

Before the
POSTAL REGULATORY COMMISSION
Washington, DC 20268-0001

Modern Rules of Procedures for the :
Issuance of Advisory Opinions in : Docket No. RM2012-4
Nature of Service Cases :

REPLY COMMENTS OF THE GREETING CARD ASSOCIATION

The Greeting Card Association (GCA) files these Reply Comments pursuant to Order No. 1738. Our comments focus mainly on one aspect of the Postal Service's Initial Comments: the proposal to abolish party discovery and substitute what the Postal Service calls "Commission-led information gathering." GCA strongly disagrees with this suggestion, for reasons we explain in section I: briefly, that the Postal Service proposal would not solve the problem at which it is aimed – the potential for more interrogatories than could be dealt with in the Commission's 90-day schedule – but would deprive parties of procedural rights guaranteed by statute. We address some other topics in section II.

I. THE POSTAL SERVICE PROPOSAL FOR "COMMISSION-LED" INFORMATION GATHERING

The Postal Service urges the Commission to scrap the discovery provisions proposed in Order No. 1738 in favor of "Commission-led" information gathering: a mechanism of Commission information requests, issued – insofar as they would substitute for normal discovery – in response to participants' requests ("applications"). A party apparently would not have the right to propound, or have the Commission propound, any particular question. Appendix I of the Service's Initial Comments sets out the proposal in the form of suggested rules.

The problem the Service seeks to solve can be roughly summarized as "too many questions in too little time." It says that the Commission's proposed rules are likely to make the 90-day deadline infeasible, resulting in too-frequent findings of "good cause" to extend it.¹

The Postal Service's proposed alternative has been worked out in detail, is in most respects lucidly presented, and is supported by some ingenious arguments. It is, however, liable to two objections, each sufficient, in GCA's view, to disqualify it.

First, it does not solve the potential problem of more questions than can be dealt with in the time available; it merely transfers the problem from the Postal Service's shoulders to those of the Commission. Second, a proceeding using it would not satisfy the standards for a hearing on the record mandated by secs. 556 and 557 of the Administrative Procedure Act (APA)², which, until legislation changes the rules, are binding on the Commission.

A. Commission-led information gathering in lieu of party discovery would not obviate the time problem

At pp. 9 et seq. of its Initial Comments, the Postal Service sets out a number of reasons for its view that limiting discovery, as proposed in Order No. 1738, is futile. We deal with some of these in subsections C and D, below. What stands out as the Service's main argument, however, is that shorter deadlines plus a 25-item limit on interrogatories, as proposed in Order No. 1738, will not allow the N-case to be finished in 90 days. Regarding deadlines, it says that

. . . This [i.e., truncation of deadlines] puts the cart before the horse. The amount and involvement of party discovery drives the length of time that it

¹ United States Postal Service Initial Comments, pp. 8 et seq.

² 5 U.S.C. secs. 556, 557.

takes the Postal Service to respond, not vice versa. The mere establishment of tighter response deadlines, without substantial reduction in the scope of discovery, simply means that deadlines will be harder to meet and that more deadlines will be missed.^[3]

The volume of discovery is relevant, the Service says, because

. . . 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.^[4]

As an example of what it considers possible under the Order 1738 rules, the Service hypothesizes five parties each serving 25 interrogatories, each interrogatory comprising 10 non-discrete subparts, plus 30 requests for production, and 50 requests for admission – i.e., $5 \times 25 \times 10 = 1,250$ interrogatories + 150 requests for production + 250 requests for admission, all in one day, and with seven days to respond.

The solution, the Service says, should begin with the Commission asking "whether party discovery is truly necessary." It continues:

. . . 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,

³ Postal Service Initial Comments, pp. 8-9 (fn. omitted).

⁴ Id., p. 10.

and administrative burden (on participants and the Commission alike) in N-cases.^{5]}

The Service goes on to explain that a party could still ask the Commission to issue an information request, and that the Commission's decision to issue or deny one would equate to a ruling on objection to an interrogatory – but that a resolution which "takes up to five steps . . . currently, and four under the proposed rules, would take only two steps, in most instances[.]"

While the Service's "1,250 + 150 + 250" hypothetical may be somewhat extreme, it remains true that procedural rules should be robust enough to deal with extreme as well as routine cases. Accepting *arguendo* the possibility of such a flood of questions, therefore, the question becomes: does the Service's proposal for Commission-led discovery solve the problem?

