITED STATES POSTAL SERVICE
(December 2, 1998)

In Order No. 1218, the Commission solicited comments and suggestions on potential improvements in the Commission's rules of practice. Comments were to be filed on or before October 28, 1998. On October 29, 1998, in response to a request filed by the Postal Service, the Commission issued Order No. 1220, which extended the deadline for comments until December 2, 1998. The Postal Service hereby respectfully submits its comments on potential improvements to the Commission's rules.

Initial Considerations

The Postal Service welcomes the Commission's efforts to improve its rules of practice. Initiation of this docket between major rate cases promises to provide the Commission, the Postal Service, and interested parties a valuable opportunity to streamline Commission proceedings, with the result that the burden of participation can be reduced, and such proceedings be completed more expeditiously.

The Postal Service's comments fall into two general categories. The first category seeks to eliminate or modify requirements of the rules which over the passing years may have become antiquated or redundant. These minor revisions seek to "clear the regulatory underbrush" of requirements of low utility to the Commission and the parties. The second category consists of more significant efforts to make practice before the Commission more streamlined and efficient, more productive, and less burdensome and time-consuming for all concerned. These changes would bring the

Commission's procedures into closer conformance with reforms already made at federal agencies such as the FCC or the EPA, and with reforms made by the federal courts.

Minor Revisions

1. Eliminate required production of "functionalized accrued costs".

Rule 54(f) currently requires the Postal Service to file in all rate cases a report of "total functionalized accrued costs." The Postal Service already routinely provides detailed accrued costs by cost segment and component. The functionalized costs are essentially a reformatting of the cost segments and components, and add no further information. The utility of "functionalized" accrued costs is negligible in these circumstances, as can be seen from the fact that the Postal Service does not reference these costs in its testimony and exhibits, other than to the extent necessary to comply with this subpart of Rule 54. Moreover, it does not appear that the Commission has ever relied upon functionalized accrued costs in its cost models. The Postal Service therefore respectfully suggests that the Commission consider in this docket the elimination of subpart (f) of Rule 54. Such a revision would eliminate unnecessary paperwork in preparing rate filings, thereby facilitating and streamlining the process.

2. Eliminate documentation requirements leading to the production of unnecessary, little-used library references.

The Postal Service produces numerous library references at the outset of each general rate proceeding, and supplements this collection with more during the case. One such library reference is the Base Year / Roll Forward, Processing Documentation Reports (LR-H-5 in Docket No. R97-1). As currently drafted, the Commission's "roll-forward" rules (Rule 54(h)(5)) have been interpreted by the Postal Service as requiring

detailed documentation of each and every instance in which "ripple-affected" cost segment components are developed, and production of a hard-copy listing of all operations performed in the CRA/Roll-forward program. In practice, this has resulted in the listing of hundreds of pages of "control string" procedures from information previously provided in control strings governing the roll-forward program. Because this process cannot be performed until all of the cost analyses underlying the rate case are complete, this time-consuming exercise must occur as one of the last stages of rate case filing preparation. It is not apparent that any party has made use of this information in the course of recent rate proceedings. For this reason, the Postal Service requests that the Commission consider revisions to Rule 54(h)(5) to eliminate the need to produce this library reference in future proceedings.

This proceeding may also provide an appropriate forum for a more general review of library references, in order to identify those library references routinely provided by the Postal Service in general rate cases which are of little value to the parties or to the Commission. The Postal Service strongly encourages such a review in order to reduce the burden of production, and to reduce the number of materials which participants may be forced to review in analyzing the Postal Service's filings.

3. Eliminate required production of hardcopy listings of data files, other computer information.

Rule 31(k)(3)(i) currently requires for each computer analysis being offered as evidence, or relied upon as support for other evidence, a foundation that includes, among other things, "a listing of the input and output data and source codes." Furthermore, it appears from the context of the rule that the required listing is a hard-

copy listing, since subparts (*d*) and (*f*) separately provide that electronic versions of data bases and source code are presumptively necessary only if requested by a party. While the standard provision of hard-copy data and source code listings was appropriate in an earlier time period in which paper remained the overwhelmingly dominant medium of communication in Commission and court proceedings, the widespread utilization of electronic media for transfer of information has reached such a state that this requirement can be beneficially revisited at this time.

