

Before the
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Rules Pursuant to 39 U.S.C. § 404a

Docket No. RM2013-4

Public Representative's Reply Comments

(August 28, 2013)

On June 5, 2013, the Commission issued a notice of proposed rulemaking to establish rules pursuant to 39 U.S.C. § 404a.¹ The order accompanying the notice established July 29, 2013 as the due date for interested parties to submit comments and August 28, 2013 as the due date for interested parties to submit reply comments. The Postal Service, the Public Representative, and ten additional parties submitted comments. Commenters addressed the procedural and substantive aspects of the Commission's proposed rules. These reply comments respond to issues raised by the commenters. Part I addresses comments pertaining to procedural aspects of the proposed rules. Part II addresses comments pertaining to substantive aspects of the proposed rules

I. PROCEDURAL ASPECTS OF THE PROPOSED RULES

The Public Representative supports the Commission's endeavors to enact procedural rules that will expedite complaint proceedings. However, the benefits that new accelerated procedures bring should be balanced against the costs that increasing procedural complexity impose. The proposed procedural rules, which are applicable solely to complaints brought pursuant to section 404a, will unnecessarily bring additional confusion to an already complex assortment of procedural rules, many of

¹ Notice of Proposed Rulemaking Establishing Rules Pursuant to 39 U.S.C. 404a, June 5, 2013 (Order No. 1739).

which were written to satisfy the procedural requirements of on-the-record proceedings. This added complexity will be particularly acute in instances in which a complainant seeks to bring claims arising from a single nucleus of facts under section 404a as well as other provisions of title 39.² Rather than make procedural changes to a single variety of complaint proceeding, the Commission would be better served by implementing only substantive regulations in the present docket, and initiating a separate docket to consider whether the rules of practice and procedure, codified at 39 C.F.R. Part 3001, should be amended to account for complaint proceedings.³ *Id.*

In their comments, the parties raise several issues concerning the procedural aspects of the proposed rules. These concern the following:

1. Part 3033, and due process issues with the accelerated procedures;⁴
2. Section 3033.1(b), which limits expedited procedures solely to 404a complaints;⁵
3. Section 3033.11, which limits who may intervene in accelerated 404a proceedings;⁶ and
4. Section 3032.15, which permits depositions during the discovery phase of non-accelerated complaint proceedings.⁷

A. Part 3033 – Due Process Issues with Accelerated Procedures

If the complainant elects to file under the accelerated procedures in proposed part 3033, the parties are restricted from engaging in discovery and submitting additional testimony outside of the pleadings. Valassis contends that the absence of discovery would compromise the due process rights of the Postal Service and third

² Public Representative Comments, July 29, 2013 (PR Comments) at 15.

³ The Commission can satisfy its statutory mandate to “prescribe regulations to carry out” section 404a solely by prescribing substantive regulations that establish the claims and defenses applicable to 404a complaints. See PR Comments at 14 (*citing* 39 U.S.C. § 404a(b)).

⁴ See Comments of Valassis Direct Mail, Inc., July 29, 2013 (Valassis Comments) at 2; Comments of Time Inc. in Response to Order No. 1739, July 29, 2013 (Time Comments) at 3-5; Comments of Grayhair Software, Inc., July 29, 2013 (Grayhair Comments) at 13; Initial Comments of the United States Postal Service, July 29, 2013 (Postal Service Comments) at 7-15.

⁵ See Joint Comments of Stamps.com and Endicia, July 29, 2013 (Joint Comments) at 7-9; Valpak Direct Marketing Systems, Inc. and Valpak Dealers’ Association, Inc. Initial Comments on Notice of Proposed Rulemaking, July 29, 2013 (Valpak Comments); PR Comments at 18.

⁶ See Valpak Comments at 3; PR Comments at 3.

⁷ See Grayhair Comments at 13-14; Postal Service Comments at 16-19. Stamps.com and Endicia support the proposed deposition procedure, but contend that the Commission should not “completely foreclose” parties from using the procedure in accelerated 404a proceedings. Joint Comments at 6-7.

parties and would immunize the complaint from scrutiny. Valassis Comments at 2-3. Time Inc. contends that this may encourage complainants to bring specious claims. Time Comments at 4-5, 10-11. The Postal Service asserts that the accelerated procedures would give an unfair advantage to the complainant. Postal Service Comments at 7-8. It contends that even if the complainant has sufficient information to initiate the proceeding, the Postal Service may require discovery in order to respond to the complaint. *Id.* at 8-9. It likens the accelerated procedures to a preliminary injunction in a judicial proceeding, but contends that the accelerated procedures lack the safeguards that courts impose before granting a preliminary injunction.⁸ *Id.* at 12-14.

