

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

RULES PURSUANT TO 39 U.S.C. 404a

Docket No. RM2013-4

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

In Order No. 1739 (June 5, 2013), the Commission initiated this docket to “propos[e] rules to govern complaints alleging violations of 39 U.S.C. 404a.” The Order sets today as the deadline for interested parties to provide comments. The Postal Service hereby submits its Initial Comments.

Introduction

On June 5, 2013, the Postal Regulatory Commission issued Order No. 1739 and established PRC Docket No. RM2013-4, entitled “Rules Pursuant to 39 U.S.C. 404a.” The rulemaking concerns the establishment of expedited procedures applicable to complaints brought under 39 U.S.C. § 404a. In establishing the instant docket, the Commission requested comments from the Postal Service and other members of the postal community.¹

As an initial matter, the Postal Service shares the Commission’s recognition of the need to expedite procedures for resolving complaints, but believes that current procedures adequately serve the goals presented by the proposed rules in this docket.

¹ See Order No. 1739, Notice of Proposed Rulemaking Establishing Rules Pursuant to 39 U.S.C. 404a, PRC Docket No. RM2013-4 (June 5, 2013), at 23.

The proposed rules do not account for the varying interests of the parties likely to participate in 39 U.S.C. § 404a proceedings, and would disadvantage the Postal Service and other parties with interests different from a complainant that elects to avail itself of the proposed rules. Hence, the Postal Service urges the Commission to refrain from finalizing the proposed rule, and instead adjudicate complaints brought pursuant to section 404a under its existing Rules of Practice and Procedure.

The Postal Service notes that its Initial Comments in PRC Docket No. RM2012-4 largely support the Commission's proposed rules that would expedite proceedings in nationwide service change dockets.² The Postal Service's different positions on the two sets of proposed rules reflect differences in the proceedings that would be subject to the proposed rules. Nationwide service change cases are intended to provide advice to the Postal Service during and before implementation of a proposed change in service. They produce opinions of an advisory nature, and any delay in issuance of these advisory opinions reduces their effectiveness and influence. For example, if the Postal Service initiates or completes a proposed service change before it receives an advisory opinion recommending changes to that proposal, it might not be feasible to incorporate any recommended changes. Or if the Postal Service delays implementation of a service change until receipt of an advisory opinion, changes in the operational or business environment, or in customer demand, could reduce the effectiveness of the proposed service change. Thus, expedited procedures in the context of service change proceedings are likely to result in improvement of those proceedings.

² United States Postal Service Initial Comments, PRC Docket No. RM2012-4 (July 29, 2013).

By contrast, 39 U.S.C. § 404a complaint proceedings involve past conduct and lead to binding orders with a potentially wide-reaching effect on markets connected to postal services. The orders produced by these proceedings could have severe consequences for the complainant, the Postal Service, and all participants in the markets affected by the allegations in the complaint. Accordingly, it is important that the procedures governing complaints brought under 39 U.S.C. §404a facilitate a complete record and full representation of all interested participants. Thus, accelerated procedures do not serve the Commission, the Postal Service, or other stakeholders well in this context.

I. EXPEDITION OF COMPLAINT CASES IS A LAUDABLE GOAL AND IS ACHIEVABLE UNDER CURRENT COMPLAINT PROCEDURES.

In seeking to establish “a mechanism for prompt complaint resolution,”³ the Commission proposes a separate set of rules available only to complainants alleging violations of 39 U.S.C. § 404a, subject to complainants’ voluntary election. Specific features of the proposed rule include the allowance of depositions,⁴ limitation of evidence considered by the Commission,⁵ a requirement that participants “produce at the outset of the case all the material and evidence on which they seek to rely,”⁶ elimination of formal discovery,⁷ and the establishment of a 90-day deadline for the

³ *Id.* at 3.

⁴ *Id.* at 2.

⁵ *Id.* at 11, 20.

⁶ *Id.* at 12.

⁷ *Id.*

issuance of a final order.⁸ But as described below, measures of this nature can be adopted for complaint cases under existing rules, where appropriate.

