

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

MODERN RULES OF PROCEDURE FOR THE
ISSUANCE OF ADVISORY OPINIONS IN NATURE
OF SERVICE PROCEEDINGS

Docket No. RM2012-4

UNITED STATES POSTAL SERVICE INITIAL COMMENTS
(July 29, 2013)

In Order No. 1738, the Commission issued a notice of proposed rulemaking in which it “seeks comments on its proposed rules applicable to requests by the Postal Service for changes in the nature of postal services.”¹ Order No. 1738 incorporates input that the Commission received from the Postal Service and other parties in response to an earlier advance notice of proposed rulemaking.²

As an initial matter, the Postal Service continues to believe that legislative reform is necessary to remove the mismatch between the Administrative Procedure Act’s (APA’s) formal rulemaking requirements and the merely advisory outcome of an N-case, and to establish a statutory timeframe that is binding upon N-cases, along the lines of the provision approved by the Senate during the last

¹ Order No. 1738, Notice of Proposed Rulemaking Regarding Modern Rules of Procedure for Nature of Service Cases Under 39 U.S.C. 3661, PRC Docket No. RM2012-4 (May 31, 2013), at 28.

² Order No. 1309, Advance Notice of Proposed Rulemaking on Modern Rules of Procedure for Nature of Service Cases Under 39 U.S.C. 3661, PRC Docket No. RM2012-4 (Apr. 10, 2012). The Postal Service submitted initial and reply comments in response to Order No. 1309. United States Postal Service Initial Comments (hereinafter “USPS ANPRM Initial Comments”), PRC Docket No. RM2012-4 (June 18, 2012); United States Postal Service Reply Comments (hereinafter “USPS ANPRM Reply Comments”), PRC Docket No. RM2012-4 (July 17, 2012).

legislative session.³ The Postal Service's participation in this rulemaking should not be construed as an endorsement of this rulemaking as a substitute for legislation. Nevertheless, the Postal Service would be remiss if it did not share the following initial comments and suggestions on the Commission's proposal to enhance the efficiency of N-cases, pending further legislative reform.

I. INTRODUCTION

In general, the Postal Service supports the direction of the Commission's proposed changes to the N-case procedures. Many of the Commission's proposals seek to achieve the same purposes as the changes proposed by the Postal Service in earlier stages of this rulemaking and to address the major flaws identified by parties during previous N-case proceedings. As described in sections II through V below, however, the Postal Service has concerns that the Commission's proposals might allow too many opportunities for exceptions that enable parties to avoid the streamlined procedures.

A. 90-day Timeframe

The Postal Service supports the Commission's proposal to complete nature of service proceedings within 90 days of the date on which the Postal Service submits its request for an advisory opinion under 39 U.S.C. § 3661. While certain proposed changes may pose other problems, the Commission's proposed rules generally aim at creating a reasonable expectation of completing N-case proceedings in 90 days. A commitment to a 90-day process will make N-

³ S. 1789, 112th Cong. § 208 (2012); see also Letter from Senator Tom Carper, Chairman, Subcommittee on Federal Financial Management, Government Information, Federal Services, and Informational Security, to Postal Regulatory Commission (hereinafter "Senator Carper Letter"), PRC Docket No. RM2012-4 (June 15, 2012), at 1-2.

case procedures more effective and increase the value of the Commission's advisory opinions because it will enable the Postal Service to review and consider the Commission's input before or during implementation of a service change proposal.

Previously, the Commission has acknowledged the importance of efficient and timely resolution of Section 3661⁴ proceedings, particularly in light of the 5-to-12-month periods that have marked past such proceedings.⁵ The combination of unnecessarily long N-case proceedings and delayed publication of advisory opinions has undercut the purpose of the advisory opinion process: to provide timely expert advice to Postal Service management. Recently, the Postal Service's unsustainable financial position has even impelled it to initiate service changes about which it has sought the Commission's advice before the conclusion of the review process that will generate that advice. In this context, more timely and less burdensome proceedings would benefit the Commission, the Postal Service, and even other participants, to whose input timelier proceedings can offer greater relevance for the Postal Service's ultimate decisions.

⁴ In general, "Section" will be used in this pleading to refer to indicated sections of title 39, U.S. Code. "Rule" will refer to indicated sections of the Commission's rules in title 39, Code of Federal Regulations.

⁵ Order No. 1309 at 1, 3. Of the six most recent N-cases, PRC Docket No. N2012-2 had the shortest period: 90 days (approximately 3 months). That case essentially built upon the foundation of PRC Docket No. N2009-1, however, which itself took 251 days (approximately 8 months). The next shortest N-case was PRC Docket No. N2011-1, which lasted 149 days (approximately 5 months). The longest was PRC Docket No. N2010-1, which took 359 days (approximately 12 months). The average length of the six most recent N-cases was 242.5 days (approximately 8 months), or 273 days (approximately 9 months) when PRC Docket N2012-2 is excluded.

By committing to a 90-day schedule for N-cases, from a timing perspective, the Commission would treat N-cases consistently with other more complex Commission dockets and proceedings conducted by other federal agencies. For example, the Commission operates under a 90-day timeframe with respect to the Annual Compliance Determination (39 U.S.C. § 3653(b)) and changes in market-dominant product prices due to exigent or extraordinary circumstances (39 U.S.C. § 3622(d)(1)(E)), both of which types of proceedings result in a final, binding order. And many federal agencies set abbreviated timeframes for their issuance of advisory opinions, ranging from 20 to 90 days.⁶ In its previous session, the U.S. Senate agreed that the Commission's advisory opinion process can and should be subject to a 90-day time limit, except where the Commission and the Postal Service jointly agree that more time is needed.⁷ Assuming that the 90-day timeframe is treated with sufficient integrity (a matter discussed in sections II and III.A below), the Postal Service agrees that establishment of a 90-day limit will lead to a more effective and valuable N-case process.

B. Limiting Subject Matter to USPS's Proposal

The Postal Service supports the Commission's attempt to focus discovery and rebuttal testimony on the service change proposal presented by the Postal Service, and to prohibit rebuttal testimony and discovery that address alternative

⁶ See USPS ANPRM Initial Comments at 7 fn.13.

⁷ S. 1789, 112th Cong. § 208 (2012); see also Letter from Senator Tom Carper, Chairman, Subcommittee on Federal Financial Management, Government Information, Federal Services, and Informational Security, to Postal Regulatory Commission (hereinafter "Senator Carper Letter"), PRC Docket No. RM2012-4 (June 15, 2012), at 1-2.

proposals. As explained in the Postal Service's earlier comments, in previous N-case proceedings, the distraction of alternative proposals has resulted in an unnecessary waste of time and resources, and confusion regarding the purpose of the N-case proceedings.⁸ The Commission's proposal to limit discovery and rebuttal testimony to the service change proposal presented by the Postal Service will lead to a more focused and less time-consuming N-case proceeding. The Commission's proposed rules aim to remove the inefficiency that comes from parties using N-case discovery and cross-examination to further extraneous interests, and the Postal Service supports the Commission's intent in this regard.

C. Elimination of Field Hearings

The Postal Service supports the Commission's commitment to eliminate field hearings in most cases. As demonstrated most recently in PRC Docket No. N2010-1, field hearings add a significant amount of time to the procedural schedule and require the Postal Service to absorb considerable management resources and high travel costs.⁹ Despite the time and travel costs, field hearings occur off the record, and thus do not lead to the development of evidence that is admissible in an N-case proceeding. As described in section V.E below, the Postal Service encourages the Commission to insert language into its proposed rules that expresses a commitment to the elimination of field hearings in more explicit terms. The Commission's commitment to eliminate field hearings reflects an apparent and appropriate recognition that, whatever the civic

⁸ USPS ANPRM Initial Comments at 16-20.

⁹ USPS ANPRM Initial Comments at 20 fn.41, 25-27. These burdens also appear to discourage attendance and participation at field hearings by intervenors in the N-case docket.

benefits of field hearings, their lack of evidentiary value compels reconsideration of whether the Commission should incur (and impose upon the Postal Service) the considerable burdens and costs associated with field hearings that can significantly delay completion of the advisory review process.

D. Limiting Interrogatories

The Postal Service supports the Commission's proposal to place reasonable limitations on N-case participants' use of interrogatories. As described in the Postal Service's earlier comments, in previous N-case proceedings, excessive and unnecessary use of interrogatories has led to delay and waste of resources.¹⁰ The Postal Service expects that the limitation on the number of interrogatories and adoption of the standard from the Federal Rules of Civil Procedure for determining the appropriateness of subparts will help avoid the delay and waste of resources that has complicated previous N-case proceedings. As discussed in section V.D below, however, the Postal Service believes that additional refinements are needed to give the proposed rule its appropriate effect.

E. Initial Technical Conference

The Postal Service recognizes that an initial technical conference requirement has the potential to clarify and identify relevant issues early in N-case proceedings, and could contribute to a shorter, more efficient N-case proceeding. Maintenance of off-the-record status for the initial technical conference increases the likelihood that the conference will facilitate a productive

¹⁰ Id. at 17-20.

discussion and reduces concerns about having to prepare for a substantive on-the-record hearing so early in the N-case proceeding.

F. Pre-filing Consultations

To the extent the pre-filing stage proposed by the Commission is not significantly more burdensome than the pre-filing activities that the Postal Service undertakes under current practice, the Postal Service recognizes that, like the initial technical conference, the establishment of a pre-filing stage could lead to a more efficient N-case proceeding. To achieve the 90-day schedule and other goals of the Commission's proposed rules, the Commission must ensure that participants do not employ opportunities provided during the pre-filing stage in a manner that delays N-case proceedings. For example, the Commission's rules should indicate that alleged nonconformity with rules applicable to the pre-filing stage does not provide a basis for extending the 90-day N-case procedural schedule.

As explained by the Postal Service in its earlier comments, the most important factors that contribute to the length and inefficiency of N-case proceedings are the absence of a firm deadline for completion of N-case proceedings and the allowance of unlimited discovery, and not alleged deficiencies in the information provided by the Postal Service at the pre-filing stage.¹¹ Parties to an N-case already have ample access to baseline information about Postal Service operations, and the Postal Service often provides independent advance public notice of its plans to change the nature of postal

¹¹ USPS ANPRM Reply Comments at 11-14.

services.¹² Although the Postal Service recognizes the purpose of establishing a formal pre-filing stage in N-case proceedings, it is not necessary for the proposed stage to require disclosure of information or procedures different from current Postal Service practice. To the extent that the pre-filing stage would merely formalize current practice without creating new burdens or opportunities for procedural disputes, however, the Postal Service sees little issue with the proposed rules.

II. THE ELIMINATION OF PARTY DISCOVERY IS LEGALLY SOUND AND WOULD BEST ACHIEVE THE COMMISSION'S GOALS FOR N-CASE EFFICIENCY.

The Postal Service commends the Commission for its effort to think creatively about how to make N-cases generally speedier and more efficient. However, some of the key methods that the Commission proposes to use to meet its 90-day-schedule goal, when taken together, would be untenable and, without further refinements, would undermine the very likelihood of ever meeting that goal. Fortunately, case-law, the practice of federal regulatory agencies, and the Commission's own practice in other contexts point toward a more certain way for the Commission to meet its 90-day-schedule goal.

The most direct method that the Commission proposes to employ is a truncation of deadlines for responses to discovery and other procedural activities. This puts the cart before the horse. The amount and involvement of party discovery drives the length of time that it takes the Postal Service to respond, not vice versa. The mere establishment of tighter response deadlines, without

¹² See id. at 13.

substantial reduction in the scope of discovery, simply means that deadlines will be harder to meet and that more deadlines will be missed.¹³ Absent further clarification of what constitutes “good cause” for vitiating the 90-day procedural schedule, as discussed in greater detail in section V.A, one may well wonder whether making discovery deadlines harder for the Postal Service to meet will simply give other participants a ready-made excuse for demanding an extension to an N-case’s overall schedule. To the extent that that may be the proposed rules’ effect in practice, then the proposed rules represent no meaningful improvement over current practice: 90 days as a floor on N-case durations, not a cap.

Although the Commission proposes to limit interrogatories along the lines of the Federal Rules of Civil Procedure and to exhort parties to focus on the Postal Service’s proposal instead of alternative proposals, the proposed rules contain no other limits on interrogatories, requests for production, and requests for admission. They would do nothing to discourage parties from posing their questions through requests for production or requests for admission, rather than through interrogatories. Nor is it clear, given the standard for non-discrete subparts, that parties would be unable to propound the same amount of interrogatory questions requiring response as under the current rules, only organized more distinctly around primary questions and arguably non-discrete subparts. The proposed rules also contain no bar against efforts to avoid the

¹³ See FED. R. CIV. P. 33 advisory committee’s note (explaining that the 15-day deadline for discovery responses under the Federal Rules of Civil Procedure was extended to 30 days in 1970 because “tardy response to interrogatories [had become] common, even expected”).

limits, such as where a party might fragment into its constituent locals (if a labor organization) or members (if a trade association), each of which might pose up to 25 interrogatories.

Although any discovery rules should be made party-neutral (see section V.D.3 below), the Commission's casting of the Postal Service as the perennial respondent illustrates the fundamentally asymmetrical nature of N-cases. The Postal Service, as the sole regulated entity and the initiator of an N-case, bears virtually all of the burden of responding to discovery requests. For all of the new timing restrictions that the proposed rules would impose on the Postal Service, nothing about the proposed rules streamlines – nor can it – the essential burden that discovery requests impose on the Postal Service. Upon receipt of a discovery request, the Postal Service still must ascertain what the best-positioned business units are to formulate an answer, analyze the request, determine what (if any) answer can be given and whether that answer gives rise to a basis for objection, and draft and fully vet the response. Particularly in the case of requests for production – even ones for existing data, to which the proposed rules would restrict such requests – this process can easily take more than 7 days. The proposed 7-day deadline appears all the less realistic when one considers that numerous discovery requests will be directed at the Postal Service at once, and within a more compressed discovery period.

For example, nothing in the Commission's proposed rules would prevent a scenario whereby each of five parties serves 25 interrogatories, each of which has an average of 10 non-discrete subparts, along with an average of 30

requests for production and 50 requests for admission, on the Postal Service on the same day. The Postal Service would then have only one week to respond to 1,250 interrogatory questions, 150 requests for production, and 250 requests for admission. The Postal Service might be able to buy a couple of extra days with respect to those for which it could formulate a motion to be excused from answering. Even that exercise would require combing through the 1,650 discovery requests and articulating objections within three days, however.¹⁴ While the Postal Service is doing so, even more discovery requests could roll in.

Needless to say, this scenario would pose an insurmountable strain on the Postal Service's resources. While any of the discovery requests (particularly requests for production) could, alone, take more than seven days for an adequate response, the cumulative effect of the 1,650-and-counting discovery requests seems certain to result in late responses. This, in turn, could lead discovery proponents to take advantage of the Postal Service's plight, by arguing that "good cause" now exists to void the 90-day schedule, as well as for sanctions or other relief prejudicial to the Postal Service. To be sure, adding definition to the standard for "good cause," as proposed in section V.A below, could mitigate some of the ultimate harm from this scenario. However, the fundamental problems are the allowed amount of discovery and the short response time.

¹⁴ Or one working day, if the discovery is filed on a Friday, per the Commission's proposed change to its rules for the computation of time. See section V.H below.

In focusing on deadlines, the Commission confuses the symptom with the cause. The problem with discovery's contribution to N-case timeframes is not that the Postal Service somehow languishes amid overly generous deadlines. The problem is that the Postal Service is forced to labor under an accumulating weight of party discovery in each N-case. The burdens of responding to party discovery are what they are; where the Commission proposes to draw an arbitrary deadline only affects how often the Postal Service (or other affected parties) will move for late acceptance. If the Commission genuinely wishes to streamline the fact-finding part of N-cases, it should start with first principles, by asking whether party discovery is truly necessary.

Commission practice demonstrates that the most workable way to conduct the necessary fact-finding in an efficient manner, within a 90-day schedule, is for the Commission itself to propound requests on the Postal Service, which parties can suggest to the Commission. The Commission can exercise judgment about relevant lines of inquiry, the proportionality of requests, and the appropriate amount of time to expect for a response. Commission-led information-gathering would avoid the need for a discovery dispute process, which only increases the amount of time, adversity, and administrative burden (on participants and the Commission alike) in N-cases.¹⁵

¹⁵ See Senator Carper Letter at 2 ("A lengthy, courtroom-style process, then, may not be necessary or appropriate. Abandoning those parts of the current process that encourage and facilitate often endless interrogatories and rebuttals on sometimes very minor aspects of what the Postal Service is proposing may make the Commission's work more timely. It may also be more appropriate considering the Commission's advisory role.").