GCA believes that it does not. If the 1,650 requests the Postal Service hypothesizes were instead submitted to the Commission, an analytical process very much like the one the Service foresees for itself would be necessary. The Service must analyze an interrogatory to be sure it understands fully what is being asked for; the Commission would have to do the same with a question submitted to it. The Service must decide whether to object to an interrogatory on relevance grounds; the Commission would, correspondingly, have to make a relevance determination before issuing or denying the proposed information request. If the Commission believes that a proposed question seeks relevant and probative information, but is so inartfully worded that even a completely good-faith response to it would leave disabling gaps in the produced material, it must decide whether to revise the proposed question, and if so, how.⁶ Like any litigant, the Service would be entitled, in traditional discovery practice, to object to

⁵ *Id.*, p. 12. For comment on the relevance of "Commission practice," see pp. 8-9, below.

⁶ A litigant who receives such an interrogatory might simply answer it as written and count itself lucky. A conscientious tribunal which has been asked to issue the interrogatory *as its own* cannot let the matter rest there.

an overly burdensome interrogatory; the Commission, to manage the proceeding fairly and efficiently, would have, at the least, to reject or streamline questions that are patently too burdensome.

All this Commission activity would take time. The Service, however, simply proposes that the Commission "exercise judgment" as to the parties' submissions. It suggests a very tight deadline for submission of parties' requests: seven days for the whole process, rather than 18, as in the Commission's proposed rules for party discovery, comprising four days after the initial technical conference for submission of requests, plus only three days for the Commission to decide on them.⁷

In short, if the Postal Service is correct that it cannot reasonably be expected to deal with the anticipated volume of interrogatories and requests within a 90-day schedule, it seems to follow that the Commission most probably cannot do so either. The Service's "Commission-led information gathering" proposal thus does little or nothing to ease the time crunch, but does seriously impair the parties' rights under sections 556 and 557 of the APA.

B. The Postal Service proposal unduly impairs parties' rights to a hearing on the record

Section 556(d) of the APA, which governs N-cases, declares that

. . . A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

Since discovery, in on-the-record hearings before this Commission, does duty for what would otherwise be oral cross examination, the last clause just quoted is clearly relevant here.

⁷ Postal Service Initial Comments, Table 1, at pp. 19-21.

The underlying problem, however, implicates the entire statutory command. The scope of the Commission's activity under the Service's Appendix I scheme, when proposed questions are submitted to it via applications for issuance of an information request, is not entirely clear. In cases where APA on-the-record-hearing requirements do not apply, the Commission evidently expects to propound less than all the questions submitted to it by parties. Rule 3010.65(c), for example, states that in an exigency rate proceeding

(c) Interested persons will be given an opportunity to submit to the Commission suggested relevant questions that *might be posed* during the public hearing. . . . [Italics added.]

(It is clear from subsection (b) of the same rule that the Commission will be asking the questions.) But where, as here, section 556(d) of the APA does govern, the question arises whether the Commission's view of what (non-objectionable) questions should be asked and which omitted would satisfy the requirement that a party be allowed to "present *his* case or defense[.]" (Italics added.)

If the Commission were to restrict itself to rejecting all and only those suggested questions as to which it would sustain an objection in ordinary discovery practice, there would be no problem under sec. 556(d) – but then it seems that nothing would be gained, in terms of overall schedule time, by the Service's proposed change in procedure. It would be asked the same questions that it would face under traditional discovery rules. Nor would that end the matter: there would, apparently, be no guarantee of an automatic answer to a Commission-issued request.⁸

⁸ At p. 13 of its Initial Comments, the Postal Service says:

. . . 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). [Italics added.]

Since the Service's proposed substitute rules (Initial Comments, Appendix I, p. 3) would omit the Commission's proposed Rule 75(b), concerning motions to be excused from answering, this for-

If, on the other hand, the Commission undertook to winnow the parties' proposed questions and propound only those which it thought most likely to contribute to a sound decision without the need to extend the schedule, what would have become of the party's sec. 556(d) right to present *its* case or defense? If a party reasonably thinks that certain facts are relevant, material, and probative, and the Commission thinks, perhaps with equal plausibility, that the case can be appropriately decided without them and so declines to issue the party's proposed questions as information requests, has that party been denied "such cross-examination⁹] as may be required for a full and true disclosure of the facts"?

The Postal Service's proposal does not really face up to this dilemma. It relies instead on the argument that sec. 556 does not, or does not in so many words, require discovery, and discusses a substantial body of case law pointing to that general conclusion.¹⁰ Helpful as it is in some respects, this discussion bypasses what is really important: (i) what is a party's right under sec. 556(d) when, as in Commission on-the-record proceedings, discovery and cross examination make up a single, integrated process? and (ii) would the Service's proposal preserve that right?