Several factors militate in favor of requiring production of data and source code in electronic form, rather than as hard-copy. First, any party seeking to investigate, replicate or validate a computer analysis will in all likelihood wish to load the source code and input the data on its own computers. This process would unquestionably be better facilitated by provision of machine-readable rather than paper copies of data files and source code. Consistent with this reality, requests for production of such electronic versions were becoming so routine in Commission proceedings that the Postal Service has for some time made it its practice to provide electronic versions of data and source code in its initial filings with the Commission, without waiting for the information to be requested. Moreover, in many instances where the data bases involved are extensive, the Postal Service has found it impractical to attempt to provide the entire set of data on paper, opting instead to print only representative subsets. No party has objected to this procedure. Finally, the requirement that data and source code be provided in hard-copy form is not only anachronistic, but it is redundant. Any interested party possessing electronic versions of such documents in most cases will be quite capable of producing hard-copy versions with little effort in the event that such paper copies are

deemed to be of interest.[1]

For the foregoing reasons, the Postal Service requests that the Commission consider amending the foundational requirements of Rule 31(k)(3)(I) to specify production only of electronic versions of data or source code, and eliminating the provisions which provide for production of these items upon request. Alternatively, consistent with other parts of Rule 31, the medium of presentation for such information could be left unspecified, allowing the provision only of electronic media. (*See* Rule 31(k)(2)(iv), where "a complete listing of the [input] data" used in econometric studies is to be provided upon request.)

4. Eliminate anachronistic technical references and requirements

At various points in the Commission's rules, requirements are expressed in terms which have become technologically outdated. For example, Rule 54(h)(5)(v)(*b*) requires certain roll-forward documentation to be produced on "a 5-inch floppy diskette in MS-DOS format." All involved in Commission proceedings will readily acknowledge that 5-inch floppy diskettes have outlived their usefulness, and in most applications have been replaced by superior, higher-capacity media. It would make sense for the Commission to initiate a thorough review of its rules to detect such anachronisms, and revise the requirements to make them less susceptible to technological obsolescence.

---

[1] In the rare instance where a party does not possess the means to print computer information, yet wishes to review such information in hard-copy form, interrogatories or requests for documents, or informal consultations with Postal Service counsel, would remain options for requesting such hard-copy.

Major Revisions

In what follows, the goal of the Postal Service is to suggest possible changes to the Commissions rules of practice and procedure that may result in more streamlined, expeditious, efficient Commission proceedings, with less burden on the participants and the Commission. In large part, these potential improvements are thought to result from increased reliance on written submissions, rather than time-consuming oral presentations, and oral cross-examination. Other federal agencies, such as the FCC and the FERC have already successfully streamlined their adjudicatory procedures through reforms such as these. Many of the "written form" procedures suggested are extensions of procedures which, to a limited degree, have already been employed successfully in various Commission proceedings. The Postal Service believes that increased use of such procedures can gainfully be employed, while still affording due process to participants.

1. **Streamline rules pertaining to intervention and participation**

Rules 20, 20a and 20b set out three classifications governing participation in Commission proceedings. These multiple classifications create varying rights and obligations of parties. The Postal Service is aware of no parallel classifications in use by other federal regulatory agencies. Although they were undoubtedly originally intended as an attempt to simplify the process, they actually create unneeded regulatory complexity. The Commission should consider revising its rules so that all interested parties who intervene will participate on an equal footing.[2]

---

[2] The Postal Service recognizes that these rules were intended to protect limited participants from broad discovery requests. Experience has shown, however,

As part of the intervention process, the rules also allow for parties to file notices of intervention and for oppositions to be filed to such notices. A simpler procedure, eliminating the need for any motions practice and resolution by the Commission, would be to allow timely intervention as of right. A motion would be necessary only in the case of late intervention. The Commission should consider such a change. As a result of these suggested changes, rules 20(d), 20a, and 20b could be eliminated.