Existing Rule 3001.24 allows the Commission broad, open-ended discretion to develop case-specific procedures through a prehearing conference held “for the purposes of considering all possible ways of expediting the proceeding.” Rule 3001.24(d)(12) invites the presiding officer and participants in complaint proceedings to consider “[a]ll ... matters which would aid in an expeditious disposition of the proceeding, including consent of the participants to the conduct of the entire proceedings off the record.” Through Rule 3001.24, the Presiding Officer and participants can mutually agree to the use of depositions in lieu of written discovery; the limitation of evidence to a complaint, answer, and intervenor submissions; the requirement that participants make pre-filing disclosures of the material and evidence on which they seek to rely; the elimination of discovery altogether; and the establishment of a 90-day deadline for the issuance of a final order. Accordingly, the Commission’s proposed rules are not necessary to achieve the objectives targeted by these rules.

Encouragement of expedition by allowing the complainant to select expedited procedures without consideration of the interests of any other participant raises fairness concerns. Current procedures require consideration of the interests of all participants and reduce the likelihood of agreement on expedited procedures, but they enable the adoption of expedited procedures, where appropriate, and, in theory, they facilitate complaint proceedings that incorporate the fairness interest not only of the complainant, but of all other participants as well. The rarity of prior experience with expedited

⁸ *Id.* at 22.

procedures in complaint cases suggests that considerations of fairness and other issues have led parties to oppose the comprehensive expedition sought by the Commission, and the Commission should assess these considerations.

II. THE COMMISSION'S PROPOSED RULES DO NOT ENABLE FULL AND EFFECTIVE PARTICIPATION BY PARTIES WITH INTERESTS DIFFERENT FROM THOSE OF THE COMPLAINANT.

As described above, the current rules governing complaint proceedings reflect consideration of the interests of multiple parties, and, in theory, facilitate proceedings that are fair to all participants. In addition, the current rules include provisions that allow flexibility when participants agree that more expedited proceedings are appropriate. Although the Commission's proposed rules maintain the flexibility of the current rules, they reflect consideration of only the complainant's interests and ignore those of all other participants. The Commission's proposed rules establish procedures that would create an unfair advantage for the complainant without increasing the flexibility for expedited procedures beyond what is enabled by existing rules, and they do not represent an improvement of current rules applicable to complaint actions brought pursuant to 39 U.S.C. § 404a.

A. The Commission's Proposed Interpretation of "Rule, Regulation, or Standard" For Purposes of 39 U.S.C. § 404a Is Too Broad and Inconsistent with the Postal Service's Own Regulations.

In proposed Rule 3032.5, the Commission submits that, for purposes of 39 U.S.C. § 404a, the term "rule, regulation, or standard" should include "among other things, documents or policies issued by the Postal Service to exercise its regulatory authority or otherwise act as a governmental entity." Under this definition, the term could be argued to have no boundaries, and satisfaction of the "rule, regulation, or standard" element of a Section 404a claim would be subject to the virtually limitless

discretion of the Commission. Adoption of the Commission's proposed definition has the potential to expand the scope of the Postal Service's liability under Section 404a, and this potential expansion of liability, combined with the removal of meaningful guideposts as to the Commission's jurisdiction, would create widespread legal uncertainty.

The Commission's definition of "rule, regulation, or standard" does not comport with the definition of similar terminology used in Postal Service regulations. Specifically, part 211 of title 39 of the Code of Federal Regulations contains a comprehensive definition of the "regulations of the United States Postal Service" and includes a list of documents included within that definition.⁹ To ensure consistency, it would be most appropriate for the Commission to apply the definition from 39 C.F.R. § 211.2 when interpreting 39 U.S.C. § 404a. Because the Commission's proposed definition of "rule, regulation, or standard" could be argued to have no boundaries, expands the potential liability of the Postal Service, provides no guidance to potential litigants, and is inconsistent with the relevant definition of Postal Service "regulations," the Postal Service opposes the Commission's proposed Rule 3032.5. The Postal Service encourages the Commission to apply the definitions of "rule, regulation, or standard"