Meanwhile, parties' ability to seek information from the Postal Service would be protected through their ability to request the Commission issuance of information requests. It stands to reason that the Commission's decision not to issue a proposed information request amounts to the same thing as if the party had posed the question in discovery, the Postal Service had objected to the question (or moved to be excused) for lack of relevance, the party had moved to compel (or answered the motion), and the Commission had upheld the Postal Service's objection. If the Commission decides to issue a proposed information request, then this would appear to reflect a judgment that the question is relevant, and the Postal Service might have less basis for seeking either to narrow the scope of a request or be excused from responding to it, or refusing to answer for lack of relevance (short of risking a subpoena). The only difference is that what takes up to five steps to resolve a relevance dispute currently, and four steps under the proposed rules, would take only two steps, in most instances, to get to the same result in the context of a Commission information request (namely, the proponent's application for issuance of a Commission information request, and the Commission's decision whether or not to act accordingly).¹⁶

¹⁶ In the interest of expedition, the Postal Service proposes that requests for issuance of Commission information requests be designated as "applications," rather than as "motions," at least in N-cases. This would avoid the need to build in time for answers to motions. The affirmative exercise of Commission discretion to determine which proposed information requests would actually be relevant, non-cumulative, and probative makes it doubtful that parties would answer such motions on a regular basis. Past practice indicates that answers to motions for issuance of Commission information requests are a rarity. In an extraordinary case where a party perceives a pressing need to offer views on another party's application for issuance of a Commission information request, the first party could presumably file a motion for leave to file a response to the application. Of course, the failure to submit such a motion for leave should not waive or otherwise prejudice any rights that a responding party has with respect to how it answers (or declines to answer) any resulting Commission information request.

This is how the Commission and parties interact in all other Commission proceedings (save only complaint cases), including proceedings with a 90-day time limit (Annual Compliance Report/Determination proceedings) and those with shorter timeframes (concerning product classification, pricing, market tests, and “exigent” price increases). It should be noted that all of these other proceedings result in binding Commission decisions with higher stakes than an advisory opinion. Annual Compliance Report/Determination and “exigent” price increase proceedings, if not other proceedings, are also at least as comprehensive and complex as N-cases in their scale and scope. Yet at no time has a party complained that the Commission-led information-gathering approach fails to provide “due process” in these other forms of proceedings.

Such an approach is entirely within the ambit of measures consistent with the APA requirements that apply to N-cases, 5 U.S.C. §§ 556 and 557. Those provisions require only that parties be given an opportunity for a hearing and cross-examination. Those provisions stop short of entitling parties to conduct their own discovery. Federal courts – including in particular the U.S. Court of Appeals for the District of Columbia Circuit – have consistently validated agency procedures that lack party discovery as nonetheless compliant with 5 U.S.C. §§ 556 and 557.¹⁷ In particular, a federal appellate court upheld streamlined

¹⁷ See USPS ANPRM Initial Comments at 10-11, 15 fn.34; USPS ANPRM Reply Comments at 3-4; McClelland v. Andrus, 606 F.2d 1278, 1285 (D.C. Cir. 1979) (“[T]he Administrative Procedure Act fails to provide for discovery; further courts have consistently held that agencies need not observe all the rules and formalities applicable to courtroom proceedings.”); NLRB v. Valley Mold Co., 530 F.2d 693, 695 (6th Cir. 1976) (“The Administrative Procedure Act does not confer a right to discovery in federal administrative proceedings.”); Frillette v. Kimberlin, 508 F.2d 205, 208 (3d Cir. 1974) (en banc); see also Pac. Gas & Elec. Co. v. FERC, 746 F.2d 1383, 1387-88 (9th Cir. 1984) (citing McClelland, 606 F.2d at 1285).

administrative proceedings for the licensing of nuclear reactors, which replaced party discovery with mandatory submissions of information to the regulator (among other things). Citizens Awareness Network v. United States, 391 F.3d 338, 355 (1st Cir. 2004).¹⁸ Another federal appellate court held that the Federal Communications Commission's denial of party discovery was not inconsistent with 5 U.S.C. §§ 556 and 557, where the party had not demonstrated that the discovery was truly necessary to presenting its case. EchoStar Communs. Corp. v. FCC, 292 F.3d 749, 756 (D.C. Cir. 2002). Along the same lines, a different federal appellate court upheld a National Labor Relations Board administrative law judge's denial of a discovery request, citing the lack of an APA requirement for discovery, the relevant agency rules' requirement of "good cause" for discovery, the fact that the requester had the opportunity to examine witnesses at a hearing, and the requester's failure to show any actual resulting prejudice. Kenwich Petrochems., Inc. v. NLRB, 893 F.2d 1468, 1484 (3d Cir. 1990), vacated on other grounds, 907 F.2d 400. The use of streamlined procedures, *per se*, would not expose to challenge the Commission's ability to exercise sound judgment and to support its advisory opinion with substantial evidence. See

¹⁸ Citizens Awareness Network stands for much more than the mere tautology that an agency has flexibility to change its rules. Order No. 1738 at 6. The court in that case specifically held that procedures much more streamlined than those the Commission has proposed – particularly in the curtailment of party discovery – are nonetheless compliant with 5 U.S.C. §§ 556 and 557. Even setting aside the advisory/binding distinction between N-cases and nuclear reactor licensing, the convenience of correspondence and package delivery inevitably seem less dire than the potential threats to human life that an unfit nuclear reactor might pose. While the Commission disavows the opportunity to draw guidance from the Nuclear Regulatory Commission's approach, *id.*, it remains unclear why the former should be deemed to warrant greater adversarial rigor than the latter.

Cellular Mobile Sys. of Pa., Inc. v. FCC, 782 F.2d 182, 211-12, 214 (D.C. Cir. 1985).

That the APA does not require party discovery has not been lost on other federal regulatory agencies that have exercised their discretion to deny discovery (except in rare cases where constitutional due process demands it) or to adopt streamlined discovery rules.¹⁹ As the Administrative Conference of the United States (ACUS) has noted,

[t]he APA provides flexibility with respect to procedures used in formal proceedings. Although sections 554, 556-558 contain certain basic requirements (such as proper notice, opportunity to present evidence and rebuttal, at least limited cross-examination, and the chance to submit proposed findings or exceptions), the APA leaves to agency discretion or other statutory provision such issues as the scope of discovery, the existence of time limits, and many evidentiary issues. Agencies should take advantage of such

¹⁹ E.g., Drug Enforcement Admin., *Beau Boshers*, M.D.; Decision and Order, DEA Docket No. 10-35, 76 Fed. Reg. 19401, 19403 (April 7, 2011) (“It is well settled, however, that neither the Due Process Clause, nor the Administrative Procedure Act (nor DEA’s rules of procedure) require the Agency to provide a general right of discovery in administrative proceedings. While discovery must be granted if in the particular situation a refusal to do so would so prejudice a party as to deny him due process, the party seeking discovery must rely on more than speculation and must show that the evidence is relevant, material, and that the denial of access to the documents is prejudicial.” (citing, *inter alia*, EchoStar Communs., 292 F.3d at 756) (internal quotation marks omitted)); Dep’t of Health & Human Servs., *Civil Money Penalties: Procedures for Investigations, Imposition of Penalties, and Hearings*, 68 Fed. Reg. 18895, 18900 (Apr. 17, 2003) (“Prehearing discovery is not provided for under the APA and is rarely available in administrative hearings. Full-scale discovery is inappropriate in administrative hearings, as it would unduly delay the streamlined administrative process.” (emphasis added)); Food & Drug Admin., *Civil Money Penalties: Biologics, Drugs, and Medical Devices*, 60 Fed. Reg. 38612, 38619 (July 27, 1995) (declining to allow depositions, written interrogatories, and requests for admission as a matter of right in civil penalty proceedings under the APA, and allowing prehearing discovery as a matter of administrative law judge discretion upon a party’s demonstration of need); Occupational Safety & Health Review Comm’n, *Rules of Procedure*, 60 Fed. Reg. 21058 (May 1, 1995) (proposing simplified proceedings under 5 U.S.C. § 556 and 557 with discovery “eliminated completely in most cases”); Dep’t of Health & Human Servs., *Health Care Programs: Fraud and Abuse; Amendments to OIG Exclusion and CMP Authorities Resulting from Public Law 100-93*, 57 Fed. Reg. 3298, 3325 (Jan. 29, 1992) (noting that APA does not require discovery and determining that “discovery should be limited to documentary exchanges in order to avoid the time-consuming discovery fights that commonly beset civil litigation. Since discovery is to be as limited as possible, we believe it is appropriate to place the burden of showing why it is needed on the party seeking discovery”).

flexibility to issue rules that would encourage expeditious resolutions in ALJ proceedings. For example, agencies could authorize (or require) limitations on discovery or the number of pages filed, or could set deadlines for the various stages of the proceeding, including the amount of time to issue a decision. ... Thus, the uniformity provided by the APA does not and should not limit agency or ALJ flexibility in handling civil penalty cases expeditiously and fairly.

Admin. Conf. of the United States, Recommendations of the Administrative Conference Regarding Administrative Practice and Procedure, 58 Fed. Reg. 45409, 45410 (Aug. 30, 1993) (footnotes omitted) (emphasis added). Although the ACUS was focusing on civil penalty proceedings specifically, the remarks address the legal latitude that agencies have under 5 U.S.C. §§ 556 and 557 and therefore apply equally to N-cases.

Given the lack of a legal requirement for party discovery, the Commission is free to replace party discovery with Commission-led information-gathering, except perhaps in specific instances where a party affirmatively demonstrates that discovery is truly essential to avoid a violation of constitutional due process rights. Of course, any due process right to party discovery is no greater or less in an N-case than it would be in any other Commission proceeding. The Postal Service is unaware of any instance in which a party claimed (and the Commission agreed) that constitutional due process required extraordinary party discovery in any rate, classification, market test, or annual compliance proceeding before the Commission. This suggests that parties have tended to view the Commission's procedures for gathering information to be adequate.²⁰

²⁰ The notion of "due process" requires consideration of what process is due in the relevant context. It would seem paradoxical for the Constitution to demand greater adversarial rights in a

In other words, as far as the law is concerned, discovery need not be the first resort in administrative proceedings under 5 U.S.C. §§ 556 and 557; rather, it can be the very last resort and is, in fact, not required at all. Absent any legal impediment, logic would seem to dictate that the Commission follow this path, given the amount of time and resources that party discovery consumes and the extent to which party discovery would only frustrate the Commission's stated goal of more streamlined N-case schedules. If anything, keeping party discovery would appear to bear a heavier burden of justification than would abolishing it.

The Postal Service accordingly urges the elimination of the proposed discovery rules and their replacement with a provision allowing for parties to submit proposed information requests to the Commission, along lines similar to those in 39 C.F.R. § 3010.65(c). Additionally, the Postal Service recommends that the procedural schedule template be revised to accommodate periods for inquiry into rebuttal and surrebuttal cases. The Postal Service's proposed changes are shown in Appendix I to these comments.

III. THE PRO FORMA PROCEDURAL SCHEDULE BEARS REVISION IN LIGHT OF THE POTENTIAL NEED FOR ADDITIONAL INFORMATION ON REBUTTAL CASES.

The Commission's proposed template for an N-case procedural schedule fails to account for the possible need to gather additional information on parties' rebuttal cases. While the proposed rules recognize the likely interest in seeking

proceeding that results in a mere advisory opinion than in a proceeding that could result in the Commission mandating particular remedial actions by the Postal Service or in the approval or disapproval of postal rates. Both of the latter proceedings would more directly and materially affect third parties' interests than do N-cases. This seeming paradox underscores the point that due process does not require more than Commission-led information-gathering in N-cases.

further clarification and information from witnesses who are attesting as to the Postal Service's direct case, fairness dictates that witnesses who are attesting as to rebuttal cases be subject to the same standard of scrutiny.²¹ The Postal Service therefore suggests revising the proposed template to allow time for information requests on rebuttal cases, and for parties to take responses to those information requests into account when considering their approach to surrebuttal and/or oral cross-examination.

This is achievable within a 90-day overall schedule, but it requires an adjustment of numerous timeframes within the template and, possibly, a reexamination of the proposed rules that set forth response times. The following table shows the changes that Appendix I would make to the *pro forma* procedural schedule in Order No. 1738 to accommodate both Commission information requests (in lieu of party discovery) and the use of such information requests to examine rebuttal cases. (Gray font indicates procedural steps that are the same in both models.)

Table 1: Comparison of Order No. 1738 *pro forma* procedural schedule with that in Appendix I, with Commission information requests replacing party discovery and with a period for information-gathering into rebuttal cases

| Procedural phase | Order No. 1738 | Appendix I |
|--|---|-------------------|
| Issuance of Commission notice and order. | 1-3 days after Postal Service's initial filing. | Same. |
| Initial technical conference. | Day 10 after initial filing (7-9 days after | Same. |

²¹ As discussed in section I. above, the proposed rules' restrictions on the subject matter of participant submissions in N-cases would go a long way toward reducing the incidence and extensiveness of rebuttal testimony, at least to the extent that participants in past N-cases have used such testimony to articulate their preferred alternatives to service change proposals. However, it remains distinctly possible that participants could perceive a need to submit witness testimony on rebuttal to offer different analytical perspectives on the Postal Service's direct case.

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| | Commission notice and order, depending on timing). | |
| Deadline for discovery or Commission information request on direct case. | 18 days after initial technical conference. | 7 days after initial technical conference; 17 days after Postal Service's initial filing. (Applications for Commission information requests would be due 4 days after initial technical conference. The Commission would issue its information request up to 3 days after the deadline for applications.) |
| Latest deadline for responses to discovery or Commission information request on direct case. | 7 days after deadline for discovery. | Same (with respect to Commission information request, not discovery). |
| Notice of intent to file rebuttal case. | 2 days after latest discovery response deadline. | Same. |
| Filing of rebuttal cases. | 5 days after notice of intent due. | Same. |
| Deadline for discovery or Commission information request on rebuttal case. | None. | 7 days after filing of rebuttal case. (Applications for Commission information requests would be due 4 days after filing of rebuttal cases. The Commission would issue its information requests up to 3 days after the deadline for applications.) |
| Latest deadline for responses to discovery or Commission information request on rebuttal case. | None. | 7 days after Commission information request. |
| Motions for leave to file surrebuttal case. | 2 days after filing of rebuttal case. | 2 days after latest deadline for responses to Commission information requests on rebuttal |

| | | |
|--|---|---|
| | | case. |
| Answers to motions for leave to file surrebuttal case. | 2 days after motions. | Same. |
| Filing of surrebuttal cases. | 3 days after answers due. | Same. |
| Hearings (no rebuttal case). | Begin 5 days after deadline for notice of intent to file rebuttal case. | Begin 3 days after deadline for notice of intent to file rebuttal case. |
| Hearings (rebuttal cases but no surrebuttal motions). | Begin 5 days after deadline for motions for leave to file surrebuttal case. | Begin 3 days after deadline for motions for leave to file surrebuttal case. |
| Hearings (rebuttal cases and surrebuttal motions). | Begin 5 days after filing of surrebuttal cases. | Begin 3 days after filing of surrebuttal cases. |
| Initial briefs. | 7 days after end of hearings. | Same. |
| Reply briefs. | 7 days after initial briefs. | Same. |
| Advisory opinion. | 90 days after Postal Service's initial filing. | Same. |

Even while accommodating inquiry into rebuttal cases, the Appendix I model would still give the Commission 19 days for deliberation between the deadline for reply briefs and Day 90 in an N-case with a surrebuttal case (or motions for leave to file a surrebuttal case) and 24 days for deliberation in an N-case with rebuttal but no surrebuttal. This is comparable to the corresponding periods under the Order No. 1738 model: 20 days and 25 days, respectively. For N-cases without rebuttal, the Appendix I model would actually give the Commission more than a whole extra week for final deliberations: 40 days as opposed to 32 days under the Order No. 1738 model.