We next (i) explain our view of what that right is, and (ii) show why the Postal Service proposal would abrogate it.

GCA believes that when discovery and cross examination are inseparable, as they are in an on-the-record hearing before the Commission, sec. 556(d) nec-

mulation presumably refers to the general grant in the Rules of Practice of leave to file motions. However this may be, it seems clear that in proposing to abolish discovery in favor of "Commission-led" factual development, the Service is *not* undertaking that it would never object to answering a Commission request. The last sentence of fn. 16 on p. 13 of the Service's Initial Comments points clearly in the same direction.

⁹ That is, in this context, written cross examination.

¹⁰ Postal Service Initial Comments, pp. 14-18.

essarily gives parties the right to a reasonable quantum of discovery. It follows that the Postal Service proposal, by taking discovery out of the hands of the parties and subjecting it to the Commission's discretion, would infringe on that right insofar as Commission-led factual development omitted matters which the party in question reasonably considered significant to its "case or defense."

The Postal Service cites a number of judicial decisions and other authorities for the proposition that secs. 556-557 of the APA do not confer a general right to discovery. If one took discovery to be something utterly distinct from cross examination, these cases would tend to support the Service's view. Sec. 556 does not mention discovery, but does, as the Service acknowledges¹¹, require an opportunity for cross examination. But where discovery, in the sense of serving questions and receiving written responses, is simply the initial phase of cross examination, designed to produce answers which are then designated as "written cross examination" and incorporated as such in the record, there is no room for the notion that discovery and cross examination are separate and distinct procedures, one required by the APA and one not. The Service does not claim that the cases it cites refer to procedural situations where discovery and cross examination are inextricably linked. Consequently, those decisions are not dispositive where – as in Commission practice – the two processes are inseparable. And because they are inseparable¹², denying the parties *any* right to their own discovery program would deprive them of a right guaranteed by sec. 3661(c) of the Act.

C. Commission practice in other types of cases is not relevant to the hearing rights question

¹¹ Id., p. 14.

¹² If there were any doubt that this would be equally true under new N-case rules, the first sentence of the Commission's proposed Rule 92(e)(2) – "Written cross-examination will be utilized as a substitute for oral cross-examination whenever possible, particularly to introduce factual or statistical evidence" – should dispel it.

In addition to judicial authority, the Postal Service points to the Commission's own procedures in other types of cases as supporting its no-party-discovery proposal. It says that in cases under other provisions of PAEA, "the most workable way to conduct the necessary fact-finding in an efficient manner, within a 90-day schedule" is for the Commission to ask the questions, at least partly on the basis of suggestions from parties.¹³ If one were concerned only with how expeditiously questions can be asked and answered, and not with statutory procedural requirements, this view would have some plausibility. The fact remains, however, that exigency cases, annual compliance determinations, market test authorizations, and the like, are not subject to secs. 556-557 of the APA, and N-cases are. This may be advanced as a reason to amend sec. 3661 of PAEA¹⁴, but it is not a circumstance which the Commission can ignore in the present rulemaking.

In short, the Commission's proposed mechanism, at least with the improvements suggested in GCA's Initial Comments, has good potential to reduce the length of N-cases, and to do so without violating basic procedural rights. The Postal Service's Appendix I alternative meets neither of these tests, and should not be adopted.

D. Other issues

Party fragmentation. At pp. 9-10 and 32 et seq. of its Initial Comments, the Postal Service says that the proposed rules would not prevent an intervenor association from evading the 25-question limit by "fragment[ing]" itself into constituent members or locals. As noted in GCA's Initial Comments¹⁵, the Commission's general rules of practice provide authority to group participants with con-

¹³ Postal Service Initial Comments, p. 12.

¹⁴ See Postal Service Initial Comments, pp. 1-2.

¹⁵ At p. 2, fn. 1.

gruent interests. We see no reason to think this rule could not deal adequately with the perceived self-fragmentation problem. If the Commission concludes, however, that the danger would be especially acute in cases governed by the proposed rules, it could require that in N-cases, members or locals seeking to intervene separately from the parent body must affirmatively show what interest they have which requires separate representation.¹⁶

The initial technical conference. The Postal Service argues¹⁷ that the proposed initial technical conference rule is burdensome insofar as it requires attendance by all witnesses who have filed testimony. Instead, it proposes two alternative procedures: (1) a rule requiring it to produce “only those witnesses whose testimony contains technical information,” or (2) a procedure whereby the Public Representative would determine which testimonies contained technical information, and thus which witnesses would be required to attend.