Valassis and Grayhair assert that the 20 days that the Postal Service has in which to file an answer may provide the Postal Service with an insufficient amount of time in which to evaluate and respond to a complaint. Valassis Comments at 3; Grayhair Comments at 13. Grayhair contends that the Postal Service will raise issues of fact in response to complaints, necessitating the need for discovery. The Postal Service also expresses concern over proposed section 3033.8, which gives it 10 days to file a dispositive motion in response to a complaint, while permitting the complainant to file a response to the dispositive motion in the ordinary 20-day time frame. *Id.* at 19.

Grayhair contends that the Commission could better achieve its goal of expediting proceedings by adopting procedures such as summary judgment and by enforcing existing deadlines for responding to discovery requests. Grayhair at 15-16. The Postal Service contends that the Commission could achieve its goal of expediting proceedings by using existing rules to develop case-specific procedures. *Id.* at 4.

The Public Representative believes that the accelerated procedures might raise significant due process concerns in certain contexts. If a complaint raises complicated factual issues or if the factual support for a complaint is primarily within the complainant's possession, the accelerated procedures may be an inappropriate vehicle for resolving the complaint. Under the proposed rules, the complainant is the master of

⁸ In the judicial setting, a preliminary injunction is for a limited duration of time, is antecedent to a full proceeding on the merits, is granted only after considering the relative harms to each side if relief is granted or denied, and is granted only after the movant has made the requisite showing. The Postal Service contends that the Commission's proposed accelerated proceedings would operate like a final injunction without the safeguards of a full trial.

the complaint.⁹ If the complainant elects to proceed under the accelerated procedures, neither the Postal Service nor any third party has the right to question the propriety of that decision. The Commission should create a means by which parties can challenge the complainant's choice to initiate a complaint under the accelerated procedures and which permits the Commission to order that the complaint proceed under the ordinary complaint rules.

The Public Representative agrees with Grayhair that the goal of expediting 404a complaints could be achieved through a variety of additional procedural rules. Summary Judgment is a procedure that enables courts and agencies to strike a balance between the parties' need to discover relevant evidence supporting their claims and defenses and the tribunal's interest in conserving resources by limiting hearings to occasions in which there is a genuine issue of material fact. In addition, the need to protect complainants from irrevocable harm could be served by the adoption of a procedure that provides for preliminary injunctive relief similar to that provided by Federal Rule of Civil Procedure Rule 65. See PR Comments at 12, n. 10.

B. Section 3033.1(b)

Proposed section 3033.1(b) provides that a party alleging violations of section 404a and other provisions of title 39 may only bring 404a claims using the accelerated procedures. This rule forces a party with multiple claims arising from the same nucleus of facts to make a difficult choice. Stamps.com and Endicia express concern over the preclusive effects that a complaint brought pursuant to 404a could have on related claims for which the accelerated procedures are unavailable. Joint Comments at 7. They contend that the related claims should be held in abeyance, but not lost, if the complainant elects to proceed on the 404a claim using the accelerated procedures. *Id.* Valpak contends that the Commission should extend the accelerated procedures to all complaint cases where the complainant has the information and documents necessary to show the Postal Service's allegedly wrongful action. Valpak Comments at 2.

The Public Representative agrees with Valpak that the expedited procedures should be made available to all complaint proceedings, not just 404a proceedings. To

⁹ See Order No. 1739 at 18 ("This proposed rule makes clear that the choice to use the accelerated procedures of part 3033 exclusively rests with the complainant.").

the extent the Commission considers only 404a complaints to come within the purview of this docket, the Joint Commenters' proposal that non-404a claims be held in abeyance is appropriate. See Joint Comments at 7-8.

C. Section 3033.11

Proposed section 3033.11 limits who may intervene in an accelerated 404a complaint proceeding to a "person who could be directly impacted by a decision on the merits of the complaint and who can demonstrate that intervention in the proceeding . . . is necessary to protect the person's interest(s)." Order No. 1739 at 35. The Commission indicates that this limitation is due "to the accelerated time frames and the need for prompt action. . ." *Id.* at 21. Valpak contends that this provision, combined with the elimination of the ability to comment pursuant to rule 20, would unwisely limit input to the Commission. Valpak Comments at 3.

The Public Representative agrees. Parties should not be required to meet the high bar of demonstrating that they could be directly impacted by a decision on the merits or that intervention is necessary to protect their interests in order to submit comments in a complaint proceeding. A complaint proceeding pursuant section 404a that uses accelerated procedures may involve matters that concern the public at large.