To be sure, these deadlines would be tight: even tighter than the already strict proposed deadlines in Order No. 1738. It cannot be emphasized enough that these short deadlines can only work in a model where the Commission is the conduit for information-gathering; they are extremely unlikely to work in a party

discovery model. As discussed in section II above, a party discovery model admits of such volume and volatility that the response and discovery dispute resolution deadlines proposed in Order No. 1738 already raise grave concerns as to their feasibility. Shorter timeframes, such as five days for discovery responses instead of seven, would only compound the problems with party discovery further. The Postal Service does not believe that party discovery is workable with even shorter deadlines, and so the inclusion of shorter deadlines in Appendix I should not be construed as an endorsement of shorter deadlines in a party discovery model.²²

IV. THE COMMISSION HAS THE LEGAL FLEXIBILITY TO STREAMLINE N-CASES FURTHER BY HOLDING ORAL HEARINGS ONLY WHEN THERE IS A DEMONSTRATED NEED, INSTEAD OF BY RIGHT.

In addition to giving the Commission greater power to control written fact-finding, 5 U.S.C. §§ 556 and 557 admit of significantly more flexibility than the Commission's proposed rules would appear to acknowledge with respect to oral hearings. In particular, 5 U.S.C. § 556(d) entitles parties merely to present their case or defense "by oral or documentary evidence." It does not provide that an agency must give parties free rein to choose an oral presentation of evidence, nor does it provide that parties must have an absolute right to oral cross-examination of other parties' evidence. To underscore this point, 5 U.S.C. § 556(d) specifically provides that "[i]n rule making ... an agency may, when a

²² This is reflected in the secondary *pro forma* procedural schedule in Appendix II, which is premised on the scenario that the Commission does not replace party discovery with Commission-led information gathering.

party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.”²³

For instance, one proven agency approach, the availability of which federal courts have repeatedly upheld under 5 U.S.C. §§ 556 and 557, is to require an affirmative showing of need before allowing oral hearings.

The law under both due process analysis and the APA ... provide the agency with broad discretion to deny or limit the right [to cross-examination]. As [the U.S. Court of Appeals for] the First Circuit observed: “The APA affords a right only to such cross-examination as may be necessary for a full and fair adjudication of the facts.”

CHARLES H. KOCH, JR., 2 ADMIN. L. & PRAC. § 5:54 (3d ed. 2012) (quoting Citizens Awareness Network v. United States, 391 F.3d 338, 351 (1st Cir. 2004)). See also United States v. Florida East Coast Ry. Co., 410 U.S. 224, 241 (1973) (“[T]he [APA] makes it plain that a specific statutory mandate that the proceedings take place on the record after hearing may be satisfied in some circumstances by evidentiary submission in written form only.”); Boston Carrier v. Interstate Commerce Commission, 728 F.2d 1508, 1511 n.5 (D.C. Cir. 1984)

²³ See APWU Reply Comments to Advance Notice of Proposed Rulemaking on Modern Rules of Procedure for Nature of Service Cases Under 39 U.S.C. § 3661 [Errata], PRC Docket No. RM2012-4 (July 18, 2012), at 5 (identifying the sentence quoted above as a “relevant part” of the “mandate” in Section 3661(c)). Because, as the APWU itself acknowledges, the APA expressly provides the Commission with the authority to reserve oral hearings only for cases of demonstrated need, it would be wholly incorrect to assume that at least this “change[] that the Postal Service advocates require[s] legislative action[.]” Id. at 6. To the extent that other parties may quibble with the relevance of the “rule making” language in the quoted sentence, the Postal Service has already explained that the rulemaking-adjudication distinction has no bearing on how APA case-law applies to N-cases. USPS ANPRM Reply Comments at 4-5. However, it bears noting that at least one other party to the instant rulemaking has itself argued that N-cases should be viewed as rulemakings for APA purposes. Valpak Direct Marketing Systems, Inc. and Valpak Dealers’ Association, Inc. Comments on Advance Notice of Proposed Rulemaking, PRC Docket No. RM2012-4 (June 18, 2012), at 15. Insofar as the rulemaking-adjudication distinction matters and N-cases might be characterized as “rulemakings,” then surely none would deny that 5 U.S.C. § 556(d) empowers the Commission to reserve oral hearings only for cases where they are necessary to avoid prejudice.

("[T]he decision whether to grant an oral hearing [in proceedings subject to 5 U.S.C. §§ 556 and 557] is generally a matter for the [ICC's] discretion. The [ICC] may deny a hearing even where material facts are disputed, so long as the disputes may be adequately resolved by the written record."). Clearly, the Commission's rules would fit comfortably within the lines of 5 U.S.C. §§ 556 and 557 if they were to do as other agencies have done and enact a presumption in favor of written-only case submission, rebuttable only upon a demonstrated need for oral hearings.

Oral hearings and the need to prepare for them add a full week to the procedural schedule illustrated in Order No. 1738. While oral hearings and cross-examination may be truly necessary to avoid prejudicing a participant's ability to fairly present its views in certain cases, that is not necessarily true in every N-case. Where written fact-finding can furnish sufficient information for participants to represent their views adequately in briefs – and bearing in mind that this exercise occurs in the context of an advisory opinion, not a binding order with dispositive effect on any participant's rights – the Commission could forgo oral hearings. This would spare a precious seven days for other purposes, such as additional follow-up questions by the Commission, post-brief deliberation, or even more timely issuance of the eventual advisory opinion.

Although the prospect of no oral hearings would streamline some N-cases, the Postal Service acknowledges that the need to allow for motions to conduct hearings and answers to such motions would add to the amount of process in other N-cases. This need not impose additional stress on the

proposed 90-day schedule, however. Rather, the Postal Service proposes that the procedural schedule allow two junctures for such motions practice: one to run concurrently with the time allotted for notices of intent to file rebuttal cases and, in the event that no rebuttal party wishes or is allowed to conduct oral hearings on the direct case, another to run concurrently with the time allotted for motions practice concerning surrebuttal cases. It is likely that a party that intends to file a rebuttal case will already know at that point – after the period for fact-finding on the direct case – whether he or she has a perceived need to conduct oral cross-examination on the direct case, as will the Postal Service as to whether it would benefit from presenting oral testimony. The same is true, *mutatis mutandis*, at the juncture between rebuttal and surrebuttal filings. Motions practice concerning hearings can be abbreviated, with two days for answer and three additional days for the Presiding Officer to issue a ruling. Corresponding changes to the proposed rules are illustrated in Appendices I and II.²⁴

V. ADDITIONAL CHANGES WOULD IMPROVE THE PROPOSED RULES.

A. Integrity of 90-Day Schedule

As described in section I.B. above, the Postal Service supports the Commission's commitment to a 90-day schedule for N-case proceedings. However, the Postal Service has concerns that the proposed rules could be applied to set a low threshold for extending the 90-day schedule. Specifically, the Postal Service encourages the Commission to modify its rules in a manner

²⁴ Appendix I also illustrates various conforming changes, such as basing the deadline for designating written cross-examination on the deadline for discovery responses, not on the dates of oral hearings. The timing for such designations is the same either way under the pro forma schedules in Order No. 1738, Appendix I, and Appendix II.

that describes the limited circumstances justifying extension of the 90-day schedule.

Proposed Rule 3001.80 indicates that the intended 90-day procedural schedule will be extended for good cause, or if the Postal Service's formal proposal is incomplete or modified significantly after filing. The Commission provides no explanation or examples of the circumstances that qualify for good cause or that demonstrate incompleteness or significant modification. Due to previous (and the likelihood of similarly motivated future) unmeritorious claims alleging incomplete, modified, or otherwise insufficient Postal Service N-case proposals, the Postal Service encourages the Commission to revise the proposed rules to eliminate or establish a more limited and clearly defined exception to the 90-day procedural schedule.²⁵

Most importantly, any exception should incorporate a materiality standard. Before granting extension of the 90-day procedural schedule, the Commission should require a party to demonstrate that that alleged defect in the Postal Service's proposal is highly prejudicial and not easily subject to cure. If the Commission decides to maintain the good cause exception, it should establish that the concept of good cause is consistent with the good cause standard recognized by federal case law. Without removing or providing a more limited

²⁵ See, e.g., American Postal Workers Union, AFL-CIO, Motion for an Emergency Order, PRC Docket No. C2012-2 (June 13, 2012), at 9-11; Complaint of American Postal Workers Union, AFL-CIO Regarding Violations of 39 U.S.C. 3661 and 3691, PRC Docket No. C2012-2 (June 12, 2012). The Commission denied the APWU motion in Order No. 1387, Order Denying American Postal Workers Union, AFL-CIO, Motion for an Emergency Order, PRC Docket No. C2012-2 (June 29, 2012), in part because APWU had not shown that it was substantially likely to prevail on the merits of that claim.

and clearly defined exception to the proposed 90-day procedural schedule, there is a risk that the exception to the 90-day procedural schedule will be invoked routinely in any case with sufficient complexity to be construed as “good cause,” and 90 days will become a mere aspirational floor, rather than a ceiling, for the length of N-case proceedings. If that were to result, Order No. 1738 (and the resulting final rule) would afford little more than the appearance of progress, with no real change to N-case schedules in practice. Such is surely not the Commission’s intention, and so the Commission should modify its rules to avoid giving rise to that implication.²⁶

The Postal Service supports the Commission’s goal of setting a 90-day deadline for completion of N-case proceedings, and with adoption of the minor recommendations described above, the Postal Service believes that the Commission’s proposed rules will lead to shorter and more efficient N-case proceedings. Corresponding changes are illustrated in Appendix I.

B. Initial Technical Conference

The Commission’s proposed rules include a requirement for an initial technical conference “to provide an informal, off-the-record opportunity for

²⁶ Of course, no matter how much rigor is applied in principle, any rules that leave room for unilateral Commission discretion over the procedural schedule would continue to raise this prospect. Moreover, as described in the Postal Service’s earlier comments and in section II above, the APA’s formal rulemaking requirements ill befit a mere advisory opinion, particularly if the Commission stops short of taking full advantage of the flexibility that 5 U.S.C. §§ 556 and 557 give it to adopt more streamlined procedures. For these reasons, the Postal Service’s proposal of incremental improvements to the Commission’s proposed rules should not be viewed as an abandonment of the Postal Service’s wholehearted support for more effective legislative reform, along the lines of that adopted by the Senate in S. 1789 (2012). In particular, S. 1789 would have required the Postal Service to agree to any extension of the 90-day timeframe. Such an external check would ensure that the Commission remains faithful to the expeditious handling of N-cases as a matter of course, and not merely as an aspirational goal.

participants, the officer of the Commission representing interests of the general public, and Commission staff to clarify technical issues and to identify and request information relevant to an evaluation of the nature of changes to postal services proposed by the Postal Service.” Order No. 1783 at 37. In principle, the Postal Service does not oppose an initial conference to clarify technical issues, but the proposed Rule 3001.85 creates requirements that are unnecessarily burdensome and will not advance the objective of open information exchange. Specifically, the proposed rules would require that all witnesses who submit direct testimony must attend the technical conference, regardless of the content of their testimony. This poses a scenario where witnesses whose written testimony (or other sponsored supporting documentation) does not include or rely on technical data or complex calculations are required to attend a conference where no participant would have any technical questions or requests of that witness.

Instead, the Postal Service recommends a process whereby the Postal Service would be required to present only those witnesses whose testimony contains technical information for the initial conference. This procedure would ensure that participants are provided the opportunity to examine and understand any technical aspects of the case, while relieving those witnesses who are not providing technical information from leaving their daily responsibilities to attend the conference, to which they would add little to no value. In the alternative, the Postal Service recommends a procedure by which the Public Representative would determine which, if any, witness’s testimony contains technical information

which would require a conference, and only those witnesses identified by the Public Representative would be required to attend the technical conference. Proposed changes implementing these comments are found in Appendices I and II.

C. Procedures for Resolution of Discovery Disputes

The proposed rules would change the process for resolution of discovery disputes. Currently, a respondent may object to a discovery request, the proponent may decide to file a motion to compel, the respondent may answer the motion, and the Presiding Officer ultimately decides whether to grant or deny the proponent's motion. Under the proposed rules, a respondent may file a motion to be excused from responding to a discovery request, the proponent may answer the motion, and the Presiding Officer decides whether to grant or deny the respondent's motion.

The Postal Service commends what it understands to be the Commission's goal with this proposed change: to reduce the time and energy spent on discovery disputes by reducing the process from five adversarial steps (including the original discovery request and the Presiding Officer's ruling) to four. As proposed, however, the new process could paradoxically increase the burden on party and Commission resources and the time spent in discovery. Therefore, the Postal Service opposes this proposed change.

Under the current process and in civil litigation, where discovery is conducted *inter partes* and not under the tribunal's gaze, not all objectionable discovery invokes an adversarial dispute resolution process before the Presiding

Officer (or the judge).²⁷ When a respondent objects, the proponent faces the option of embroiling the tribunal in the dispute or, alternatively, of letting the objection stand. The proponent may decide that that discovery question was not so essential to the proponent's purpose after all, or the proponent may decide to reframe the question in a less objectionable manner. The more time- and resource-intensive adversarial resolution process is only engaged when the proponent believes that the particular discovery question is worth the effort, and that he or she has a basis for overcoming the objection.

Although the current party discovery system is unnecessary and inefficient, it at least uses party discretion as a tool to avoid adding an even greater margin of intensity and adversity. Yet the Commission proposes to do away with the role of party discretion and to subject every objectionable discovery request – even those that a proponent would not otherwise have contested – to an adversarial dispute resolution process as a matter of course. It is possible, albeit not clear from Order No. 1738, that the Commission envisions uncontested objections being resolved in a similar manner to the status quo: under the proposed rules, the proponent could simply decline to answer the respondent's motion, or could file an answer volunteering to withdraw or reframe the discovery request, and the Presiding Officer could then grant the respondent's motion for lack of contest. Even if this is the Commission's vision, however, the proposed rules would still require the Presiding Officer to referee all

²⁷ See FED. R. CIV. P. 33(a) advisory committee's note ("The [1970] amendment improves the procedure of Rule 33 in the following respects: ... If objections are made, the burden is on the interrogating party to move under Rule 37(a) for a court order compelling answers, in the course of which the court will pass on the objections.").

objectionable discovery requests, not merely the subset that is submitted to the Presiding Officer under the current rules. The proposed dispute resolution process is all too likely to move the cause of N-case efficiency but one step forward and two steps back.

Because the proposed approach would only increase the adversity and inefficiency of N-case discovery, the Postal Service opposes these changes. If the goal is to scale down N-case discovery, then the Commission should actually scale it down. The only workable solution apparent to the Postal Service is that discussed in section II above: the Commission should conduct information-gathering in N-cases through Commission information requests, which parties may recommend, and reserve party discovery only for the rare instances when it is absolutely necessary to preserve a party's constitutional due process rights. Case-law and other federal regulatory agencies' practices demonstrate the consistency of this approach with 5 U.S.C. §§ 556 and 557, and the Commission's use of this practice in other areas has demonstrated its effectiveness, efficiency, and lack of prejudice to parties' participation rights.

Another advantage of this approach to party discovery is that it reinforces the notion that the Commission or Presiding Officer is best-suited to determine appropriate response timeframes as a matter of discretion, in light of the prevailing circumstances. This would befit the general reliance on Commission information requests, and it avoids the potential for unfairness that could arise from prescribed, short time limits that may or may not bespeak the actual amount of time necessary to formulate a response to a given request.

Corresponding changes to the proposed rule are illustrated in Appendix I.

D. Number of Interrogatories

To the extent that the Commission is disinclined to adopt the necessary changes outlined in the previous section and in Appendix I, the Commission should consider additional refinements to its proposed rules for interrogatories. In particular, proposed Rule 3001.87(a) would limit the number of interrogatories that an individual party may serve to 25, as under Federal Rule of Civil Procedure 33(a)(1). The Postal Service generally supports this proposal, except for one significant concern about the potential for abuse. This, combined with the allotted seven-day time period for answering interrogatories, could unfairly overburden respondents, particularly the Postal Service, resulting in protraction of discovery and pressure on the overall procedural schedule. The Postal Service also recommends other clarifying changes to this proposed rule.

1. Associational Parties

The Postal Service's primary concern is that associational parties may fragment into their constituent entities in order to multiply the number of interrogatories to which they are entitled. For example, a national union might decide to intervene in an N-case not as a single entity, which would entitle it only to 25 interrogatories, but rather through five of its locals, which are independent for some purposes but not typically for the purposes relevant to an N-case: with some coordination by the national union, this would effectively increase the party's available interrogatories to 125. The same could be true of a trade

association and its member companies. Without a safeguard, then, the proposed 25-interrogatory limit admits of a loophole that could swallow the rule itself.