⁹ 39 C.F.R. § 211.2 defines "the regulations of the Postal Service" as
(1) The resolutions of the Governors and the Board of Governors of the U.S. Postal Service and the bylaws of the Board of Governors;
(2) The *Mailing Standards of the United States Postal Service, Domestic Mail Manual*; the *Postal Operations Manual*; the *Administrative Support Manual*; the *Employee and Labor Relations Manual*; the *Financial Management Manual*; the *International Mail Manual*; and those portions of Chapter 2 of the former *Postal Service Manual* and chapter 7 of the former *Postal Manual* retained in force.
(3) Headquarters Circulars, Management Instructions, Regional Instructions, handbooks, delegations of authority, and other regulatory issuances and directives of the Postal Service or the former Post Office Department. Any of the foregoing may be published in the Federal Register and the Code of Federal Regulations.

provided in 39 C.F.R. § 211.2 when adjudicating claims brought under 39 U.S.C. § 404a.¹⁰

B. The Proposed Rules Would Confer on Complainants the Right to Elect the Accelerated Procedures, Thereby Raising Fairness Concerns.

The Commission's proposed Rule 3030.1(c) grants complainants the unilateral and voluntary right to elect accelerated complaint procedures for complaints brought under 39 U.S.C. § 404a. Notably, in its discussion of the complainant's ability to elect the procedures applicable to its complaint,¹¹ the Commission does not address the interests of participants other than the complainant.

The Postal Service opposes the Commission's proposal because it would establish a process that creates an unfair advantage for the complainant and ignores the interests and concerns of other mailers. As the initiator of a complaint, the complainant has an advantage over other participants by virtue of its ability to frame the scope of the complaint and select the allegations for consideration in complaint proceedings. Complaint procedures should reflect consideration of the interests and rights of the Postal Service and participants other than the complainant, as these parties have the most to lose from complaint proceedings and the least control over the proceedings. Given the differences in risk and control faced by parties to a complaint, when considering new complaint procedures, the Commission should carefully consider the balance of interests among all participants in a complaint proceeding.

¹⁰ The definition of "regulation" that appears in 39 CFR § 211.2 includes "rules" and "standards." For example, "the regulations of the Postal Service" include the *Mailing Standards of the United States Postal Service*, and 39 CFR § 211.2(c) refers to "any rule of law or regulation in this or any other regulation of the Postal Service."

¹¹ Order No. 1739 at 12-14.

The universe of parties likely to suffer harm and disadvantage from this proposed rule is not limited to the Postal Service. Section 404a addresses Postal Service rules, regulations, and standards that affect competition, which often involves multiple parties with different interests. The proposed rule could place at a disadvantage any complaint participant (other than the complainant) that competes in the market affected by a challenged rule, regulation, or standard. In some situations, the proposed rule would prevent these disadvantaged participants from fully protecting their interests, simply because the complainant has decided that accelerated procedures benefit its own parochial interest.

C. Discovery for the Postal Service and Participants Other than the Complainant Could Be Necessary in Some Cases Because Even If the Complainant Has Sufficient Information to Bring a Section 404a Complaint Without Discovery, the Postal Service and Other Participants Might Need Discovery to Determine Whether the Complainant Has Been Harmed and Whether a Particular Rule Or Regulation Has Created an Unfair Advantage that Affects Competitors of the Postal Service.

Like its justification for the complainant's voluntary election of accelerated procedures described in section II.B above, the Commission supports its elimination of discovery based on the interests and perspective of only the complainant. Specifically, the Commission explains that it "does not anticipate the absence of discovery under the[] accelerated procedures to appreciably affect the complainant's ability to make a compelling case on the merits," because, "[f]or the vast majority of issues expected to arise under 39 U.S.C. § 404a, complainants should have the information and documentation needed to support their claims well in advance of filing a complaint."¹²

¹² *Id.* at 12.