It is possible that additional streamlining and expedition in Commission proceedings could be fostered if the Commission were to establish rules for general rate and classification proceedings under which a list of parties interested in automatic intervention were maintained by the Commission. Under such rules, these parties would automatically become parties to any docket established by the Commission. Currently, such procedures exist only with respect to a limited subset of proceedings, such as market tests and provisional service changes. *See* Rules 163, 173. Since such procedures have the potential to streamline the intervention process and speed service of documents upon the core of parties who intervene in Commission proceedings as a matter of course, the Commission should consider in this proceeding whether they should be extended to major rate and classification proceedings.

2. Limitations on discovery

Currently, in Commission rate and classification proceedings, parties have the ability to file an unlimited number of interrogatories, requests for admissions, requests for documents, and other forms of discovery. The only significant constraints presently

---

that such parties are rarely, if ever, subject to such requests. Moreover, parties are free to seek relief from the Commission in such cases on an exception basis.

bearing on the conduct of such wide-ranging discovery are the time limits on discovery set in the procedural schedules established in a given proceeding. There are, however, no limitations to the number of interrogatories (including subparts) that a party might ask. The fact that discovery is "free" to the propounding party leads to a lack of strong incentives to carefully review testimony, workpapers, library references and other documentation prior to the launching of discovery efforts. It is not uncommon, in the experience of the Postal Service, to find that a significant number of interrogatories can be answered by a straightforward reference to previously provided documentation, indicating that a cursory review of that information would have obviated the need for the discovery request.

Such inefficient discovery does not advance the interests of the parties or the Commission. Thus, the Postal Service believes that the Commission should consider in this docket the extent to which numerical limitations on discovery requests could beneficially focus discovery efforts, reduce the burdens of participation on the parties, and potentially lead to overall efficiencies in Commission proceedings.

In this review, reference could be made to the Federal Rules of Civil Procedure, which provide for limits on discovery by parties. The Federal Rules of Civil Procedure, governing how a civil case proceeds through a United States district court, were changed dramatically by amendments effective December 1, 1993. The changes were specifically made to move cases along expeditiously while ensuring the parties a fair hearing and the preservation of all due process rights. To this end, the federal discovery rules, Rules 26, 29-37, were changed to place numerous limitations on how discovery is to be conducted.

For example, Rule 33 now provides that, absent leave of court or stipulation of the parties, a party is limited to serving any other party **25** interrogatories "including all discrete subparts." Rule 33(a).[3] The Advisory Committee Notes to the rule state that parties "cannot evade this presumptive limitation through the device of joining as 'subparts' questions that seek information about discrete separate subjects." Fed. R. Civ. P. 33(a), Advisory Committee Notes.

Moreover, the presumptive limit of 25 interrogatories applies to complex litigation. See Manual for Complex Litigation, Third, Federal Judicial Center, § 21.462 (1995). The Manual advises that interrogatories in complex cases can be handled more effectively by requiring similarly-situated parties on the same side of a case to confer and develop a single or master set of interrogatories to be served on the opposing parties. The Manual also suggests that if a party has already served interrogatories, other parties should be precluded from asking the exact same questions. Instead, the previously filed answers to the interrogatories should be used. See FRCP 26(b)(2).