This problem is not unfamiliar to federal civil litigation. One leading treatise describes it thus:

Because it frequently happens that a number of parties on the same side are represented by a single attorney and in that sense act in unison, [a construction that groups affiliated parties under a single umbrella] might be attractive in the interrogatory setting Consider, for example, a situation in which ten people injured in a bus crash sue the bus company in a single suit represented by the same lawyer. Should they be considered one party or ten for purposes of the interrogatory limitation? The best result would seem to be to recognize that in some instances nominally separate parties should be considered one party for purposes of the 25-interrogatory limitation.

CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2168.1 at 261 (West 2d ed 1994). In other words, the Federal Rules are designed to function efficiently with two opposing parties, but giving equal shrift to multiple parties with essentially the same concerns leads to significant inefficiencies and burdens. In Zito v Leasecomm Corp., for example, the court noted the difference between interpreting the rule as 25 interrogatories per party and 25 per side, and pointed out that 25 interrogatories per party would subject the defendant to over 5,000 interrogatories; given that implication, the court noted that the “per side” interpretation was the “more sensible approach.” 233 F.R.D. 395, 399 (S.D.N.Y. 2006). In that case, the court essentially joined the parties that shared the same interest, as reflected by their existence on the same side of the proverbial “v.”, for purposes of discovery. The Commission should adopt the same approach here and limit the amount of interrogatories according to parties with like interests.

While Zito could be read to support an adjudicator's discretion to limit interrogatories on a case-by-case basis, historical experience with N-cases bears out both their asymmetrical nature (the Postal Service on one side, numerous parties on the other side) and the intense participation of member organizations. These two factors pose a risk that intervenors will plan their participation so as to minimize the effect of discovery limits.²⁸ The Commission should revise the text of the rule to clarify that associational parties must refrain from taking advantage of opportunities to vitiate the rules through their constituents, or else the Presiding Officer may impose the 25-interrogatory cap on the entire group of affiliated constituents. Commission rules already advise formal participants "having substantially like interests and positions" that the Commission or Presiding Officer may require them "to join together for purposes of service of documents, presenting evidence, making and arguing motions and objections, cross-examining witnesses, filing briefs, and presenting oral arguments to the Commission or presiding officer." 39 C.F.R. § 3001.20(e). This rule, which proposed Rule 3001.71 would continue to apply to N-cases, could be expanded to explicitly include discovery in the list of purposes for which like-interested

²⁸ Without a meaningful 25-interrogatory limit, the proposed seven-day limit on interrogatory responses would place an unreasonable burden on the Postal Service to handle a large number of requests. To the extent that the Commission is drawing from the Federal Rules of Civil Procedure, it should be noted that those rules allow 30 days for a party to answer the interrogatories. FED. R. CIV. P. 33(b)(2). In fact, Federal Rule of Civil Procedure 33(b)(2) originally only allowed a 15-day period to answer interrogatories and a 10-day period for objections, both of which were amended in 1970 to a single 30-day response period due to the fact that "tardy response to interrogatories [had become] common, even expected." FED. R. CIV. P. 33 advisory committee's note. For all of the difficulties that a seven-day response time would impose on its own, a dual deviation from federal court practice – a quarter of the response time for interrogatories, combined with no check against circumvention of interrogatory limits – would result in an unsustainable burden on the Postal Service as the primary target of N-case discovery and would ultimately put undue pressure on the Commission's procedural schedule.

parties can be compelled to join together. The text that the Postal Service would propose for these changes is included in Appendix II.

2. Sets of Interrogatories “by Witness”

Additionally, the Commission should clarify the meaning of “by witness” in proposed Rule 3001.87(a). In relevant part, that provision would allow “any participant in a proceeding [to] propound to the Postal Service 25 written, sequentially numbered interrogatories, by witness” (emphasis added). This phrase is ambiguous: it could mean that the proponent must organize his or her 25 total interrogatories, which must be organized by witness, or it could mean that the proponent can issue up to 25 interrogatories to each separate witness. The narrative portion of Order No. 1738 suggests that the Commission intends the former interpretation: “Under the new rules, participants also would be limited to filing a total of 25 interrogatories for the entire N-case.” Order No. 1738 at 18. To avoid expectations to the contrary, the Postal Service proposes that the proposed rule be amended to read “organized by witness.” The text that the Postal Service would propose for these changes is included in Appendix II.

3. Party-Neutral Discovery Rules

The same text allows only for “any participant in a proceeding [to] propound [interrogatories] to the Postal Service” (emphasis added). Other provisions of proposed Rules 3001.86 through .89, as well as proposed Rule 3001.75(b)(2)-(3), cast discovery strictly as a scenario where the Postal Service is the respondent. To the extent that one or more other participants may offer rebuttal testimony in a given N-case, however, the Postal Service (or other

participants) may have need to propound discovery upon the party offering the rebuttal testimony. The Commission should allow for this prospect by reframing its discovery and motion rules in a more party-neutral manner, lest it give the impression that the Postal Service and other participants do not have the opportunity to inquire into another participant's rebuttal (or surrebuttal) case.

Beyond semantic revisions, recognition of this eventuality requires adjustment of the proposed *pro forma* procedural schedule in Order No. 1738 along similar lines to those discussed in section III above. Time would need to be redistributed from the period for discovery into the Postal Service's direct case, in order to create a period for discovery into any rebuttal case and responses to that discovery. The following table shows the changes that Appendix II would make to the *pro forma* procedural schedule in Order No. 1738 to accommodate both Commission information requests (in lieu of party discovery) and the use of such information requests to examine rebuttal cases. (Gray font indicates procedural steps that are the same in both models.)

Table 2: Comparison of Order No. 1738 *pro forma* procedural schedule with that in Appendix II, with party discovery and with a period for information-gathering into rebuttal cases

| Procedural phase | Order No. 1738 | Appendix II |
|--|--|---|
| Issuance of Commission notice and order. | 1-3 days after Postal Service's initial filing. | Same. |
| Initial technical conference. | Day 10 after initial filing (7-9 days after Commission notice and order, depending on timing). | Same. |
| Deadline for discovery on direct case. | 18 days after initial technical conference. | 7 days after initial technical conference; 17 days after Postal Service's initial filing. |

| | | |
|--|---|---|
| Latest deadline for responses to discovery on direct case. | 7 days after deadline for discovery. | Same. |
| Notice of intent to file rebuttal case. | 2 days after latest discovery response deadline. | Same. |
| Filing of rebuttal cases. | 5 days after notice of intent due. | Same. |
| Deadline for discovery on rebuttal case. | None. | 4 days after filing of rebuttal case. |
| Latest deadline for responses to discovery on rebuttal case. | None. | 7 days after deadline for discovery. |
| Motions for leave to file surrebuttal case. | 2 days after filing of rebuttal case. | Same. |
| Answers to motions for leave to file surrebuttal case. | 2 days after motions. | Same. |
| Filing of surrebuttal cases. | 3 days after answers due. | Same. |
| Hearings (no rebuttal case). | Begin 5 days after deadline for notice of intent to file rebuttal case. | Begin 3 days after deadline for notice of intent to file rebuttal case. |
| Hearings (rebuttal cases but no surrebuttal motions). | Begin 5 days after deadline for motions for leave to file surrebuttal case. | Begin 3 days after deadline for motions for leave to file surrebuttal case. |
| Hearings (rebuttal cases and surrebuttal motions). | Begin 5 days after filing of surrebuttal cases. | Begin 3 days after filing of surrebuttal cases. |
| Initial briefs. | 7 days after end of hearings. | Same. |
| Reply briefs. | 7 days after initial briefs. | Same. |
| Advisory opinion. | 90 days after Postal Service's initial filing. | Same. |

In an N-case with surrebuttal (or a motion for leave to file surrebuttal), the Appendix II *pro forma* procedural schedule would give the Commission the same amount of post-reply brief deliberation time as would the schedule in Order No. 1738: 20 days. In N-cases with rebuttal but no surrebuttal, the Appendix II schedule would be comparable: 27 days as opposed to 25 days under Order No. 1738. Without rebuttal, the Appendix II schedule would give the Commission 25

percent more deliberation time than would the Order No. 1738 schedule: 40 days as opposed to 32 days under Order No. 1738. Incidentally, the time for post-reply brief deliberation is comparable across the models in Appendices I and II, as shown in Table 3 below.

Table 3: Comparison of time for post-brief Commission deliberation under Order No. 1738, Appendix I, and Appendix II models

| Time for Commission deliberation after reply briefs if... | Order No. 1738 (Party discovery for direct case only) | Appendix I (Commission-led information gathering for direct case and rebuttal case) | Appendix II (Party discovery for direct case and rebuttal case) |
|--|--|--|--|
| No rebuttal. | 32 | 40 | 40 |
| Rebuttal but no surrebuttal. | 25 | 24 | 27 |
| Rebuttal and surrebuttal. | 20 | 19 | 22 |

Despite the comparable and even slightly favorable results for the Appendix II schedule in theory, the Appendix II party-discovery model actually has a significant disadvantage over the Appendix I Commission-led information-gathering model. So long as party discovery is maintained, parties and the Commission will put substantial pressure on the 90-day procedural schedule, as the volume of party discovery and the potential for disputes in need of resolution draw out the discovery process longer than planned. These unknowns are impossible to predict in the abstract. Meanwhile, the Commission-led information-gathering model contains none of this volatility. Thus, even if the Appendix II model might be seen as promising the Commission a couple of extra days for post-brief deliberation than the Appendix I model in certain N-cases, the Appendix II model is less likely than the Appendix I model to deliver on that

promise, and the slight theoretical advantage is not worth the risk of overall instability inherent in the Appendix II model.

4. Initial and Follow-Up Interrogatories

The Commission should also confirm that the 25-interrogatory limit applies to initial and follow-up questions collectively, not to each set of questions separately. The narrative portion of Order No. 1738 explicitly says that the 25-interrogatory limit “includes all initial and follow-up questions,” id. at 17; see also id. at 18 (“Under the new rules, participants also would be limited to filing a total of 25 interrogatories for the entire N-Case.”), but the text of the proposed rules is not so clear.

The proposed text of Rule 3001.87(a) discusses the 25-interrogatory limit, and then in a separate sentence allows for the filing of follow-up questions, without clarifying whether these follow-up questions fall within a proponent’s 25-interrogatory limit or whether they are in addition to that limit and, if the latter, whether any limit applies to follow-up questions. In light of the Commission’s explanations in Order No. 1738, it appears that the intent is that each party only gets a total of 25 interrogatories, be they initial or follow-up questions, an intention that the Postal Service would applaud for its furtherance of streamlined and more definite N-case discovery. However, that intention should be made explicit in the text of the rules. The text that the Postal Service would propose for these changes is included in Appendix II.

5. Standard for Discrete Subparts

Finally, proposed Rule 3001.87(a) indicates that interrogatory subparts that are logically and factually subsumed within and necessarily related to the primary question will be counted as part of the primary question for purposes of computing the 25-interrogatory limit. Order No. 1738 does not explain the source of this standard, but it appears to derive word-for-word from case-law interpreting Federal Rule of Civil Procedure 33(a)(1). E.g., *Perez v. Aircom Mgmt. Corp.*, 2012 WL 6811079, at *1 (S.D. Fla. Sept. 24, 2012) (quoting prior cases). The Commission should make the derivation of its non-discrete-subpart standard explicitly clear, so that participants and the Commission will have transparency about the standards and precedents that may be brought to bear on matters concerning the 25-interrogatory limit. The text that the Postal Service would propose for these changes is included in Appendix II.

E. Field Hearings

The Postal Service commends the Commission for advancing the proposal to eliminate, in most cases, the use of field hearings as a tool for N-cases. See Order No. 1738 at 10. As explained in its initial and reply comments to the ANPRM, the Postal Service does not believe that field hearings are appropriate for N-cases, as the expense and delay in conducting field hearings far outweigh the value of non-evidentiary information obtained during those proceedings. USPS ANPRM Initial Comments at 25-27. The elimination of field hearings in N-cases will greatly improve the efficiency of conducting N-cases

without depriving the Commission of the evidence that it needs to issue its advisory opinion.

Despite the Commission's affirmation of its desire to eliminate field hearings in its pronouncement of the principal elements of the proposed N-case format, the proposed rules contain no new language that would give effect to that desire. In fact, the proposed rules do not make any mention of field hearings, and proposed Rule 3001.92 merely restates the Commission's current practice in Rule 3001.30, which has not precluded the Commission from holding field hearings in prior N-cases. The absence of any change to the current rules as they relate to hearings does not appear to bear out the Commission's stated desire for the "elimination, in most cases, of field hearings." Order No. 1738 at 10.

The Postal Service recommends that the Commission formalize its intentions to eliminate the use of field hearings in most cases by including a rule that prescribes the conditions for their use in exceptional cases. The Postal Service further recommends that the Commission clarify in its rules that statements at field hearings have the status of informal comments, not record evidence, due to the lack of cross-examination or other procedural methods for ensuring evidentiary integrity. Accordingly, the Postal Service recommends that the following language be added to the Commission's rules (this language has also been included in Appendix I as Rule 3001.94):

- (a) The use of a field hearing to gather information shall only be permitted upon motion of a party and an en banc decision of the Commission that (i) the field hearing will not negatively affect the procedural schedule; (ii) the information to be gathered at the field

hearing is necessary for the Commission's advisory opinion; and (iii) the information to be gathered at the field hearing cannot be obtained from any other source, including in particular any other informal expression of views pursuant to § 3001.20b.

(b) Information obtained at a field hearing shall not constitute evidence pursuant to § 3001.31, but rather shall have the status of informal expressions of views pursuant to § 3001.20b.

F. Exclusion of Alternative Proposals from Cross-Examination

Proposed Rule 3001.72 would allow for issues not directly related to the Postal Service's service change proposal to give rise to a separate study or other investigation. The Postal Service applauds the Commission's stated desire to keep proceedings focused on the topic at hand and not to allow proceedings to stray into tangential topics, including alternatives to the Postal Service's service change proposal at issue in the given N-case. This intention is apparent in the Commission's discussion of cross-examination (proposed Rule 3001.92(e)(1)), rebuttal testimony (proposed Rule 3001.90(b)), and advisory opinions (proposed Rule 3001.72). Order No. 1738 at 9-10, 20, 22-23.

The Postal Service respectfully submits that some further reinforcement of this principle would be helpful. For one thing, the Commission clearly intends to limit cross-examination to the Postal Service's service change proposal, yet the proposed rules do not contain a similar instruction with respect to discovery, which often ends up constituting written cross-examination and forming the basis for oral cross-examination. While it is possible that the proposed discovery rules' references to relevance could be read as just such a limitation, those references could also be argued to give parties broader latitude to conduct discovery, regardless of the resulting information's eventual utility in preparing a rebuttal

case tied specifically to the Postal Service's service change proposal (and not ancillary or alternative matters). The Commission should therefore include a more explicit subject-matter limitation in any rules for N-case discovery.

Moreover, Rule 3001.72 should clarify that any off-topic issue that arises in an N-case should not be discussed in that N-case. The text of proposed Rule 3001.72 is somewhat ambiguous on this point. As presented in Order No. 1738, it seems to say that any off-topic tangent that comes up during testimony can be the basis for a separate study. This proposed rule does not, however, close the door to exploration of such tangents within the N-case proceeding. Without foreclosure of that possibility, this proposed rule could offer little practical benefit in speeding up proceedings. On the other hand, if the Commission intends to continue to allow parties to pursue off-topic discovery and testimony within N-cases on a case-by-case basis, the Commission should clarify how this will represent any real change (other than in tone) from the situation under the current rules, which empower the Commission and the Presiding Officer to bar discovery or testimony that is determined to be irrelevant on a case-by-case basis.

Given that the Commission's intention seems to be to bring about meaningful change in the efficiency of N-cases, the more effective and simpler solution would be to provide that ancillary and alternative topics will not be explored in any part of an N-case, notwithstanding parties' ability to ask the Commission to initiate a separate special study of the matter at a later time. Corresponding changes are shown in Appendix I.

G. Length Limits for Briefs

The Commission's proposed rules would adopt strict length limits of 14,000 words for initial briefs and 7,000 words for reply briefs. Although Order No. 1738 does not say as much, these limits appear to derive from the Federal Rules of Appellate Procedure. FED. R. APP. P. 32(a)(7)(B)(i)-(ii). While the Postal Service appreciates the Commission's intent to accelerate proceedings, the proposed across-the-board, party-blind word limits are a blunt instrument that belie an important aspect of N-cases. As stated above, N-cases are inherently asymmetrical: typically, each intervenor uses its brief to raise its own parochial criticisms of the Postal Service's service change proposal, while the Postal Service must defend its proposal against each intervenor's criticisms in turn.²⁹

In this context, a uniform limitation on all parties is unfair. Because the Postal Service has a larger task than that of other participants, an across-the-board word limit, with reply briefs limited to only half the length of initial briefs, is liable to impose a sharper burden on the Postal Service, which the Commission does not seek to justify. It is to be expected that briefs from the Postal Service should require significantly more words than briefs from other participants. Indeed, the empirical data below indicate that the Commission's proposed word limits would be unnecessarily generous to non-Postal Service parties.