The Commission does not address the impact of the elimination of discovery on participants other than the complainant. For example, presentation of a Section 404a claim requires a showing that the challenged rule, regulation, or standard precludes competition or establishes the terms of competition, and creates an unfair advantage for the Postal Service or any entity funded by the Postal Service.¹³ In defending against a claim based on 39 U.S.C. § 404a, discovery provides an important opportunity for the Postal Service and other participants with interests that diverge from those of the complainant to obtain information regarding factors other than the challenged rule, regulation, or standard that affect complainant's ability to compete in the relevant market. A complainant should not be able to assert claims while unilaterally shutting out other participants from examining the basis for those claims. Because discovery could be important for participants other than the complainant in a Section 404a complaint proceeding, the Postal Service opposes the proposal to eliminate discovery under accelerated Section 404a procedures.

D. The Commission Justifies its Proposed Use of Accelerated Procedures with Reasoning More Commonly Applied to Preliminary Relief, But the Relief That Would Result from the Accelerated Procedures in the Proposed Rule Would Be Permanent.

The Commission's proposed procedural changes would effectively dispense with discovery, requiring plaintiffs to present their evidence at the outset of the case in order to avoid delay. The Commission justifies these accelerated procedures with reasoning and language that is commonly applied to preliminary relief in federal court, through

¹³ 39 U.S.C. § 404a(a)(1).

remedies such as temporary restraining orders or preliminary injunctions.¹⁴ However, these proposed procedures would result in permanent decisions, not temporary measures. Because the Commission does not have the ability to issue injunctive relief, it seeks to use these expedited procedures in the same fashion but without the same care and consideration that courts apply. Because of the potential for reaching an ill-considered decision and the availability of a superior alternative, the Postal Service opposes these changes.

In Order No. 1739, the Commission states that violations of Section 404a “could cause irreparable harm and threaten the livelihood of certain companies or individuals. Prolonged litigation might not be financially viable even if the complainant were to ultimately succeed. This would leave such parties without effective recourse and frustrate the purposes of section 404a.”¹⁵ Although the Commission’s statement is accurate in that Section 404a violations can have very serious consequences, the Commission’s solution, an expedited procedure, is not the most effective procedural mechanism for addressing this concern. The Commission’s inspiration for this procedure seems to be drawn from standards for issuing preliminary relief, although the Commission is not authorized to issue such relief. Courts have long used measures such as injunctions to avert irreparable harm while still giving parties all due procedural rights and careful consideration. However, because preliminary relief can be granted before a full proceeding is conducted, courts place important limits on such orders. In

¹⁴ Order No. 1739 at 2 (“The Commission is concerned that, at least for some businesses, Postal Service violations of section 404a – whether through abuse of its governmental regulatory authority, improperly requiring parties to divulge intellectual property, or inappropriately obtaining information – could cause irreparable harm and threaten the livelihood of certain companies or individuals.”).

¹⁵ *Id.*

contrast, the Commission's proposed rule seems to be an attempt to use preliminary relief, but ignores the well-established standards and safeguards employed by courts before granting a preliminary injunction.¹⁶

The Commission's procedure and the procedure for granting preliminary relief are similar in a number of ways. First, both processes seek to prevent the same issue: irreparable harm. Order No. 1739 states that "violations of rule 404a ... could cause irreparable harm and threaten the livelihood of certain companies or individuals."¹⁷ Similarly, the requirements of "substantial probability" and "irreparable injury" are two elements of the traditional test for granting preliminary relief.¹⁸ Two central points of the Commission's proposal are also features of motions for preliminary relief: eliminating the discovery process, which allows parties to substantiate their claims and test the evidence of opponents, and the full benefits of a hearing. The Commission touts its proposal as being more efficient "due to the absence of a prolonged formal discovery process and hearing."¹⁹ Likewise, discovery is generally not available before motions for preliminary relief unless the court orders expedited discovery,²⁰ and hearings are not required to satisfy due process requirements, such as "confrontation and cross-

¹⁶ The Postal Service merely draws analogies between the proposed rule and preliminary relief issued by courts. By drawing this analogy, however, the Postal Service does not intend to concede that the Commission has authority to issue any form of preliminary injunctive relief. Such authority is nowhere found in the Title 39.

¹⁷ Order No. 1739 at 2.

¹⁸ See, e. g., *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008).

¹⁹ Order No. 1739 at 12.