Neither of these alternatives is an improvement on the Commission’s proposed Rule 85. Both, to be effective, would require a shared understanding of what constitutes “technical information,” and such agreement might not be quickly or easily achieved. In addition, a witness not personally presenting technical information, but making use of technical information furnished by others, could be asked legitimate “how” questions regarding the use of that information in his/her testimony. It is not clear whether the Postal Service would consider testimony of this kind to “contain” technical information.

The second alternative seems to be aimed at finding a neutral evaluator to determine whether or not any witness’s information is “technical.” The idea is ingenious, but does not really solve the problem of defining “technical.” It is not certain that all parties would agree with the Public Representative’s definition,

¹⁶ The Service’s suggestion (Initial Comments, p. 34) that discovery be added to the list of processes in Rule 20(e) could also be helpful.

¹⁷ Postal Service Initial Comments, pp. 27 et seq.

any more than they would with the Postal Service's under the first alternative, and the result might be requests that the Commission overrule it.¹⁸

If, however, the Commission comes to believe that its proposed Rule 85 is too rigid, a more suitable adjustment would be to allow the Service to move that a witness who it can demonstrate neither presents nor uses technical¹⁹ information be excused from attendance.

Field hearings. The Postal Service asks the Commission to formalize its intention to dispense with field hearings, in most cases, by way of a suggested Rule 94. This proposal would bar field hearings unless the Commission found, en banc, that (i) such a hearing would not adversely affect the procedural schedule and that the information it would produce both (ii) was necessary for the advisory opinion and (iii) could not be otherwise obtained.²⁰

The National Newspaper Association, on the other hand, explains in some detail the unique value of field hearings, especially for rural or small-town postal patrons.²¹ GCA agrees that these persuasively expressed considerations are substantial and important. The Postal Service does not really deal with them. It might be thought, however, that NNA's proposed remedy – an opportunity for customer groups to show that they would be disproportionately affected, thus justifying field hearings, and in that case a 120- to 180-day schedule – could be dif-

¹⁸ It would have to be made clear, in the order appointing the Public Representative, that in determining which Postal Service witnesses were presenting "technical" information, he or she was acting neutrally and not as representative of the interests of the general public.

¹⁹ Such a motion should explain the sense and reference of "technical information," as the Service uses the term.

²⁰ It is not entirely clear (i) how the Commission could know, in advance of such a hearing, that it would produce information neither dispensable for its opinion nor otherwise unobtainable, or (ii) in what sense information which, under both the APA and proposed Rule 94(b), cannot constitute record evidence could nonetheless be "necessary" for an advisory opinion which must be based solely on record evidence.

²¹ Comments of National Newspaper Association, Inc., pp. 2 et seq.

difficult to accommodate to the other schedule-shortening measures the Commission proposes.

GCA continues to believe that its suggestion, presented at pp. 8-9 of our Initial Comments, is an effective compromise solution which would allow field hearings, where they would be helpful, to proceed efficiently. Having a qualified staff member, not otherwise assigned to the N-case, conduct the field hearing would solve the scheduling problem, since normal N-case activity in Washington would not be interrupted, and would result in information having the same non-record status it would have if a Commissioner presided. The “non-evidentiary” information gathered at field hearings would be available as a foundation for Commission notices of inquiry, which in turn could produce record evidence on which the advisory opinion could lawfully rely.

Special studies. At p. 2 of its Appendix I, the Postal Service proposes changes to proposed Rule 72(b). GCA has proposed what we think would be a more effective approach to public inquiries and special studies.²² Our present concern is the Postal Service’s suggested addition of the phrase “and at a later date” in the third sentence of the rule.

The Commission can determine for itself whether the N-case and its other commitments allow it to undertake a special study or public inquiry while the N-case is in progress. The Service’s proposed addition could result in withholding an equally good or superior alternative, uncovered through the study or public inquiry, from the Postal Service and others concerned with the proposed service change until that information was too late to be useful. It should not be adopted. Rule 72(b), as proposed in Order No. 1738 and with the amendments suggested by GCA, would appropriately serve the interests of both expedition and comprehensive analysis.

²² GCA Initial Comments, pp. 7-8.

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Respectfully submitted,

GREETING CARD ASSOCIATION

David F. Stover
2970 S. Columbus St., No. 1B
Arlington, VA 22206-1450
(703) 998-2568
(703) 998-2987 fax
E-mail: postamp@crosslink.net