²⁹ It should be noted that federal appellate courts primarily resolve disputes between two opposing sides or, at most, a relatively small and symmetrical number of briefing parties. N-cases involve multiple parties with a large variety of issues and interests at stake, each of which files its own brief and virtually all of which tend to array themselves in opposition to the Postal Service.

To avoid the disproportionate burden that would arise from across-the-board word limits, the Commission's rules should reduce the length of all briefs while allowing more generous word limits for the Postal Service. Therefore, the Postal Service proposes that the Commission limit initial briefs by the Postal Service to 13,000 words and reply briefs to 12,000 words. This rebalancing of word limits would better reflect the fact that the Postal Service has a greater need to articulate arguments in reply briefs than is recognized in Order No. 1738. At the same time, as shown in Table 4 below, these proposed limits would still represent approximately a 23-percent reduction in the length of Postal Service initial and reply briefs alike, compared with the average length of such briefs in the last six N-cases.³⁰

³⁰ The Postal Service's willingness to offer such cuts in its own briefs, while essentially proposing no real cuts in the length of other participants' briefs, demonstrates its faith in the Commission's willingness to narrow the scope of issues to be addressed in N-cases. Obviously, if the Commission were to relax its apparent commitment to that goal, such limits on Postal Service briefs might again prove to unfairly hamper the Postal Service's ability to respond to opposing arguments.

Table 4: Comparison of proposed brief limits with word counts of Postal Service briefs in Docket Nos. N2006-1 through N2012-2³¹

| | Initial | % difference from proposal³² | Reply | % difference from proposal |
|-----------------|----------------|--|--------------|-----------------------------------|
| Proposed | 13,000 | | 12,000 | |
| N2006-1 | 7,557 | -72.0% | 8,347 | -43.8% |
| N2009-1 | 7,902 | -64.5% | 11,455 | -4.8% |
| N2010-1 | 29,106 | 55.3% | 35,304 | 66.0% |
| N2011-1 | 21,991 | 40.9% | 11,681 | -2.7% |
| N2012-1 | 29,892 | 56.5% | 17,977 | 33.2% |
| N2012-2 | 5,355 | -142.8% | 9,082 | -32.1% |
| Average | 16,967 | 23.4% | 15,641 | 23.3% |

Other participants, including Public Representatives, tend to focus on analyzing the Postal Service’s direct case, rather than the various positions of their fellow non-Postal Service participants. As a result, other participants tend to file shorter briefs as a matter of course, and their reply briefs tend to be even shorter than their initial briefs. Indeed, the limits proposed in Order No. 1738 may be more generous to other participants than past practice warrants and may encourage them paradoxically to increase the length of their briefs. As Table 5 below shows, with Public Representative briefs as a proxy for those of non-Postal Service participants, limits of 10,000 words for initial briefs and 3,000 words for reply briefs would give the Commission assurance that future briefs by non-Postal Service participants will stay approximately within historical boundaries.

³¹ Per the discussion later in this section, these word counts exclude title pages, tables of contents, and signature blocks.

³² Positive values in this column represent the amount of the respective brief that would have had to be cut in order to meet the proposed word limit. Negative values represent the amount of “headspace” that the relevant brief would have had under the proposed word limit. In either case, the formula is [(actual word count – proposed word limit) / actual word count].

Table 5: Comparison of proposed brief limits with word counts of Public Representative briefs in Docket Nos. N2006-1 through N2012-2³³

| | Initial | % difference from proposal | Reply | % difference from proposal |
|-----------------------------|----------------|-----------------------------------|--------------|-----------------------------------|
| Proposed | 10,000 | | 3,000 | |
| N2006-1³⁴ | 18,138 | 44.9% | 2,582 | -16.2% |
| N2009-1 | 14,559 | 31.3% | 4,096 | 26.8% |
| N2010-1 | 6,233 | -60.4% | 1,161 | -158.4% |
| N2011-1 | 7,921 | -26.2% | 5,204 | 42.4% |
| N2012-1 | 12,243 | 18.3% | 2,256 | -33.0% |
| N2012-2 | 1,582 | -532.1% | 1,098 | -173.2% |
| Average | 10,113 | 1.1% | 2,733 | -9.8% |

In addition, the Postal Service recommends that the Commission clarify that only the substantive body of a brief counts toward the word limit, and not certain formal aspects of the brief: the caption and title at the top of the first page, the title page, the table of contents, any page headers and page numbers, the signature and contact information blocks at the end of a brief, any certificate of service, and the attestation of the word count itself. This recommendation is modeled on Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). Corresponding changes are shown in Appendix I.

³³ See footnotes 30 and 31 above. The statistics for briefs in Docket Nos. N2009-1, N2012-1, and N2012-2 (and, consequently, the average statistics) may overstate the actual word counts slightly, due to the inclusion of headers in the transfer of text from native Adobe PDF format to Microsoft Word format for purposes of tabulation. At the same time, all statistics in this table may understate actual word counts to the extent that Public Representatives filed appendices and tables in separate documents (and to the extent that the Commission intends to include such appendices toward word limits).

³⁴ Because this case was conducted before the Postal Accountability and Enhancement Act, the relevant brief was filed by the Commission's Office of the Consumer Advocate and not by a Public Representative.

H. Computation of Deadlines

In proposed Rule 3001.73, the Commission appears to change the calculation for the computation of days when determining the time period for parties to respond. The proposed rule indicates that the term “day,” as used when computing time periods under the N-case rules, refers to all calendar days, except when the final day of a time period is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next working day. This is different from the current Rule 3001.15, which excludes Saturdays, Sundays, and legal holidays from time periods that are less than five days. The new proposed rule would likely lead to unfairness and prejudice and should be amended along the lines of the current standard.

The proposed rules could lead to an unfair application of the Commission’s proposed three-day and two-day deadlines for responses to discovery and motions. For example, a motion to be excused from filing a response to a discovery request is to be filed within three days of the filing of the discovery request under the proposed rules. If an objectionable discovery request were filed at Friday at 4:30 p.m., the deadline for filing a motion to be excused would be Monday by 4:30 p.m. under the proposed rules: three calendar days later, including Saturday and Sunday, but only one working day later. Under the current rules, Saturday and Sunday would not be counted as part of the time period, and the movant would have three working days to file: until Wednesday at 4:30 p.m. A one-business-day response time would likely be insufficient for any responding party to review discovery requests, determine

which, if any, are objectionable, craft objections to those requests, and obtain any necessary management approval to file a motion. Instead, utilizing the current standard of excluding Saturdays, Sundays, and legal holidays when computing time periods less than five days will provide sufficient and consistent time for all parties involved to prepare and file proper motions and responses.³⁵

It is also important to note that by including Saturdays, Sundays, and legal holidays in the computation of already short deadlines for parties to respond to or file necessary motions, the Commission is creating a scenario that will inevitably lead to additional motions for late acceptance. Such a scenario would only undermine the Commission's goal of efficiently litigating N-cases. By continuing the current computation method, the Commission will be better able to manage the litigation process and avoid unnecessary extensions.

Corresponding changes are shown in Appendix I.

VI. CONCLUSION

With Order No. 1738, the Commission has taken an important first step toward outlining how N-cases can be made more efficient within the bounds of existing statutory requirements. Within the scope of the exercise in this rulemaking, the Commission has much more opportunity for streamlining the information-gathering process while still according participants the fullness of

³⁵ Because the amount of working-day response time under the proposed rule would fluctuate according to the day of the week that discovery is filed, the proposed rule would also create an opportunity for bad-faith conduct. Discovery proponents (or movants) would be rewarded for timing their requests (or motions) such that the respondent will have as few working days as possible. This, in turn, could create more occasions for discovery proponents to ask the Presiding Officer and/or Commission to extend the procedural schedule or impose sanctions on the respondent due to late responses.

their APA and due process rights. Even short of these larger, more effective changes, there are various ways in which the Commission should clarify and improve its proposed rules. The Postal Service respectfully submits the comments above for the Commission's consideration.

Respectfully submitted,

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APPENDIX I

PRIMARY PROPOSED CHANGES TO TITLE 39, CODE OF FEDERAL REGULATIONS

(Additions are underlined and deletions are marked with ~~strikethrough~~.)

This Appendix shows the Postal Service's preferred changes, on the premise that the Commission agrees that converting party discovery into Commission-led information-gathering is legally permissible and would be more efficient. Alternative proposed changes to party discovery are shown in Appendix II, in the event that the Commission is disinclined to adopt the framework proposed in section II of the comments above. Appendix II also shows an alternative proposed change concerning the initial technical conference.

§ 3001.71 Applicability.

The rules in this subpart govern the procedure with regard to proposals of the Postal Service pursuant to 39 U.S.C. § 3661 requesting from the Commission an advisory opinion on changes in the nature of postal services that will generally affect service on a nationwide or substantially nationwide basis. The Rules of General Applicability in subpart A of this part are also applicable to proceedings conducted pursuant to subpart D except that 39 CFR 3001.20a (limited participation by persons not parties); 39 CFR 3001.21 (Motions); 39 CFR 3001.25 (Discovery—general policy); 39 CFR 3001.26 (Interrogatories for purposes of discovery); 39 CFR 3001.27 (Requests for production of documents or things for the purpose of discovery); 39 CFR 3001.30 (Hearings); 39 CFR 3001.33 (Depositions) and 39 CFR 3001.34 (Briefs) do not apply in proceedings conducted under this subpart.

§ 3001.72 Advisory opinion and special studies.

(a) *Issuance of opinion.* In the absence of a determination of good cause for extension, the Commission shall issue an advisory opinion in proceedings conducted

under this subpart not later than 90 days following the filing of the Postal Service's request for an advisory opinion.

(b) *Special studies.* Advisory opinions shall address the specific changes proposed by the Postal Service in the nature of postal services. If, in any proceeding, alternatives or related issues of significant importance arise, discussion of those alternatives or issues shall not be allowed. Instead, the Commission may, in its discretion, and at a later date, undertake a separate evaluation of such alternative or issues by means of special studies, public inquiry proceedings, or other appropriate means.

~~§ 3001.73 Computation of Time.~~

~~In computing any period of time prescribed or allowed by this subpart, the term "day" means a calendar day unless explicitly specified otherwise. The last day of the period so computed is to be included unless it is a Saturday, Sunday, or legal holiday for the Commission, in which event the period runs until the end of the next day which is neither a Saturday, Sunday, or legal holiday. A part-day holiday shall be considered as other days and not as a legal holiday.~~

§ 3001.74 Service by the Postal Service.

By filing its request electronically with the Commission, the Postal Service is deemed to have effectively served copies of its formal request and its prepared direct evidence upon those persons, including the officer of the Commission, who participated in the pre-filing conference held under § 3001.81. The Postal Service shall be required to serve hard copies of its formal request and prepared direct evidence only upon those persons who have notified the Postal Service, in writing, during the pre-filing conference(s), that they do not have access to the Commission's website.

§ 3001.75 Motions.

(a) *In general.* (1) An application for an order or ruling not otherwise specifically provided for in this subpart shall be made by motion. A motion shall set forth with particularity the ruling or relief sought, the grounds and basis therefor, and the statutory or other authority relied upon, and shall be filed with the Secretary and served pursuant to the provisions of §§ 3001.9 through 3001.12 of this part. A motion to dismiss proceedings or any other motion that involves a final determination of the proceeding, any motion under rule 91 of this subpart, or a motion that seeks to extend the deadline for issuance of an advisory opinion shall be addressed to the Commission. After a presiding officer is designated in a proceeding, all other motions in that proceeding, except those filed under part 3007, shall be addressed to the presiding officer.

(2) Within 5 days after a motion is filed, or such other period as the Commission or presiding officer in any proceeding under this subpart may establish, any participant to the proceeding may file and serve an answer in support of or in opposition to the motion pursuant to §§ 3001.9 to 3001.12 of this part. Such an answer shall state with specificity the position of the participant with regard to the ruling or relief requested in the motion and the grounds and basis and statutory or other authority relied upon. Unless the Commission or presiding officer otherwise provides, no reply to an answer or any further responsive document shall be filed.

~~(b) *Motions to be excused from answering discovery requests.* (1) A motion to be excused from answering discovery requests shall be filed with the Commission in conformance with this section within 3 days of the filing of the interrogatory, request for production, or request for admissions to which the motion is directed. If a motion to be excused from answering is made part of an interrogatory, request for production, or request for admissions, the part to which objection is made shall be clearly identified. Claims of privilege shall identify the specific evidentiary privilege asserted and state the reasons for its applicability. Claims of undue burden shall state with particularity the~~

~~effort that would be required to answer or respond to the request, providing estimates of costs and workhours required, to the extent possible.~~

~~(2) An answer to a motion to be excused from answering a discovery request shall be filed within 2 days of the filing of the motion in conformance with section 3001.75 of this subpart. The text of the discovery request and any answer previously provided by the Postal Service shall be included as an attachment to the answer.~~

~~(3) Unless the Commission or the presiding officer grants the motion to be excused from answering, the Postal Service shall answer the interrogatory, production request, or request for admission. Answers shall be filed in conformance with §§ 3001.9 through 3001.12 of this part within 3 days of the date on which a motion to be excused from answering is denied.~~

~~(4) The Commission or the presiding officer may impose such terms and conditions as are just and may, for good cause, issue a protective order as provided in § 3001.26(g) of this part, including an order limiting or conditioning interrogatories, requests for production, and requests for admissions as justice requires to protect the Postal Service from undue annoyance, embarrassment, oppression, or expense.~~

(b) Motions for leave to submit oral testimony or to conduct oral cross-examination. Motions for leave to submit oral testimony or to conduct oral cross-examination are requests for extraordinary relief and are not substitutes for the written fact-finding process. A motion for leave to submit oral testimony or to conduct oral cross-examination must be submitted in writing on or before the date provided in the procedural schedule. The moving participant bears the burden of demonstrating exceptional circumstances that warrant a grant of the motion. Such a motion must specify with particularity the intended subject(s) of cross-examination, why the sought-for information cannot be elicited through any other reasonable means, and why the inability to elicit such information in oral cross-examination would result in substantial

prejudice to the movant's ability to present its case. Answers to such motions are due within 2 days.

(c) *Motions to strike.* Motions to strike are requests for extraordinary relief and are not substitutes for briefs or rebuttal evidence in a proceeding. A motion to strike testimony or exhibit materials must be submitted in writing at least 3 days before the scheduled appearance of a witness, unless good cause is shown. Responses to motions to strike are due within 2 days.

(d) *Motions for leave to file surrebuttal testimony.* Motions for leave to file surrebuttal testimony submitted pursuant to § 3001.91 and any answers thereto must be filed and served on or before the dates provided in the procedural schedule established by the Commission.

§ 3001.76 - § 3001.79 [Reserved].

§ 3001.80 Procedural schedule.

(a) *Notice.* Subject to paragraph (b) of this section, the Commission shall include in the notice of proceeding issued under 39 CFR 3001.17 a procedural schedule based upon the pro forma schedule set forth in the Appendix to subpart D. The procedural schedule shall include:

- (1) A deadline for notices of interventions;
- (2) The date(s) for the mandatory technical conference between the Postal Service, Commission staff, and interested parties;
- (3) The deadline for ~~discovery~~applications for issuance of Commission information requests on the Postal Service's direct case;
- (4) The deadline for ~~responses to participant discovery~~any Commission information requests on the Postal Service's case;

(5) The deadline for responses to Commission information requests on the Postal Service's direct case;

~~(5)~~(6) The deadline for participants to confirm their intent to file a rebuttal case;

~~(6)~~(7) The date for filing participant rebuttal testimony, if any;

(8) The deadline for applications for issuance of Commission information requests on any rebuttal case;

(9) The deadline for any Commission information requests on any rebuttal case;

(10) The deadline for responses to Commission information requests on any rebuttal case;

~~(7)~~(11) The dates for filing motions for leave to file surrebuttal testimony and answers thereto;

~~(8)~~(12) The date for filing surrebuttal, if any;

(13) The deadlines for motions for leave to submit oral testimony or to conduct oral cross-examination on the direct case or on any rebuttal case;

(14) The deadlines for answers to motions for leave to submit oral testimony or to conduct oral cross-examination on the direct case or on any rebuttal case;

(15) The deadlines for Presiding Officer's rulings regarding leave to submit oral testimony or to conduct oral cross-examination on the direct case or on any rebuttal case;

~~(9)~~(16) The date(s) for hearings on the Postal Service's direct case, rebuttal testimony, and surrebuttal testimony, if any;

~~(10)~~(17) The date for filing initial briefs;

~~(11)~~(18) The date for filing reply briefs; and

~~(12)~~(19) A deadline for issuance of an advisory opinion which is 90 days from the date of filing.