The Postal Service believes that just as the Commission imposes time limits on discovery, it has the discretion to impose limits on the number of questions directed by

---

[3] Similarly, Rule 30 now limits the number of depositions that can be taken to 10 depositions on each side of a case. Specifically, Rule 30(a)(2)(A) requires leave of court or agreement of the parties before all plaintiffs, all defendants, or all third-party defendants may take more than 10 depositions under Rule 30 (Depositions Upon Oral Examination) and Rule 31 (Depositions Upon Written Questions) together. Further, Rule 30(a)(2)(B) and Rule 31 prohibit a second deposition of the same person without leave of court, and Rule 30(d)(2) allows a court by local rule or court order to limit the duration of a particular deposition.

a party to a particular party or witness, while still providing due process to all concerned. Such question limits would encourage parties to carefully review existing documentation and direct well-considered, carefully focused interrogatories to other participants. Such procedures would also encourage the parties to make greater use of informal means of discovery, such as informal technical conferences, which in many instances can more quickly resolve technical issues than more formal mechanisms. It would also provide the parties with increased incentives to negotiate limitations of issues and join in stipulations of undisputed factual matters.[4]

3. *Eliminate the assumption that witnesses will be subjected to oral cross-examination.*

Additional efficiencies in Commission litigation may be obtainable through increased reliance on written, rather than oral, submissions of testimony. Many of the functions performed during Commission hearings -- filing of direct (or rebuttal) testimony, and filing of responses to interrogatories -- are currently handled in written form. Moreover, when no participant requests oral cross-examination, current practice is usually to provide appropriate written declarations to confirm the veracity of previously-filed testimony and discovery responses, and thus facilitate their admission into evidence. Sometimes this is accomplished by presenting the necessary paperwork in the hearing room, while on other occasions it is done entirely by written submission.

---

[4] The Commission currently has in its rules provisions which could facilitate more efficient discovery. Rule 20 provides that two or more intervenors having substantially like interests and positions may be required to join together for purposes of cross-examining witnesses and other purposes. Use of this and other procedures could forestall attempts to evade numerical limitations on discovery requests by duplicative or overlapping interventions by similarly-situated interests. *See* also Rule 24(d).

In any event, there is no doubt that live hearings often are not required to perform these functions. The Commission should consider means by which reliance on written submissions can be expanded, so as to further reduce the need for live hearings and the costs associated with the appearances of witnesses at such hearings.

One such means would be to alter the rules of practice and procedure to make it possible for oral cross-examination to be the exception rather than the expected occurrence. Limitations on cross-examination are entirely consistent with section 556 of the APA, which provides only for "such cross-examination as may be required for a full and true disclosure of the facts." 5 U.S.C. § 556(d). In accord with this provision, the Commission's current Rule 30(f) allows the Commission or the Presiding Officer to limit "the cross-examination of a witness to that required for a full and true disclosure of the facts necessary for the disposition of the proceedings and to avoid irrelevant, immaterial, or unduly repetitious testimony." Rule 30(f)(3). Thus, although the Commission must be careful to avoid prejudicing the rights of the parties, its authority is well-established to impose limitations on oral cross-examination which do not conflict with its due process obligations.[5]

---

[5] While postal ratemaking can be distinguished in some respects from the work of other federal agencies, some of those agencies often are required to conduct formal adjudicatory hearings subject to Sections 554, 556, and 557 of the APA. *See, e.g.*, 16 U.S.C. § 824d (Federal Energy Regulatory Commission); 47 U.S.C. § 205 (Federal Communications Commission); 49 U.S.C. § 10701 (Surface Transportation Board). Because their proceedings often involve a tremendous amount of detailed, technical facts, these agencies have streamlined their procedures to achieve greater institutional efficiency. The FCC has attempted to find ways to streamline its hearing processes and increasingly has relied on "paper hearings" to reduce the burdens placed on the agency and on the affected parties. *See In the Matter of An Inquiry Into* the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to