²⁰ FED. R. CIV. P. 26(f)(4).

examination of witnesses... where a prompt post-reinstatement evidentiary hearing is available.”²¹

However, the PRC proposal and the availability of preliminary relief in court are also drastically different in some ways. For instance, preliminary injunctive relief expires either after the time specifically stated in the relevant order, or when the court makes a final determination on the merits (if sooner).²² A court may order preliminary injunctive relief multiple times or extend a past order; this simply imposes a burden on plaintiffs to continue to prove that preliminary relief is warranted.²³ This very limited measure ensures that all final decisions are concluded with careful consideration, even if the initial relief was awarded hastily. By contrast, under the Commission’s proposed rule, complainants would not need to show that expedited relief is necessary, and that relief would not expire after a set period. The expedited decision would have permanent, long-term consequences just like a final injunction ordered by a court after a full trial.

The Commission’s proposal seeks to speed up the final decision-making process by eliminating procedural safeguards. Motions for preliminary relief also dispense with the necessity of a long trial, but such decisions are guided by limiting principles, and instituted temporarily. In some contexts, preliminary injunctive relief must be narrowly drawn, extend no further than necessary to correct the harm the court finds to require preliminary relief, and be the least intrusive means necessary to correct that harm.²⁴ A preliminary injunction may disturb the status quo, provide affirmative relief, or even

²¹ *Brock v. Roadway Exp., Inc.*, 481 U.S. 252 (1987).

²² *Sole v. Wyner*, 551 U.S. 74 (2007) (holding that any benefits from the initial victory for injunctive relief are eliminated after a final determination is made).

²³ FED. R. CIV. P. 65(b)(3); *Mayweathers v. Newland*, 258 F.3d 930 (9th Cir. 2001).

²⁴ *Nelson v. Campbell*, 541 U.S. 637 (2004); see also 18 U.S.C. § 3626(a)(2).

provide the plaintiff, at least on a temporary basis, with the ultimate relief sought if such measures are necessary to preserve the ability of the court to award meaningful relief following a full trial on the merits. In order to prevent unnecessary harm to a defendant, Courts carefully balance the likelihood that the Plaintiff will prevail, whether the Plaintiff faces an urgent and irreparable harm, whether the harm to the Plaintiff would exceed harm done to the Defendant by the preliminary injunction, and if the injunction would serve the public interest.²⁵ The Commission's proposed rules provide no such balancing of harms because the Plaintiff can elect to have the expedited procedure without any rebuttal from the defending party, and there is no opportunity to reverse the decision. Instead, the Commission's proposed rule seeks to right the same problems as preliminary relief, but by eliminating the safeguards of a full trial.

It is well-established in judicial practice that lower courts must use such temporary measures with strict safeguards and extreme care: “[Preliminary relief] is an extraordinary remedy never awarded as of right.”²⁶ This approach is necessary because preliminary relief must be given quickly, without the time and resources necessary for a final disposition of the controversy, and strictly to preserve the status quo while the litigation runs its course. At the same time, courts recognize that preliminary relief imposes a burden on the defendant, which may yet prove to be unjustified upon resolution of the case. In the interest of quickly alleviating harm, the

²⁵ See *Munaf v. Geren*, 553 U.S. 674, 689-690 (2008); *Amoco Production Co. v. Gambell*, 480 U.S. 531, 542 (1987); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-312 (1982).

²⁶ *Winter*, 555 U.S. at 24; see also *Bonaparte v. Camden & A.R. Co.*, 3 F. Cas. 821, 827 (C.C.N.J. 1830) (“There is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing [of] an injunction... in such a case the court owes it to its suitors and its own principles, to administer the only remedy which the law allows to prevent the commission of such act.”).

Commission's proposed rule dispenses with safeguards such as affirmative defenses, and burdens the Postal Service with many other disadvantages laid out in these comments. Unlike preliminary relief, however, the effects of the Commission's decision would be permanent and a full trial will not be conducted.