(b) *Changes for good cause.* These dates are subject to change for good cause only.

(c) *Incomplete request.* If at any time the Commission determines that there is a material omission in the Postal Service's request ~~is incomplete or that~~ or material changes made subsequent to its filing significantly modify the request, the Commission may extend the deadlines established or take any other action as justice may require.

§ 3001.81 Pre-filing requirements.

(a) *Pre-filing conference required.* Prior to the Postal Service filing a request that the Commission issue an advisory opinion on a proposed change in the nature of postal services subject to the procedures established in this subpart, the Postal Service shall conduct one or more pre-filing conference(s) with interested persons in the proceeding.

(b) *Purpose.* The purpose of a pre-filing conference under this section is to expedite consideration of the Postal Service's request for the issuance of advisory opinions by informing interested persons of the Postal Service's proposal; by providing an opportunity for interested persons to give feedback to the Postal Service that can be used by the Postal Service to modify or refine its proposal before it is filed at the Commission; and by identifying relevant issues and information needed to address those issues during proceedings at the Commission.

(c) *Notice.* The Postal Service shall file with the Commission a notice of its intent to conduct any pre-filing conference(s) at least 10 days before the first scheduled conference. The notice filed by the Postal Service shall include a schedule of proposed date(s) and location(s) for the conference(s). Upon receipt of such notice, the Commission shall issue a notice of pre-filing conference(s), which shall be published in the *Federal Register* and appoint a Public Representative.

(d) *Nature of conferences.* Discussions during the pre-filing conference(s) under this section shall be informal and off the record. No formal record will be created during a pre-filing conference.

(e) *Informal meetings.* Interested persons may meet outside the context of a pre-filing conference, among themselves or with the Postal Service, individually or in groups, to discuss the proposed changes in the nature of postal services.

§ 3001.82 Filing of formal requests.

Whenever the Postal Service determines to request that the Commission issue an advisory opinion on a proposed change in the nature of postal services subject to this subpart, the Postal Service shall file with the Commission a formal request for such an opinion in accordance with the requirements of §§ 3001.9 to 3001.11 and 3001.83. The request shall be filed not less than 90 days before the proposed effective date of the change in the nature of postal services involved. Within 5 days after the Postal Service has filed a formal request for an advisory opinion in accordance with this subsection, the Secretary shall lodge a notice thereof with the Director of the *Federal Register* for publication in the *Federal Register*.

§ 3001.83 Contents of formal requests.

(a) *General requirements.* A formal request filed under this subpart shall include such information and data and such statements of reasons and basis as are necessary and appropriate to fully inform the Commission and interested persons of the nature,

scope, significance, and impact of the proposed change in the nature of postal services and to show that the change in the nature of postal services is in accordance with and conforms to the policies established under title 39, United States Code.

(b) *Specific information.* A formal request shall include:

(1) A detailed statement of the present nature of the postal services proposed to be changed and the change proposed;

(2) The proposed effective date for the proposed change in the nature of postal services;

(3) A full and complete statement of the reasons and basis for the Postal Service's determination that the proposed change in the nature of postal services is in accordance with and conforms to the policies of title 39, United States Code;

(4) A statement that the Postal Service has completed the pre-filing conference(s) required by § 3001.81, including the time and place of each conference and a summary of discussions at the pre-filing conference(s);

(5) The prepared direct evidence required by § 3001.84;

(6) The name of an institutional witness capable of providing information relevant to the Postal Service's proposal that is not provided by other Postal Service witnesses; and

(7) Confirmation that Postal Service witnesses, including its institutional witness, will be available for the mandatory technical conference provided for in § 3001.85.

(c) *Additional information.* The Commission may request additional information from the Postal Service concerning a formal request.

(d) *Reliance on prepared direct evidence.* The Postal Service may incorporate detailed data, information, and statements of reason or basis contained in prepared direct evidence submitted under paragraph (b)(5) of this section into its formal request by reference to specific portions of the prepared direct evidence.

§ 3001.84 Filing of prepared direct evidence.

As part of a formal request for an advisory opinion under this subpart, the Postal Service shall file all of the prepared direct evidence upon which it proposes to rely in the proceeding on the record before the Commission to establish that the proposed change in the nature of postal services is in accordance with and conforms to the policies of title 39, United States Code. Such prepared direct evidence shall be in the form of prepared written testimony and documentary exhibits which shall be filed in accordance with § 3001.31.

§ 3001.85 Mandatory technical conference.

(a) *Date.* A date for a mandatory technical conference shall be included in the procedural schedule required by § 3001.80 of this subpart. The date for this technical conference shall be set based upon the pro forma schedule set forth in Appendix A to this subpart D. The conference shall be held at the offices of the Commission.

(b) *Witnesses.* The Postal Service shall make available at the technical conference each witness whose prepared direct testimony, ~~was~~ filed pursuant to § 3001.84 of this subpart, contains technically complex data and calculations or relies upon technically complex supporting documentation.

(c) *Purpose.* The purpose of the technical conference is to provide an informal, off-the-record opportunity for participants, the officer of the Commission representing interests of the general public, and Commission staff to clarify technical issues and to identify and request information relevant to an evaluation of the nature of changes to postal services proposed by the Postal Service.

~~(d) *Relation to discovery process.* Information obtained during the mandatory technical conference may be used to discover additional relevant information by means of the formal discovery mechanisms provided for in §§ 3001.85 through 3001.89 of this subpart.~~

~~(e)~~(d) *Record.* Information obtained during, or as a result of, the mandatory technical conference is not part of the decisional record unless admitted under the standards of § 3001.31(a) of this part.

§ 3001.86 ~~Discovery—in general.~~ Collection of information.

~~(a) *Purpose.* The rules in this subpart allow discovery against the Postal Service that is reasonably calculated to lead to admissible evidence during a proceeding. The notice and scheduling order issued pursuant to § 3001.80 of this part shall provide that discovery will be scheduled to end at least 3 days prior to the commencement of hearings.~~

~~(b) *Informal discovery.* The discovery procedures of this section, § 3001.85, and §§ 3001.87 through 3001.89 of this part are not exclusive. Participants are encouraged to engage in informal discovery whenever possible to clarify exhibits and testimony. The results of these efforts may be introduced into the record by stipulation, by supplementary testimony or exhibit, or by other appropriate means. In the interest of reducing motion practice, participants also are expected to use informal means to clarify questions and to identify portions of discovery requests considered overbroad or burdensome.~~

~~(c) *Failure to obey orders or rulings.* If the Postal Service fails to obey an order of the Commission or ruling of the presiding officer to provide or permit discovery pursuant to this section or §§ 3001.85 through 3001.89 of this part, the Commission or the presiding officer may issue orders or rulings in regard to the failure as are just. These orders or rulings may, among other things:~~

~~(1) direct that certain designated facts are established for the purposes of the proceeding;~~

~~(2) prohibit the Postal Service from introducing certain designated matters in evidence; or,~~

~~(3) strike certain evidence, requests, pleadings, or parts thereof.~~

(a) *In general.* The Postal Service shall provide such additional information as may be requested under § 3001.83. Any participant submitting a rebuttal case shall provide such additional information as the Commission may request.

(b) *Submission of proposed information requests.* Participants will be given an opportunity to submit to the Commission suggested relevant questions that might be posed as information requests. Such questions, and any explanatory materials submitted to clarify the purpose of the questions, should be filed in accordance with § 3001.9, and will become part of the administrative record of the proceeding.

(c) *Timing.* Applications for issuance of an information request may be filed on or before the dates established for those purposes by the procedural schedule issued by the Commission pursuant to § 3001.80 of this subpart.

§ 3001.87 Interrogatories. Reserved.

~~(a) *Service and contents.* In the interest of expedition and limited to information which appears reasonably calculated to lead to the discovery of admissible evidence, any participant in a proceeding may propound to the Postal Service 25 written, sequentially numbered interrogatories, by witness, requesting non-privileged information relevant to the subject matter of the proceeding. An interrogatory with subparts that are logically and factually subsumed within and necessarily related to the primary question will be counted as one interrogatory. The Postal Service shall answer each interrogatory and furnish such information as is available. The participant propounding the interrogatories shall file them with the Commission in conformance with §§ 3001.9~~

~~through 3001.12 of this part. Follow-up interrogatories to clarify or elaborate on the answer to an earlier discovery request may be filed after the period for intervenor discovery on the Postal Service case ends if the interrogatories are filed within 7 days of receipt of the answer to the previous interrogatory. In extraordinary circumstances, follow-up interrogatories may be filed not less than 6 days prior to the filing date for the participant's rebuttal testimony.~~

~~(b) *Answers.* (1) Answers to interrogatories shall be prepared so that they can be incorporated into the record as written cross-examination. Each answer shall begin on a separate page, identify the individual responding and the relevant testimony number, if any, the participant who propounded the interrogatory, and the number and text of the question.~~

~~(2) Each interrogatory shall be answered separately and fully in writing by the individual responsible for the answer, unless it is objected to, in which event the reasons for objection shall be stated in a motion to be excused from answering in the manner prescribed by paragraph (c) of this section.~~

~~(3) An interrogatory otherwise proper is not necessarily objectionable because an answer would involve an opinion or contention that relates to fact or the application of law to fact, but the Commission or presiding officer may order that such an interrogatory need not be answered until a prehearing conference or other later time.~~

~~(4) Answers filed by the Postal Service shall be filed in conformance with §§ 3001.9 through 3001.12 of this part within 7 days of the filing of the interrogatories or within such other period as may be fixed by the Commission or presiding officer. Any other period fixed by the Commission or presiding officer shall end before the conclusion of the hearing.~~

~~(c) *Motion to be excused from answering.* The Postal Service may, in lieu of answering an interrogatory, file a motion pursuant to § 3001.75(b) of this subpart to be excused from answering.~~

~~(d) *Supplemental answers.* The Postal Service has a duty to timely amend a prior answer if it obtains information upon the basis of which it knows that the answer was incorrect when made or is no longer true. The Postal Service shall serve supplemental answers to update or to correct responses whenever necessary, up until the date the answer could have been accepted into evidence as written cross-examination. The Postal Service shall indicate whether the answer merely supplements the previous answer to make it current or whether it is a complete replacement for the previous answer.~~

§ 3001.88 Production of documents. Reserved.

~~(a) *Service and contents.* (1) In the interest of expedition and limited to information which appears reasonably calculated to lead to the discovery of admissible evidence, any participant may serve on the Postal Service a request to produce and permit the participant making the request, or someone acting on behalf of the participant, to inspect and copy any designated documents or things that constitute or contain matters, not privileged, that are relevant to the subject matter involved in the proceeding and that are in the custody or control of the Postal Service.~~

~~(2) The request shall set forth the items to be inspected either by individual item or category, and describe each item and category with reasonable particularity, and shall specify a reasonable time, place, and manner of making inspection. The participant requesting the production of documents or items shall file its request with the Commission in conformance with §§ 3001.9 through 3001.12 of this part.~~

~~(b) *Answers.* (1) The Postal Service shall file an answer to a request under paragraph (a) of this section with the Commission in conformance with §§ 3001.9 through 3001.12 of this part within 5 days after the request is filed, or within such other period as may be fixed by the Commission or presiding officer. The answer shall state, with respect to each item or category, whether inspection will be permitted as requested.~~

~~(2) If the Postal Service objects to an item or category, the Postal Service shall state the reasons for objection in a motion to be excused from answering as prescribed by paragraph (c) of this section.~~

~~(c) *Motions to be excused from answering.* The Postal Service may, in lieu of answering a request for production, file a motion pursuant to § 3001.75(b) of this subpart to be excused from answering.~~

§ 3001.89 Admissions. Reserved.

~~(a) *Service and content.* In the interest of expedition, any participant may serve upon the Postal Service a written request for the admission of any relevant, unprivileged facts, including the genuineness of any documents or exhibits to be presented in the hearing. The admission shall be for purposes of the pending proceeding only. The participant requesting the admission shall file its request with the Commission in conformance with §§ 3001.9 through 3001.12 of this part.~~

~~(b) *Answers.* (1) A matter for which admission is requested shall be separately set forth in the request and is deemed admitted unless, within 7 days after the request is filed, or within such other period as may be established by the Commission or presiding officer, the Postal Service files a written answer or motion to be excused from answering pursuant to paragraph (c) of this section. Postal Service answers to requests for admission shall be filed with the Commission in conformance with §§ 3001.9 through 3001.12 of this part.~~

~~(2) If the answer filed by the Postal Service does not admit a matter asserted in the participant's request, it must either specifically deny the matter or explain in detail why it cannot truthfully admit or deny the asserted matter. When good faith requires, the Postal Service must admit a portion of the asserted matter and either deny or qualify the remaining portion of such asserted matter. Lack of knowledge for failing to admit or deny can be invoked only after reasonable inquiry if the information already possessed or reasonably obtainable is insufficient to enable an admission or denial.~~

~~(3) Grounds for objection to requests for admission must be stated. Objections cannot be based solely upon the ground that the request presents a genuine issue for trial.~~

~~(c) *Motion to be excused from answering.* The Postal Service may, in lieu of answering a request for admission, file a motion pursuant to § 3001.75(b) of this subpart to be excused from answering.~~

§ 3001.90 Rebuttal testimony.

(a) *Timing.* Any participant may file rebuttal testimony on or before the date established for that purpose by the procedural schedule issued by the Commission pursuant to § 3001.80 of this subpart. If authorized, Hearing on rebuttal testimony shall proceed as set forth in the procedural schedule.

(b) *Limitations.* The scope of rebuttal testimony shall be limited to material issues relevant to the specific proposal made by the Postal Service. Rebuttal testimony shall not propose, or seek to address, alternatives to the Postal Service's proposal.

(c) *Intent to file rebuttal testimony.* If a participant wishes to file rebuttal testimony, it must file a document confirming its intent to file rebuttal testimony with the Commission by the date provided in the procedural schedule.

(d) *Adjustment of dates.* If no participant files a confirmation of intent to file rebuttal testimony on or before the date established by the procedural schedule issued by the Commission pursuant to § 3001.80 of this subpart, the Commission may adjust other dates in the procedural schedule as it deems to be necessary and appropriate.

§ 3001.91 Surrebuttal testimony.

(a) *Scope.* Surrebuttal testimony shall be limited to material issues relevant to the Postal Service's proposal and to the rebuttal testimony which the surrebuttal

testimony seeks to address. Testimony that exceeds the scope of the Postal Service's proposal or rebuttal testimony shall not be permitted.

(b) *Motion for leave to file surrebuttal.* A participant who wishes to file surrebuttal testimony must obtain prior approval by filing with the Commission a motion for leave to file surrebuttal pursuant to § 3001.75(d) of this subpart on or before the date provided in the procedural schedule established by the Commission. The motion must summarize the surrebuttal testimony the participant wishes to file and must identify and explain exceptional circumstances that require the filing of such testimony. The moving participant bears the burden of demonstrating exceptional circumstances that warrant a grant of the motion. Answers to such motions may be filed as provided in § 3001.75(d).

(c) *Deadline for filing surrebuttal authorized by the Commission.* In the event the Commission grants the motion for leave to file surrebuttal testimony, the moving participant must file its proposed surrebuttal testimony by the date provided in the procedural schedule established pursuant to § 3001.80.

(d) *Adjustment of procedural dates.* If no participant files a motion for leave to file surrebuttal testimony, or if the Commission denies all such motions as may be filed, the remaining dates in the procedural schedule may be adjusted by the Commission as it deems to be necessary and appropriate.

§ 3001.92 Hearings.

(a) *Initiation.* Hearings for the purpose of taking evidence shall be initiated only upon the approval of a motion under § 3001.75(b) by the issuance of a notice and scheduling order pursuant to § 3001.80 of this subpart.

(b) *Presiding officer.* All hearings shall be held before the Commission sitting en banc with a duly designated presiding officer.

(c) *Entering of appearances.* The Commission or the presiding officer before whom the hearing is held will cause to be entered on the record all appearances

together with a notation showing in whose behalf each such appearance has been made.