D. Section 3032.15

Proposed section 3032.15 introduces an oral deposition device for use during the discovery phase of non-accelerated 404a complaints. Order No. 1739 at 28. The Commission anticipates that allowing depositions will expedite the discovery process. *Id.* at 18.

Some parties express support for the deposition proposal.¹⁰ These parties agree with the Commission that depositions can streamline the discovery process, allowing for a more efficient exchange of information. Pitney Bowes contends that the deposition device should be made available in all complaint proceedings. Pitney Bowes Comments at 7. The Joint Commenters contend that the Commission should not "completely foreclose" the possibility of depositions in accelerated 404a proceedings.

¹⁰ See Initial Comments of United Parcel Service in Response to Notice of Proposed Rulemaking Establishing Rules Pursuant to 39 U.S.C. § 404a, July 29, 2013 (UPS Comments); Joint Comments at 6; Comments of Pitney Bowes, July 29, 2013 (Pitney Bowes Comments) at 7.

Joint Comments at 7. Other parties express doubts about the ability of depositions to streamline proceedings. Grayhair contends that depositions may not be an efficient means to narrow the issues in an administrative proceeding and may be used as a tool for harassment. Grayhair Comments at 14. The Postal Service contends that the written discovery rules currently in place permit the parties to develop complete and accurate responses to interrogatories. Postal Service Comments at 17. It contends that depositions could be burdensome due to the need to prepare witnesses to respond to a variety of subjects. *Id.* at 17-18.

The Public Representative believes that the Commission should craft a provision that permits parties to take oral depositions. PR Comments at 17. Although depositions have the potential to be burdensome, and can be used as a tool of harassment, the problems of potential discovery abuse are not unique to depositions. Whatever problems of burdensomeness or harassment that arise in future proceedings are best resolved by the Commission's careful monitoring of the discovery process. The Postal Service may be correct that the written discovery rules currently in place enable the parties to develop complete and accurate responses. If the Commission adopts an oral deposition rule, the parties will remain free to utilize the written discovery tools where they believe it is beneficial to do so.

II. SUBSTANTIVE ASPECTS OF THE PROPOSED RULES

The Public Representative agrees with supports the Commission's substantive proposals, in sections 3032.6 and 3032.7, implementing section 404a(a)'s prohibitions against compelled disclosures of intellectual property and expropriations of information provided by third parties. With respect to section 3032.5, the Public Representative believes that a complainant who makes the showing required by section 3032.5(a)(1) has stated a *prima facie* case. The burden should then shift to Postal Service to make the showing required by section 3032(b) as a defense, which the complainant should be permitted to rebut. PR Comments at 8. The Commission should excise section 3032.5(a)(2) from the proposed rules. In addition, section 3032.5 should be amended so as to recognize a cause of action where a complainant shows that the Postal Service's entry into a competitive market that it regulates has the effect of precluding or establishing the terms of competition. PR Comments at 10.

In their comments, the parties raise several issues concerning the substantive aspects of the proposed rules. These concern the following:

- (1) Section 3032.5(c), which defines the scope of Postal Service activities subject to a section 404a(a)(1) complaint proceeding;
- (2) Section 3032.5(a)(2), which requires that a complaint show harm to the complainant and to competition in a section 404a(a)(1) proceeding;
- (3) Section 3032.7(c), which requires the Postal Service to show, when raising the affirmative defense of consent in a 404a(a)(3) complaint proceeding, that consent was informed, uncoerced, and given only after the Postal Service has provided adequate information to the consenting party;
- (4) Section 3032.8(b), which provides that the authority provided pursuant to 39 U.S.C. §§ 401 and 404 may not form the basis of an affirmative defense to a section 404a claim; and
- (5) The request of some commenters for the inclusion of additional substantive provisions defining which activities violate section 404a(a).

A. Section 3032.5(c)

Under section 404a(a)(1), the Postal Service is not permitted to “establish any rule or regulation (including any standard) the effect of which is to preclude competition or establish the terms of competition” unless certain conditions are met. 39 U.S.C. § 404a(a)(1). In proposed section 3032.5(c) the Commission indicates that the term “rule, regulation, or standard” includes “among other things, documents or policies issued by the Postal Service to exercise its regulatory authority or otherwise act as a governmental entity.” Order No. 1739 at 26. The Commission indicates that the inclusion of the catch-all provision concerning other “documents or policies” is to ensure that form is not elevated over substance and that the Postal Service not be able to avoid violations of section 404a(a)(1) by labeling its governmental policies as “manuals” or “operating procedures” as opposed to “regulations” or “standards.” *Id.* at 8. Several parties express support for proposed section 3032.5(c).¹¹

¹¹ See PR Comments at 10; UPS Comments at 3-4; Joint Comments at 3-5; Pitney Bowes Comments at 6.