Additionally, the Commission's proposed rule would shift the heavy burden required for injunctive relief. Under court rules for granting preliminary relief, a plaintiff is tasked with convincing the tribunal that it requires special relief before the matter can be finally adjudicated;²⁷ under the Commission's proposed rules, a complainant can simply elect this option without any necessary proof that the balance of hardships favors granting a measure of relief even before the Commission has reached a final decision about whether permanent relief is warranted.

Finally, in court practice, preliminary injunctive relief expires either after the time specifically stated in the relevant order, or when the court makes a final determination on the merits (if sooner).²⁸ A court may order preliminary injunctive relief multiple times or extend a past order; this simply imposes a burden on plaintiffs to continue to prove that preliminary relief is warranted.²⁹ Under the Commission's proposed rule, complainants would not need to show that expedited relief is necessary, and that relief would not expire after a set period. The expedited decision would have permanent, long-term consequences just like a final injunction ordered by a court after a full trial.

²⁷ See, e.g., *Kinney v. Pioneer Press*, 881 F.2d 485, 490 n.3 (7th Cir. 1989).

²⁸ *Sole v. Wyner*, 551 U.S. 74 (2007) (holding that any benefits from the initial victory for injunctive relief are eliminated after a final determination is made).

²⁹ FED. R. CIV. P. 65(b)(3); *Mayweathers v. Newland*, 258 F.3d 930 (9th Cir. 2001).

In summary, the Commission's proposal seeks to redress the same wrongs as systems providing preliminary relief; but, whereas injunctions carry due process safeguards, the Commission seeks to curtail procedural safeguards in exchange for a swifter process.

E. The Commission Seeks to Eliminate Statutory Affirmative Defenses That Are Available to the Postal Service by Law.

The Commission's proposed changes to Section 404a would eliminate important affirmative defenses currently available to the Postal Service.

The proposed rule states that "the Postal Service may not base any statutory affirmative defenses to alleged violations of 39 U.S.C. 404a(a) on the powers enumerated in 39 U.S.C. 401 and 404."³⁰ Section 404 establishes a number of specific powers that the Postal Service regularly uses, such as providing for the handling of mail, prescribing the amount of postage for mail, determining needs of postal facilities, selling stamps and other necessary items, and investigating offences against the Postal Service. Section 401 provides similar authority for actions necessary to conduct routine business, such as the establishment of rules and regulations, and the ability to sue and be sued, enter contracts, manage its own accounts, acquire and operate facilities and other real property, accept gifts and donations, and settle claims against it.

The Commission's proposal here would purport to speed up the process not by increasing procedural efficiency, but rather by eliminating the Postal Service's ability to assert potentially relevant substantive arguments. The Commission gives no reasoning for why such a change would be necessary, or even beneficial. Sections 401 and 404 already contain provisions establishing that those powers are subject to the restrictions

³⁰ Order No. 1739 at 17.

imposed by section 404a, so that those powers cannot be used for anti-competitive purposes. Additionally, the Commission has not furnished reasoning to explain how this would facilitate proceedings in any way, and has not offered any evidence to show that these defenses have been used inappropriately or in a time-consuming manner.

Moreover, citation to authority in Sections 401 and 404 may provide appropriate defenses if pleaded as such in combination with denial of the conduct alleged to violate section 404a. For example, section 404a(2) forbids the taking of intellectual property, but contains the caveat “except as authorized by law.” Section 401(9) of Title 39 gives the Postal Service the power to exercise eminent domain, which can be used to acquire intangible goods such as intellectual property rights; this use of eminent domain would be authorized. Under the Commission’s new procedures, the Postal Service would be authorized to take such an action, but incongruously unable to assert that same authority to exercise eminent domain under section 401(9) as a defense, because the Commission’s proposed rule would foreclose that possibility.

In conclusion, the Postal Service strongly opposes the Commission’s proposal to eliminate statutory defenses available under the current rules; the proposal draws from the current court practices that regulate issuing preliminary relief, but the Commission’s proposal includes none of the same safeguards that courts have in place.

F. The Commission’s Proposed Reliance on Depositions for Discovery Would Result in a Process More Burdensome and Time-Consuming and Less Informative and Streamlined than the Process Enabled by the Current Complaint Procedures.