(d) *Order of procedure.* In requests for advisory opinions before the Commission, the Postal Service shall be the first participant to present its case. Unless otherwise ordered by the Commission, the presiding officer shall direct the order of presentation of all other participants and issue such other procedural orders as may be necessary to assure the orderly and expeditious conclusion of the hearing.

(e)(1) *Presentations by participants.* Where one or more participants have moved for leave to submit oral testimony under § 3001.75(b) of this subpart, and the presiding officer has granted such motion, Any participant shall have the right in public hearings to present evidence relevant to the Postal Service's proposal, cross-examine (limited to testimony adverse to the participant conducting the cross-examination), object, move, and argue on matters directly relevant to that oral testimony. Where one or more participants have moved for leave to conduct oral cross-examination under § 3001.75(b) of this subpart, and the presiding officer has granted such motion, such participants and the participants subject to such cross-examination shall have the right in public hearings to cross-examine, object, move, and argue on matters directly relevant to the matters authorized by the presiding officer. The participant's presentation shall be in writing and may be accompanied by a trial brief or legal memoranda. (Legal memoranda on matters at issue will be welcome at any stage of the proceeding.) When objections to the admission or exclusion of evidence before the Commission or the presiding officer are made, the grounds relied upon shall be stated. Formal exceptions to rulings are unnecessary.

(2) *Written cross-examination.* Written cross-examination will be utilized as a substitute for oral cross-examination whenever possible, particularly to introduce factual or statistical evidence. Designations of written cross-examination shall be served in accordance with §§ 3001.9 through 3001.12 of this part no later than 32 days before the scheduled appearance of a witness after the deadline for responses to Commission

information requests on the Postal Service's direct case or any rebuttal case.

Designations shall identify every item to be offered as evidence, listing ~~the participant who initially posed the discovery request, the relevant information request, the witness and/or party to whom the question was addressed (if different from the witness answering),~~ the number of the request and, if more than one answer is provided, the dates of all answers to be included in the record. (For example, "~~OCA-T1-17 to USPS witness Jones, answered by USPS witness Smith (March 1, 1997) as updated (March 21, 1997).~~"CHIR No. 1, Question 1 (Revised July 30, 2013)".) When a participant designates written cross-examination, two hard copies of the documents to be included shall simultaneously be submitted to the Secretary of the Commission. The Secretary of the Commission shall prepare for the record a packet containing all materials designated for written cross-examination in a format that facilitates review by the witness and counsel. The witness will verify the answers and materials in the packet, and they will be entered into the transcript by the presiding officer. Counsel may object to written cross-examination at that time, and any designated answers or materials ruled objectionable will not be admitted into the record.

(3) *Oral cross-examination.* Oral cross-examination will be permitted for clarifying written cross-examination and for testing assumptions, conclusions or other opinion evidence, to the extent necessary to avoid substantial prejudice to a participant as provided in § 3001.75(b). ~~Notices of intent to conduct oral cross-examination shall be filed 3 or more days before the announced appearance of the witness and shall include specific references to the subject matter to be examined and page references to the relevant direct testimony and exhibits.~~ A participant intending to use complex numerical hypotheticals, or to question using intricate or extensive cross-references, shall provide adequately documented cross-examination exhibits for the record. Copies of these exhibits shall be filed at least 2 days (including 1 working day) before the scheduled appearance of the witness. They may be filed online or delivered in hardcopy form to counsel for the witness, at the discretion of the participant. If a participant has obtained permission to receive service of documents in hardcopy form,

hardcopy notices of intent to conduct oral cross-examination of witnesses for that participant shall be delivered to counsel for that participant and served 3 or more working days before the announced appearance of the witness. Cross-examination exhibits shall be delivered to counsel for the witness at least 2 days (including 1 working day) before the scheduled appearance of the witness.

(f) *Limitations on presentation of the evidence.* The taking of evidence shall proceed with all reasonable diligence and dispatch, and to that end, the Commission or the presiding officer may limit appropriately:

(1) the number of witnesses to be heard upon any issue,

(2) the examination by any participant to specific issues, and

(3) the cross-examination of a witness to that required for a full and true disclosure of the facts necessary for exploration of the Postal Service's proposal, disposition of the proceeding, and the avoidance of irrelevant, immaterial, or unduly repetitious testimony.

(g) *Motions during hearing.* After a hearing has commenced in a proceeding, a request may be made by motion to the presiding officer for any procedural ruling or relief desired. Such motions shall set forth the ruling or relief sought, and state the grounds therefor and statutory or other supporting authority. Motions made during hearings may be stated orally upon the record, except that the presiding officer may require that such motions be reduced to writing and filed separately. Any participant shall have the opportunity to answer or object to such motions at the time and in the manner directed by the presiding officer.

(h) *Rulings on motions.* The presiding officer is authorized to rule upon any motion not reserved for decision by the Commission. No ruling on motions to dismiss, motions that involve or constitute a final determination of the proceeding, motions under ~~rule~~ § 3001.91, or motions that seek to extend the deadline for issuance of an advisory

opinion may be made by the presiding officer. This section shall not preclude a presiding officer from referring any motion made in hearing to the Commission for ultimate determination.

(i) *Transcript corrections.* Corrections to the transcript of a hearing shall not be requested except to correct a material substantive error in the transcription made at the hearing.

§ 3001.93 Initial and reply briefs.

(a) *When filed.* At the close of the taking of testimony in any proceeding, participants may file initial and reply briefs. The dates for filing initial and reply briefs shall be established in the procedural schedule issued pursuant to § 3001.80 ~~of this subpart~~. Such dates may be modified by subsequent order issued by the Commission or the presiding officer.

(b) *Contents.* Each brief filed with the Commission shall be as concise as possible and shall include the following in the order indicated:

(1) A subject index with page references, and a list of all cases and authorities relied upon, arranged alphabetically, with references to the pages where the citation appears;

(2) A concise statement of the case from the viewpoint of the filing participant;

(3) A clear, concise, and definitive statement of the position of the filing participant as to the Postal Service request;

(4) A discussion of the evidence, reasons, and authorities relied upon with precise references to the record and the authorities; and

(5) Proposed findings and conclusions with appropriate references to the record or the prior discussion of the evidence and authorities relied upon.

(c) *Length.* Any initial briefs from the Postal Service shall not exceed 13,000 words. Initial briefs shall not exceed 14000 words from any other parties shall not exceed 10,000 words. Reply briefs shall not exceed 7000-12,000 words for the Postal Service and the Public Representative, and 3,000 words for all other participants. Participants shall attest to the number of words contained in their brief. The word limit shall not include words in the caption, title, title page, table of contents, page headers, page numbers, signature and submitter contact information blocks, attestation of the word count, or certificate of service.

(d) *Incorporation by reference.* Briefs before the Commission or a presiding officer shall be completely self-contained and shall not incorporate by reference any portion of any other brief, pleading, or document.

(e) *Excerpts from the record.* Testimony and exhibits shall not be quoted or included in briefs except for short excerpts pertinent to the argument presented.

(f) *Filing and service.* Briefs shall be filed in the form and manner and served as required by §§ 3001.9 to 3001.12 of this part.

§ 3001.94 Field Hearings.

(a) *Purpose.* The use of a field hearing to gather information shall only be permitted upon motion of a party and an en banc decision of the Commission that (i) the field hearing will not negatively affect the procedural schedule; (ii) the information to be gathered at the field hearing is necessary for the Commission's advisory opinion; and (iii) the information to be gathered at the field hearing cannot be obtained from any other source, including in particular any other informal expression of views pursuant to § 3001.20b.

(b) *Evidence.* Information obtained at a field hearing shall not constitute evidence pursuant to § 3001.31, but rather shall have the status of informal expressions of views pursuant to § 3001.20b.

APPENDIX A to Part 3001, subpart D
 PRO FORMA N-CASE PROCEDURAL SCHEDULE

| <u>Line</u> | <u>Action</u> | <u>Day No.</u> |
|-------------------------|---|---------------------------------------|
| 1 | Pre-Filing Consultations ³⁶ | n/a |
| 2 | Commission Order ³⁷ | n/a |
| 3 | Filing of Postal Service Request | 0 |
| 4 | Commission Notice and Order ³⁸ | 1-3 |
| 5 | Technical Conference | 10 |
| 6 | Participant Discovery on Postal Service Case Ends | 28 |
| 7 | Responses to Participant Discovery on Postal Service Case | 35 |
| <u>6</u> | <u>Deadline for Applications for Issuance of Information Requests</u> | <u>14</u> |
| <u>7</u> | <u>Target Deadline for Issuance of Information Requests</u> | <u>17</u> |
| <u>8</u> | <u>Responses to Information Requests</u> | <u>24</u> |
| 8 <u>9</u> | Participants Confirm Intent to File a Rebuttal Case | 37 <u>26</u> ³⁹ |
| 10 | Deadline for Motions for Leave to Submit Oral Testimony or to Conduct Oral Cross-Examination on Direct Case | 26 |
| 11 | Deadline for Answers to Motions for Oral Testimony and/or Cross-Examination | 28 |
| 12 | Presiding Officer's Ruling on Oral Testimony and/or Cross-Examination | 31 |
| <u>9</u> <u>13</u> | <u>Filing of Rebuttal Cases (if submitted)</u> | <u>42</u> <u>31</u> |
| <u>14</u> | <u>Deadline for Applications for Issuance of Information Requests on Rebuttal Case (if submitted)</u> | <u>34</u> |
| <u>15</u> | <u>Target Deadline for Issuance of Information Requests on Rebuttal Case (if submitted)</u> | <u>40</u> |
| <u>16</u> | <u>Responses to Information Requests on Rebuttal Case (if submitted)</u> | <u>45</u> |
| 17 <u>17</u> | Deadline for Motions for Leave to File Surrebuttal, to Submit Oral Testimony on Rebuttal Case, and/or to Conduct Oral Cross-Examination on Rebuttal Case | 44 <u>47</u> ⁴⁰ |

³⁶ The Postal Service would initiate pre-filing consultations and would file a notice with the Commission of such consultations prior to their commencement.

³⁷ This order would appoint a Public Representative.

³⁸ This notice and order would announce the Postal Service request, set a deadline for interventions, set a date for a technical conference, and establish a procedural schedule.

³⁹ If no participant elects to file a rebuttal case, hearings begin on Day 4234, if authorized.

⁴⁰ If no surrebuttal cases are requested, hearings begin on Day 4950, if authorized.

| | | |
|-------|---|--|
| 4418 | Deadline for Answers to Motions for Surrebuttal and for Oral Testimony and/or Cross-Examination | 4649 |
| 4219 | Filing of Surrebuttal Cases (if authorized) | 4952 ⁴¹ |
| 20 | Presiding Officer's Ruling on Oral Testimony and/or Cross-Examination | 49 |
| <hr/> | | |
| 4321 | Hearings (if authorized) | |
| | Hearings (with no Rebuttal Cases) | 42-4434-36 |
| | Hearings (with Rebuttal Cases, but no requests for leave to file Surrebuttal Cases) | 49-5150-52 |
| | Hearings (with Rebuttal Cases and requests for leave to file Surrebuttal Cases) | 54-5655-57 |
| 4422 | Initial Briefs | (7 days after <u>scheduled</u> conclusion of hearings) |
| 4522 | Reply Briefs | (7 days after filing of Initial Briefs) |
| 4623 | Target Issuance Date of Advisory Opinion | 90 |

Section 3001.3 is amended by striking the word “The” at the beginning of the section and inserting the following introductory phrase:

(a) Except as otherwise provided in 39 CFR 3001.71, the...

Section 3001.5(h) is amended by striking the current subsection and replacing it with the following:

(h) *Participant* means any party and the officer of the Commission who is designated to represent the interests of the general public. In a proceeding that is not conducted under subpart D, for purposes of §§ 3001.11(e), 3001.12, 3001.21, 3001.23, 3001.24, 3001.29, 3001.30, 3001.31, and 3001.32 only, the term “participant” includes persons who are limited participators.

⁴¹ If one or more surrebuttal cases are requested (whether or not authorized by the Commission), hearings begin on Day 5455, if authorized.

~~Section 3001.15 is amended by striking the last sentence and replacing it with the following:~~

~~Except in proceedings conducted under subpart D, in computing a period of time which is 5 days or less, all Saturdays, Sundays and legal holidays observed by the Commission are to be excluded.~~

Section 3001.17 is amended by adding the following new subsection (c)(5):

(5) In proceedings under subpart D involving Postal Service requests for issuance of an advisory opinion, the notice issued under 39 CFR 3001.17 shall include the procedural schedule provided for under 39 CFR 3001.80.

and by renumbering existing subsection (c)(5) as subsection (c)(6).

Section 3001.20(d) is amended by striking existing subsection (d) and replacing it with the following:

(d) *Oppositions.* (1) Except as otherwise provided in subparagraph (d)(ii), oppositions to notices of intervention may be filed by any participant in the proceeding no later than 10 days after the notice of intervention is filed.

(2) Oppositions to notices of interventions in proceedings conducted under subpart D may be filed by any participant in the proceeding no later than 3 days after the notice of intervention is filed.

(3) Pending Commission action, an opposition to intervention shall, in all proceedings except those conducted under subpart D, delay on a day-for-day basis the date for responses to discovery requests filed by that intervenor.

Section 3001.20a is amended by striking the first sentence of said section and replacing it with the following:

Except for cases noticed for a proceeding under subpart D, any person may, notwithstanding the provisions of § 3001.20, appear as a limited participator in any case that is noticed for a proceeding pursuant to § 3001.17(a) in accordance with the following provisions:

Section 3001.31(e) is amended by striking that existing subsection and replacing it with the following:

(e) *Designation of evidence from other Commission dockets.*

(1) Participants may request that evidence received in other Commission proceedings be entered into the record of the current proceeding. These requests shall be made by motion, shall explain the purpose of the designation, and shall identify material by page and line or paragraph number.

(2) In proceedings conducted under subpart D, these requests must be made at least 6 days before the date for filing the participant's direct case. Oppositions to motions for designations and/or requests for counter-designations shall be filed within 3 days. Oppositions to requests for counter-designations are due within 2 days.

(3) In all other proceedings subject to this section, these requests must, in the absence of extraordinary circumstances, be made at least 28 days before the date for filing the participant's direct case. Oppositions to motions for designations and/or requests for counter-designations shall be filed within 14 days. Oppositions to requests for counter-designations are due within 7 days.

(4) In all proceedings subject to this section, the moving participant must submit two copies of the identified material to the Secretary at the time requests for designations and counter-designations are made.

Section 3001.31(k)(4) is amended by striking that existing subsection and replacing it with the following:

(4) *Expedition.* The offeror shall expedite responses to requests made pursuant to this section. Responses shall be served on the requesting party, and notice thereof filed with the Secretary in accordance with the provisions of § 3001.12: (a) no later than 3 days after a request is made under subsection (e)(2) of this section; or (b) no later than 14 days after a request is made under subsection (e)(3) of this section.

APPENDIX II

SECONDARY CHANGES TO APPENDIX I

(Additions to the proposed rule are underlined and deletions are marked with ~~strikethrough~~. Within the addition to the proposed rule concerning Rule 3001.20(e), additions to existing Rule 3001.20(e) are also marked in boldface type.)

These alternatives are presented for the eventuality that the Commission determines not to adopt the primary changes proposed by the Postal Service with respect to (1) Commission-led information-gathering in lieu of party discovery and (2) selection by the Postal Service of witnesses to attend the initial technical conference. Again, the conversion of party discovery to Commission-led information-gathering, as illustrated in Appendix I, is preferable to the refinements of party discovery shown here. The Postal Service is ambivalent about the changes to the proposed initial technical conference rules shown here and in Appendix I. Appendix II does not affect any of the Postal Service's proposed changes in Appendix I other than those included in Appendix II.

* * *

§ 3001.80 Procedural schedule.