In practice in recent years, neither the Commission nor the parties have taken many steps to minimize unnecessary oral cross-examination. Under current practice, only pro-forma statements of intent to cross-examine are submitted, often with minimal descriptions of the areas to be covered. (The typical submission states simply that the witness is to be questioned with regard to his or her testimony or written responses, or words to that effect.) Admittedly, the terseness of these submissions often may stem from the large amount of business which must be conducted prior to and during the scheduled cross-examination period, and from the fact that preparations for cross-examination often reach their peak in the day or two immediately prior to the appearance of the witness. When many parties have engaged in such last-minute preparations, it has not been apparent that no cross-examination was required of a particular witness until that witness had already made his way to the stand, and had been asked to do little more than authenticate prefiled testimony and interrogatory responses. *See, e.g.,* Docket No. R97-1, Tr. 10/5222 (no oral cross-examination of Postal Service witness Baron), Tr. 10/4838 (no oral cross-examination of Postal Service witness Kaneer).

Thus, in the current regime, most witnesses are expected to appear for hearings, even if the initial indications of the parties are that the expected amount of oral cross is "little or none." There may even have been occasions in which witnesses were asked questions just to avoid the appearance that their appearance has been wasted, or for other reasons which would not have justified an appearance. Overall, the expectation

---

Cellular Communications, FCC No. 82-99, Memorandum Opinion and Order on Reconsideration, 89 FCC 2d 58 (1982).

is that oral cross-examination is an inevitable outcome of the submission of written testimony.

This could be reversed if the rules were amended to require parties requesting oral cross-examination to show cause why written submission is inadequate to achieve the desired objective. This could reduce the practice of requesting oral cross without any well-defined objective in mind, or with last-minute questions that were overlooked during discovery. The objective would be to devise a system in which oral cross-examination would become the exception, not the rule. It is true that such a system would require a more disciplined approach to discovery and potential oral cross-examination on the part of the Postal Service and all other parties to the proceeding. It may also give rise to additional motions practice, as parties would have to justify the need for live examination of a witness. Such steps are necessary components, however, of any attempt to streamline postal ratemaking through increased reliance on written submissions.

4. Eliminate Oral Argument

Commission Rules 36 and 37 govern oral argument. After years in which every general rate case generated requests for oral argument, Docket No. R97-1 was successfully concluded without such a request, and without oral argument. This change appears to signal increased acceptance of the view that oral argument in such cases may not be a productive use of the time of either the Commission or the participants. Once again, an effort to streamline the Commission's proceedings would suggest that the provision for this practice in the rules should be eliminated, or modified such that oral argument is scheduled in only truly extraordinary circumstances.

5. Adjust rules pertaining to limited, expedited proceedings to minimize the need to file routine waiver requests

The Commission also may wish to consider changes in what information is required with the initial filing in limited, expedited proceedings. Experience under the more flexible procedures indicates that some of the filing requirements warrant a review. In cases filed in recent years under the Commission's rules for experiments, market tests and provisional services, the Postal Service, as part of its initial filing, has requested waiver of various provisions of Rules 54 and 64. These requests have been made by the Postal Service, largely have been unchallenged by intervenors, and have been granted by the Commission, based on a seeming mutual understanding that the more detailed information required for omnibus rate and larger classification cases is either unnecessary, unavailable, or both, in more limited proceedings. The Postal Service proposes an examination of all provisions in the rules for expedited proceedings requiring either compliance with Rules 54 and 64, or a showing that the data are unavailable. Eliminating the motions practice engendered by certain of these requirements has the potential for a more streamlined process. Past experience has shown that the proceedings have been successfully litigated by all participants and

concluded by the Commission without the necessity of the waived Rule 54 and 64 information.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

Daniel J. Foucheaux, Jr.
Chief Counsel, Ratemaking

Richard T. Cooper

475 L'Enfant Plaza West, S.W.
Washington, D.C. 20260–1137
(202) 268-2989; Fax -5402
December 2, 1998

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all participants of record in Docket No. R97-1 in accordance with section 12 of the Rules of Practice.

Richard T. Cooper

475 L'Enfant Plaza West, S.W.
Washington, D.C. 20260–1137
(202) 268-2993; Fax -5402
December 2, 1998