In proposed Rule 3032.15, the Commission encourages expansion of the “opportunity to engage in depositions” consistent with the Federal Rules of Civil

Procedure instead of Commission Rule 3001.33.³¹ Through this proposal, the Commission aims “to streamline the discovery process for section 404a complaints that are not filed under the proposed accelerated procedures.”³² The Commission assumes that Section 404a complaints will “involve a limited number of participants” and are “particularly well-suited for depositions.”³³

The Postal Service opposes proposed Rule 3032.15 because the increased use of depositions is not likely to achieve the objectives sought by the Commission. In support of proposed Rule 3032.15, the Commission expresses its understanding that “responses to interrogatories ordinarily take weeks, [while] responses to questioning during depositions will result in immediate responses and allow for immediate follow up.”³⁴ But this perspective does not consider the differences between current discovery practice and depositions with respect to burden and response quality. The post-deposition follow-up necessary to provide complete and accurate responses to deposition questions can require as much time as that allowed for written discovery, thereby eliminating any streamlining effects from the provision of near-immediate oral responses in depositions. In contrast, in most cases, the current written discovery process allows parties time to develop complete and accurate responses, and the current rules allow for reduction of the discovery response period where appropriate.

The Commission should also consider the burden associated with the deposition process. Witness preparation for depositions requires more time and effort than

³¹ Order No. 1739 at 14, 17-18.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

necessary under current procedures because deposition preparation must include the range of all subjects that could be raised during the deposition, while the current procedures narrow the scope of the subject matter to the content of interrogatories and follow-up questions to interrogatories. And unlike with current procedures for written and oral cross-examination, the Commission does not preside over depositions. The absence of a Presiding Officer will lead to longer deposition sessions and increase the likelihood that parties will use the deposition process to explore issues outside the scope of the underlying complaint case.³⁵ The presence of a Presiding Officer in hearings aids in streamlining depositions, by ruling on motions on the spot and helping to guide and mediate the course of the examination. Without that degree of oversight, depositions may be bogged down in tedious motions practice

And contrary to the Commission's contention that "section 404a complaints are expected to involve a limited number of participants,"³⁶ there is great potential for a section 404a challenge to a particular rule, regulation, or standard that impacts an entire industry and leads to intervention by dozens of market participants with opposing views and interests. If the Commission is incorrect regarding its assumption about the number of participants involved in Section 404a complaints, and in fact such a complaint involves a larger number of participants, the current procedures enable the Commission to exercise oversight over discovery and prevent unnecessary delay and expansion of proceedings.

³⁵ Experience suggests that depositions can be very contentious, and without the presence of a Presiding Officer, they can lead to multiple rulings and protracted appearances. See P.O. Ruling Nos. C2008-3/2, 3, 4, 5, 6, 7, 8, and 10.

³⁶ Order No. 1739 at 14.

As explained above, the Commission's proposal to increase the use of depositions will not streamline complaint procedures more than the procedures enabled by the current rules. Current procedures for written and oral cross-examination provide sufficient time for witnesses to develop complete and accurate answers to discovery, and allow for shorter response periods where appropriate. In contrast, increased use of depositions will lead to longer, more burdensome, and less productive proceedings that will require substantial post-deposition follow up.

G. The Commission's Proposed Rules Would Unnecessarily Shorten the Timeframe for Filing a Pre-answer Dispositive Motion.

Through proposed Rule 3033.8(b), the Commission proposes to shorten the timeframe allowed for the Postal Service to file a dispositive motion in response to a Section 404a complaint filed under the Commission's proposed accelerated procedures. The current rule addressing dispositive motions filed in response to a complaint does not establish a new timeframe, and thus the 20-day period applicable to the filing of an answer governs.