(a) *Notice.* Subject to paragraph (b) of this section, the Commission shall include in the notice of proceeding issued under 39 CFR 3001.17 a procedural schedule based upon the pro forma schedule set forth in the Appendix to subpart D. The procedural schedule shall include:

- (1) A deadline for notices of interventions;
- (2) The date(s) for the mandatory technical conference between the Postal Service, Commission staff, and interested parties;
- (3) The deadline for discovery on the Postal Service's direct case;

(4) The deadline for responses to participant discovery on the Postal Service's direct case;

(5) The deadline for participants to confirm their intent to file a rebuttal case;

(6) The date for filing participant rebuttal testimony, if any;

(7) The deadline for discovery on any rebuttal case;

(8) The deadline for responses to participant discovery on any rebuttal case;

~~(7)~~(9) The dates for filing motions for leave to file surrebuttal testimony and answers thereto;

~~(8)~~(10) The date for filing surrebuttal, if any;

(11) The deadlines for motions for leave to submit oral testimony or to conduct oral cross-examination on the direct case or on any rebuttal case;

(12) The deadlines for answers to motions for leave to submit oral testimony or to conduct oral cross-examination on the direct case or on any rebuttal case;

(13) The deadlines for Presiding Officer's rulings regarding leave to submit oral testimony or to conduct oral cross-examination on the direct case or on any rebuttal case;

~~(9)~~(14) The date(s) for hearings on the Postal Service's direct case, rebuttal testimony, and surrebuttal testimony, if any;

~~(10)~~(15) The date for filing initial briefs;

~~(11)~~(16) The date for filing reply briefs; and

(17) A deadline for issuance of an advisory opinion which is 90 days from the date of filing.

* * *

§ 3001.85 Mandatory technical conference.

* * *

(b) *Witnesses.* ~~The Postal Service shall make available at the technical conference each witness whose prepared direct testimony was filed pursuant to § 3001.84 of this subpart.~~ The Public Representative shall review the prepared direct testimony of each witness for the Postal Service that was filed pursuant to § 3001.84 of this subpart and determine which, if any, witnesses present technically complex data and calculations or relies upon technically complex supporting documentation sufficient to require the witness to be present at the technical conference. The Public Representative shall notify the Postal Service of which witnesses shall be required to attend at least 5 days prior to the technical conference.

* * *

(d) *Relation to discovery process.* Information obtained during the mandatory technical conference may be used to discover additional relevant information by means of the formal discovery mechanisms provided for in §§ 3001.85 through 3001.89 of this subpart.

(e) *Record.* Information obtained during, or as a result of, the mandatory technical conference is not part of the decisional record unless admitted under the standards of § 3001.31(a) of this part.

§ 3001.86 Discovery—in general.

(a) *Purpose.* The rules in this subpart allow discovery ~~against the Postal Service~~ that is reasonably calculated to lead to admissible evidence during a

proceeding. The notice and scheduling order issued pursuant to § 3001.80 of this part shall set forth an appropriate schedule for discovery, in accordance with the pro forma schedule in Appendix A to this subpart~~provide that discovery will be scheduled to end at least 3 days prior to the commencement of hearings.~~

(b) *Informal discovery.* The discovery procedures of this section, § 3001.85, and §§ 3001.87 through 3001.89 of this part are not exclusive. Participants are encouraged to engage in informal discovery whenever possible to clarify exhibits and testimony. The results of these efforts may be introduced into the record by stipulation, by supplementary testimony or exhibit, or by other appropriate means. In the interest of reducing motion practice, participants also are expected to use informal means to clarify questions and to identify portions of discovery requests considered overbroad or burdensome.

(c)(1) *Objections.* In the interest of expedition, the bases for objection shall be clearly and fully stated. If objection is made to part of an interrogatory, request for production of documents, or request for admission, the part shall be specified. A participant claiming privilege shall identify the specific evidentiary privilege asserted and state the reasons for its applicability. A participant claiming undue burden shall state with particularity the effort that would be required to answer the interrogatory, providing estimates of cost and work hours required, to the extent possible. An interrogatory otherwise proper is not necessarily objectionable because an answer would involve an opinion or contention that relates to fact or the application of law to fact, but the Commission or presiding officer may order that such an interrogatory need not be answered until a prehearing conference or other later time. Objections shall be filed with the Commission in conformance with §§ 3001.9 through 3001.12 within 3 days of the filing of the interrogatories.

(2) *Motions to compel responses to discovery.* Motions to compel a more responsive answer, or an answer to an interrogatory to which an objection was interposed, should be filed within 3 days of the answer or objection to the

discovery request. The text of the discovery request, and any answer provided, should be provided as an attachment to the motion to compel. Participants who have objected to interrogatories which are the subject of a motion to compel shall have 2 days to answer. Answers will be considered supplements to the arguments presented in the initial objection.

(3) *Compelled answers.* The Commission, or the presiding officer, upon motion of any participant to the proceeding, may compel a more responsive answer, or an answer to an interrogatory to which an objection has been raised if the objection is found not to be valid, or may compel an additional answer if the initial answer is found to be inadequate. Such compelled answers shall be filed in conformance with §§ 3001.9 through 3001.12 within 3 days of the date of the order compelling an answer or within such other period as may be fixed by the Commission or presiding officer, but before the conclusion of the hearing.

(e)(d) *Failure to obey orders or rulings.* If the ~~Postal Service~~ a respondent fails to obey an order of the Commission or ruling of the presiding officer to provide or permit discovery pursuant to this section or §§ 3001.85 through 3001.89 of this part, the Commission or the presiding officer may issue orders or rulings in regard to the failure as are just. These orders or rulings may, among other things:

(1) direct that certain designated facts are established for the purposes of the proceeding;

(2) prohibit the ~~Postal Service~~ respondent from introducing certain designated matters in evidence; or,

(3) strike certain evidence, requests, pleadings, or parts thereof.

§ 3001.87 Interrogatories.

(a) *Service and contents.* In the interest of expedition and limited to information which appears reasonably calculated to lead to the discovery of

admissible evidence, any participant in a proceeding may propound to ~~the Postal Service~~ any other participant no more than a total of 25 written, sequentially numbered interrogatories, organized by witness, requesting non-privileged information relevant to the subject matter of the proceeding. An interrogatory with subparts that are logically and factually subsumed within and necessarily related to the primary question (according to the standard for non-discrete subparts in Federal Rule of Civil Procedure Section 33(a)(1)) will be counted as one interrogatory. The ~~Postal Service~~ respondent shall answer each interrogatory and furnish such information as is available. The participant propounding the interrogatories shall file them with the Commission in conformance with §§ 3001.9 through 3001.12 of this part. Follow-up interrogatories to clarify or elaborate on the answer to an earlier discovery request may be filed after the period for intervenor discovery on the Postal Service case ends if the interrogatories are filed within 7 days of receipt of the answer to the previous interrogatory. In extraordinary circumstances, follow-up interrogatories may be filed not less than 6 days prior to the filing date for the participant's rebuttal or surrebuttal testimony.

(b) *Answers.* (1) Answers to interrogatories shall be prepared so that they can be incorporated into the record as written cross-examination. Each answer shall begin on a separate page, identify the individual responding and the relevant testimony number, if any, the participant who propounded the interrogatory, and the number and text of the question.

(2) Each interrogatory shall be answered separately and fully in writing by the individual responsible for the answer, unless it is objected to, in which event the reasons for objection shall be stated in a motion to be excused from answering in the manner prescribed by paragraph (c) of this section.

(3) An interrogatory otherwise proper is not necessarily objectionable because an answer would involve an opinion or contention that relates to fact or the application of law to fact, but the Commission or presiding officer may order

that such an interrogatory need not be answered until a prehearing conference or other later time.

(4) Answers filed by ~~the Postal Service~~ a respondent shall be filed in conformance with §§ 3001.9 through 3001.12 of this part within 7 days of the filing of the interrogatories or within such other period as may be fixed by the Commission or presiding officer. Any other period fixed by the Commission or presiding officer shall end before the conclusion of the hearing.

~~(c) Motion to be excused from answering.~~ ~~The Postal Service may, in lieu of answering an interrogatory, file a motion pursuant to § 3001.75(b) of this subpart to be excused from answering.~~

~~(d)(c) Supplemental answers.~~ ~~The Postal Service~~ A respondent has a duty to timely amend a prior answer if it obtains information upon the basis of which it knows that the answer was incorrect when made or is no longer true. ~~The Postal Service~~ A respondent shall serve supplemental answers to update or to correct responses whenever necessary, up until the date the answer could have been accepted into evidence as written cross-examination. ~~The Postal Service~~ A respondent shall indicate whether the answer merely supplements the previous answer to make it current or whether it is a complete replacement for the previous answer.

§ 3001.88 Production of documents.

(a) *Service and contents.* (1) In the interest of expedition and limited to information which appears reasonably calculated to lead to the discovery of admissible evidence, any participant may serve on ~~the Postal Service~~ any other participant a request to produce and permit the participant making the request, or someone acting on behalf of the participant, to inspect and copy any designated documents or things that constitute or contain matters, not privileged, that are relevant to the subject matter involved in the proceeding and that are in the custody or control of the ~~Postal Service~~ respondent.

(2) The request shall set forth the items to be inspected either by individual item or category, and describe each item and category with reasonable particularity, and shall specify a reasonable time, place, and manner of making inspection. The participant requesting the production of documents or items shall file its request with the Commission in conformance with §§ 3001.9 through 3001.12 of this part.

(b) *Answers.* (1) The ~~Postal Service~~ respondent shall file an answer to a request under paragraph (a) of this section with the Commission in conformance with §§ 3001.9 through 3001.12 of this part within 5 days after the request is filed, or within such other period as may be fixed by the Commission or presiding officer. The answer shall state, with respect to each item or category, whether inspection will be permitted as requested.

(2) If the Postal Service objects to an item or category, the ~~Postal Service~~ respondent shall state the reasons for objection in a motion to be excused from answering as prescribed by paragraph (c) of this section.

~~(c) *Motions to be excused from answering.* The Postal Service may, in lieu of answering a request for production, file a motion pursuant to § 3001.75(b) of this subpart to be excused from answering.~~

§ 3001.89 Admissions.

(a) *Service and content.* In the interest of expedition, any participant may serve upon ~~the Postal Service~~ any other participant a written request for the admission of any relevant, unprivileged facts, including the genuineness of any documents or exhibits to be presented in the hearing. The admission shall be for purposes of the pending proceeding only. The participant requesting the admission shall file its request with the Commission in conformance with §§ 3001.9 through 3001.12 of this part.

(b) *Answers.* (1) A matter for which admission is requested shall be separately set forth in the request and is deemed admitted unless, within 7 days

after the request is filed, or within such other period as may be established by the Commission or presiding officer, the ~~Postal Service respondent~~ files a written answer or motion to be excused from answering pursuant to paragraph (c) of this section. ~~Postal Service answers~~ Answers to requests for admission shall be filed with the Commission in conformance with §§ 3001.9 through 3001.12 of this part.

(2) If the answer filed by the ~~Postal Service respondent~~ does not admit a matter asserted in the participant's request, it must either specifically deny the matter or explain in detail why it cannot truthfully admit or deny the asserted matter. When good faith requires, the ~~Postal Service respondent~~ must admit a portion of the asserted matter and either deny or qualify the remaining portion of such asserted matter. Lack of knowledge for failing to admit or deny can be invoked only after reasonable inquiry if the information already possessed or reasonably obtainable is insufficient to enable an admission or denial.

(3) Grounds for objection to requests for admission must be stated. Objections cannot be based solely upon the ground that the request presents a genuine issue for trial.

~~(c) Motion to be excused from answering. The Postal Service may, in lieu of answering a request for admission, file a motion pursuant to § 3001.75(b) of this subpart to be excused from answering.~~

* * *

§ 3001.92 Hearings.

* * *

(2) *Written cross-examination.* Written cross-examination will be utilized as a substitute for oral cross-examination whenever possible, particularly to introduce factual or statistical evidence. Designations of written cross-examination shall be served in accordance with §§ 3001.9 through 3001.12 of this part no later than 32 days ~~before the scheduled appearance of a witness~~ after

the deadline for responses to Commission information requests on the Postal Service's direct case or any rebuttal case. Designations shall identify every item to be offered as evidence, listing the participant who initially posed the discovery request, the witness and/or party to whom the question was addressed (if different from the witness answering), the number of the request and, if more than one answer is provided, the dates of all answers to be included in the record. (For example, "~~OCA-T1-17-PR-T1-1~~ to USPS witness Jones, ~~answered by~~ redirected from USPS witness Smith (March 1, 1997), as updated (March 21, 1997)).") When a participant designates written cross-examination, two hard copies of the documents to be included shall simultaneously be submitted to the Secretary of the Commission. The Secretary of the Commission shall prepare for the record a packet containing all materials designated for written cross-examination in a format that facilitates review by the witness and counsel. The witness will verify the answers and materials in the packet, and they will be entered into the transcript by the presiding officer. Counsel may object to written cross-examination at that time, and any designated answers or materials ruled objectionable will not be admitted into the record.

* * *

APPENDIX A to Part 3001, subpart D

PRO FORMA N-CASE PROCEDURAL SCHEDULE

| <u>Line</u> | <u>Action</u> | <u>Day No.</u> |
|-------------|---|----------------|
| 1 | Pre-Filing Consultations ⁴² | n/a |
| 2 | Commission Order ⁴³ | n/a |
| 3 | Filing of Postal Service Request | 0 |
| 4 | Commission Notice and Order ⁴⁴ | 1-3 |
| 5 | Technical Conference | 10 |

⁴² The Postal Service would initiate pre-filing consultations and would file a notice with the Commission of such consultations prior to their commencement.

⁴³ This order would appoint a Public Representative.

⁴⁴ This notice and order would announce the Postal Service request, set a deadline for interventions, set a date for a technical conference, and establish a procedural schedule.

| | | |
|-------|---|---|
| 6 | Participant Discovery on Postal Service Case Ends <u>(with no Rebuttal Cases)</u> | 2817 |
| 7 | Responses to Participant Discovery on Postal Service Case | 3524 |
| 8 | Participants Confirm Intent to File a Rebuttal Case | 3726 ⁴⁵ |
| 9 | Deadline for Motions for Leave to Submit Oral Testimony or to Conduct Oral Cross-Examination on Direct Case | 26 |
| 10 | Deadline for Answers to Motions for Oral Testimony and/or Cross-Examination | 28 |
| 11 | Presiding Officer's Ruling on Oral Testimony and/or Cross-Examination | 31 |
| 912 | Filing of Rebuttal Cases (if submitted) | 4231 |
| 13 | <u>Participant Discovery on Rebuttal Cases Ends (if any)</u> | <u>35</u> |
| 14 | <u>Responses to Participant Discovery on Rebuttal Cases</u> | <u>42</u> |
| 4015 | <u>Deadline for Motions for Leave to File Surrebuttal, to Submit Oral Testimony on Rebuttal Case, and/or to Conduct Oral Cross-Examination on Rebuttal Case</u> | <u>44</u> ⁴⁶ |
| 4416 | <u>Deadline for Answers to Motions for Surrebuttal and for Oral Testimony and/or Cross-Examination</u> | <u>46</u> |
| 4217 | Filing of Surrebuttal Cases (if authorized) | 49 ⁴⁷ |
| 18 | <u>Presiding Officer's Ruling on Oral Testimony and/or Cross-Examination</u> | <u>49</u> |
| <hr/> | | |
| 4319 | <u>Hearings (if authorized)</u> | |
| | Hearings (with no Rebuttal Cases) | 42-44 <u>34-36</u> |
| | Hearings (with Rebuttal Cases, but no requests for leave to file Surrebuttal Cases) | 49-51 <u>47-49</u> |
| | Hearings (with Rebuttal Cases and requests for leave to file Surrebuttal Cases) | 54-56 <u>52-54</u> |
| 4420 | Initial Briefs | (7 days after conclusion of hearings) |
| 4521 | Reply Briefs | (7 days after filing of Initial Briefs) |
| 4622 | Target Issuance Date of Advisory Opinion | 90 |

* * *

⁴⁵ If no participant elects to file a rebuttal case, hearings begin on Day 4234, if authorized.

⁴⁶ If no surrebuttal cases are requested, hearings begin on Day 4947, if authorized.

⁴⁷ If one or more surrebuttal cases are requested (whether or not authorized by the Commission), hearings begin on Day 5452, if authorized.

Section 3001.20(e) is amended by striking the second sentence and replacing it with the following:⁴⁸

Intervenors are also subject to the right of the Commission or the presiding officer as specified in § 3001.24 to require two or more intervenors having substantially like interests and positions to join together for purposes of service of documents, presenting evidence, making and arguing motions and objections, propounding discovery, cross-examining witnesses, filing briefs, and presenting oral arguments to the Commission or presiding officer.

⁴⁸ As information, this change would add the phrase “propounding discovery” to the relevant sentence in 39 C.F.R. § 3001.20(e). The underlining of this text illustrates that the entire change is additional to the proposed amendments in Order No. 1738, consistent with the format used in Appendices I and II above, and not necessarily that the text is additional to the underlying Commission rules.