The Postal Service states that the Commission’s definition of “rule, regulation, or standard” does not comport with “similar terminology” used in the Postal Service’s own regulation defining the “regulations of the Postal Service.”¹² Postal Service Comments at 6. It contends that to “ensure consistency,” the Commission should adopt the Postal Service’s definition of “regulations.” *Id.* Unlike the Commission’s proposed definition, the Postal Service defines “regulations” in substantial detail, by including specific publications by name. While supporting the Commission endeavor to define “rule, regulation or standard” broadly, the Joint Commenters also recommend that the Commission provide a detailed listing of the terms defined as rules, regulations, or standards.¹³ Joint Comments at 4. They contend that a more inclusive approach will prevent the Postal Service from using nomenclature to avoid section 404a complaints.

The Commission has chosen to define “rule, regulation, or standard” in a general way, so as to encompass “documents or policies” issued by the Postal Service when exercising its “regulatory authority” or acting as a “governmental entity.” Order No. 1739 at 26. There is merit in the Commission’s proposed approach. While a more detailed approach has merit, no attempt to list every type of action by the Postal Service in a regulatory or governmental capacity will be able to capture all such actions, present and future, in that capacity. In addition, by creating a list of such actions, the Commission would invite a court interpreting the Commission’s rule to invoke the *expressio unius est exclusio alterius* canon of construction, under which the express inclusion of some terms implies the exclusion of all others.

B. Section 3032.5(a)(2)

Proposed section 3032.5(a)(2) requires that a complainant alleging a violation of section 404a(a)(1) show that the “rule, regulation, or standard harms or harmed the person filing the complaint and competition.” Order No. 1739 at 26. United Parcel Service contends that this provision “would add to the complainant’s burden additional elements that are not set forth in the statute.” UPS Comments at 5. It contends that

¹² See 39 C.F.R. § 211.2.

¹³ The Joint Commenters suggest that the following terms be included in the definition of rules, regulations, and standards: recommend the following terms: “instructions,” “manuals,” “guidelines,” “guidebooks,” “principles,” “standard operating procedures,” “courses of conduct,” and “administrative fees.”

section 404a(a)(1) is “*not* like federal unfair competition cases,” where the burden is on the plaintiff to show that conduct has an anticompetitive effect. *Id.* at 7. Pitney Bowes agrees. It contends that a complainant should be able to state a *prima facie* case “merely by showing that the Postal Service has established a rule or regulation that establishes the terms of competition.” Pitney Bowes Comments at 2-3. It contends that once a complainant shows that a regulation establishes the terms of competition, the burden should then shift to the Postal Service to demonstrate why the regulation should be allowed to stand. *Id.* at 3. It advises the Commission to “remove the threshold burden on the complainant to show injury and harm to competition.” *Id.* at 4.

The Public Representative agrees with these comments. Under section 404a(a)(1), a complainant pleads a *prima facie* case when it shows that a rule, regulation, or standard precludes competition or establishes the terms of competition. The statute then gives the Postal Service the opportunity to rebut the *prima facie* case by showing that the offending regulation does not create an unfair advantage for it.¹⁴ Proposed section 3032.5(a)(2) would require a complainant to make two additional showings that section 404a(a)(1) does not require.

C. Section 3032.7(c)

Section 404a(a)(3) prohibits the Postal Service from using information that it obtains from a person in postal services that it offers unless the provider of the information consents or the information can otherwise be obtained from an independent source. Proposed section 3032.7(c) permits the Postal Service to raise consent as an affirmative defense to a 404a(a)(3) complaint by showing that the “information obtained was provided by consent.” Order No. 1739 at 27. The proposed rule provides that “[s]uch consent must be informed, uncoerced, and given only after the Postal Service has communicated adequate information and explanation about the risks of providing such consent.” *Id.* The Commission explains that in determining whether consent is informed and uncoerced it draws upon the experience of the D.C. Bar Rule of Professional Conduct 1.0 and its associated comments. *Id.* at 16. It indicates that informed consent ordinarily requires a communication to inform the consenting party of

¹⁴ Fairness dictates that the complainant has an opportunity to rebut the Postal Service’s defense. PR Comments at 8.

“their legal rights and obligations of the proposed course of conduct, and a discussion of the options and alternatives.” *Id.* at 16-17. The proposed rule would require the Postal Service to show three things before it could avail itself of the affirmative defense of consent. It would need to show that: (1) consent was informed, (2) consent was not coerced, and (3) the Postal Service first communicated adequate information and explanation about the risks of providing such consent.