As described above, many of the Commission's proposed rules for Section 404a complaint proceedings reflect a preference for the complainant's interests and lack of consideration for the interests of other parties, including, but not limited to, the interests of the Postal Service. Proposed Rule 3033.8(b) continues this trend. It appears that the goal of accelerating complaint proceedings motivates this proposed rule. While this is a laudable goal and the Postal Service supports the Commission's pursuit of it, the goal of acceleration must be weighed against any resulting impacts on the fairness and effectiveness of proceedings. Order No. 1739 does not address the effect of the shortened timeframe on the Postal Service, the party likely to experience the greatest

impact from the proposed change. And it appears that the Commission has not considered the importance of dispositive motions in reducing the scope of proceedings and facilitating early termination of unsubstantiated complaints.³⁷ A reduction in the time period allowed for preparation and consideration of dispositive motions will harm the Postal Service and other parties opposed to complainant by forcing them to determine whether to file a dispositive motion before they have sufficient time necessary for fact-finding and consultation with stakeholders. No complaint filed in Fiscal Year 2013 has proceeded past the dispositive motion stage of proceedings.³⁸ For these reasons, the Postal Service opposes the Commission's proposal to shorten the time allowed for the filing of a dispositive motion in response to a complaint.

H. By Linking Consent for Purposes of Section 404a(a)(3) with the District of Columbia Rules of Professional Conduct, Which Apply in a Separate and Unrelated Context, the Proposed Rules Would Impose Unnecessary and Burdensome Obligations on the Postal Service.

The Commission's proposed Rule 3032.7, which provides that "[a]s an affirmative defense to a complaint under 39 U.S.C. 404a(a)(3), the Postal Service may show that the information obtained was provided by consent,"³⁹ reflects an apparent misunderstanding of the nature of transactions that could trigger 39 U.S.C. § 404a(a)(3). Section 404a(a)(3) applies primarily to business and sales transactions and relationships that might not raise significant legal issues or require extensive attorney

³⁷ See, e.g., Order No. 1762, Order Dismissing Complaints, PRC Docket Nos. C2013-3, C2013-4, C2013-5, C2013-6, C2013-7, C2013-8, C2013-9 (June 26, 2013) (dismissing complaints in response to motion to dismiss filed by the Postal Service); Order No. 1643, Order Dismissing Complaint, PRC Docket No. C2013-1 (January 29, 2013) (same).

³⁸ *Id.* The complaint in PRC Docket No. C2013-2 was withdrawn. Order No. 1662, Order Granting Motion to Withdraw Complaint, PRC Docket No. C2013-2 (February 19, 2013).

³⁹ Order No. 1739 at 27.

involvement. In this context, the justification for adopting the District of Columbia Rules of Professional Conduct, which apply to the attorney-client relationship, is not apparent, and the Commission offers no explanation for its proposal.

Notwithstanding the absence of a connection between consent for purposes of the attorney-client relationship and consent between parties in a business or sales relationship, proposed Rule 3032.7 would impose unnecessary and burdensome obligations on the Postal Service that could interfere with its ability to conduct business. The Commission offers no justification for the consent requirements included in proposed Rule 3032.7, but the proposed section reflects an apparent assumption that the Postal Service enjoys a superior bargaining position compared to its business partners and other parties in a position to bring a Section 404a(a)(3) complaint. This assumed inequality, combined with a perceived need to protect disadvantaged parties, would provide a justification for the requirement that the Postal Service inform potential business partners of their rights before they enter a business relationship with the Postal Service. The Commission's apparent assumption is unsupported. In fact, in many cases, the Postal Service occupies an equal or even inferior bargaining position, due to inflexibility and transparency arising from its status as a federal governmental entity. The Postal Service opposes proposed Rule 3032.7, because it would effectively result in the imposition of consent obligations that would interfere with the Postal Service's ability to conduct business, and the Commission has offered no justification for the disadvantage to the Postal Service that would result from adoption of this proposed section.

Conclusion

The Postal Service respectfully submits these Comments and urges the Commission to withdraw its proposed rules for Section 404a complaints, and instead aim to expedite complaint proceedings when necessary and appropriate with the mutual consent of all affected parties within the existing framework of its current Rules of Practice and Procedure.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

Anthony F. Alverno
Chief Counsel, Global Business and Service
Development

Kyle R. Coppin
Jacob D. Howley
James M. Mecone

475 L'Enfant Plaza West, S.W.
Washington, D.C. 20260-1137
(202) 268-6525, Fax -6187
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