The Postal Service states that proposed section 3032.7(c) would impose unnecessary and burdensome obligations that could interfere with its ability to conduct business. Postal Service Comments at 21. It contends that the informed consent rule governing attorney-client relations is not an appropriate standard for measuring consent in its business transactions and is not justified. *Id.* at 20-21.

The Public Representative agrees that the Postal Service should, in order to avail itself of the consent defense, be required to show that consent was both informed and not coerced. However, the Postal Service should not be required to show that it also made an affirmative prior communication explaining the risks of providing consent. The rules governing consent in the ordinary business context do not require the additional protections that exist in the fiduciary context. The Postal Service should not be required to treat its business partners as fiduciaries.

D. Section 3032.8

The authority granted to the Postal Service to exercise certain enumerated powers in sections 401 and 404 of title 39 is “subject to the provisions of section 404a.” 39 U.S.C. §§ 401, 404. The prohibitions on the Postal Service to engage in certain enumerated activities in section 404a of title 39 have an exception for actions that “are specifically authorized by law.” 39 U.S.C. § 404a(a). Proposed section 3032.8(a) permits the Postal Service to raise, as an affirmative defense to an alleged violation of section 404a(a), that “it is specifically authorized by law to take the action or inaction alleged to be a violation of that section.” Order No. 1739 at 28. Proposed section 3032.8(b) provides that the “[a]uthority under 39 U.S.C. 401 or 39 U.S.C. 404 may not form the basis of an affirmative defense under paragraph (a) of this section.” *Id.*

The Postal Service opposes proposed section 3032.8(b). It contends that citation to authority in sections 401 and 404 of title 39 may provide appropriate

defenses. Postal Service Comments at 16. As an example, it points out that section 401(9) permits the Postal Service to acquire intangible goods such as intellectual property by eminent domain, while section 404a(a)(2)'s prohibition on compelled disclosure of intellectual property rights is subject to the caveat "except as authorized by law." *Id.*

Proposed section 3032.8 faithfully implements what sections 401, 404, and 404a require. Subsection (a) implements the caveat in section 404a that creates an exception to prohibited acts that are "specifically authorized by law." 39 U.S.C. § 404a. And subsection (b) implements the condition in sections 401 and 404 that the Postal Service's exercises of power are subject to the prohibitions of section 404a. While subsection (b) prohibits authority under sections 401 or 404 from being used as an "affirmative defense" to a 404a(a) claim, it does not altogether prohibit the Postal Service from raising authority under sections 401 or 404 as a defense. An affirmative defense differs from other defenses in its preclusive effect: it is an "assertion raising new facts and arguments that, if true, will defeat the plaintiff's or the prosecution's claim, even if all of the allegations in the complaint are true." BLACK'S LAW DICTIONARY (7th ed. 1999) at 430. Although subsection (b) will prohibit authority under sections 401 or 404 from having the preclusive force of an affirmative defense, nothing in subsection (b) necessarily prohibits the Postal Service from raising authority under sections 401 and 404 as a defense.

E. Additional Substantive Provisions

Pitney Bowes and Grayhair propose that the Commission provide additional guidance indicating the specific types of conduct that will constitute violations of section 404a. Pitney Bowes indicates that the Commission should provide additional guidance as to the types of conduct that will be deemed *per se* violations of 404a. Pitney Bowes Comments at 5. Grayhair suggests that the Commission initiate a follow-up rulemaking to consider specific standards against "competitive foreclosure." Grayhair Comments at 17.

The Commission should decline the invitation to define *ex ante* the type of conduct that will constitute a violation of section 404a. Neither commenter provides a basis for concluding that it is better to define conduct that will violate section 404a *ex*

ante rather than determining on the facts of a complaint whether specific conduct violates section 404a. The Public Representative believes that the Commission's proposed approach offers advantages that an *ex ante* approach cannot offer. By determining whether conduct violates section 404a on a case-by-case approach, the Commission has the advantage of basing its determinations on facts and with the benefit of having the parties legal and policy arguments pertaining to the facts before it. The Public Representative believes this approach encourages careful consideration of the issues and the legal standards.

III. CONCLUSION

The Public Representative supports the Commission's endeavors to enact procedural rules that will expedite complaint proceedings. It believes that the Commission would be better served by implementing only the substantive portions of the 404a regulations in the present docket, and initiating a separate docket to consider whether the rules of practice and procedure should be amended to account for complaint proceedings. A separate docket would permit the Commission to consider other procedural tools, such as preliminary injunctions and summary judgment. The proposed accelerated procedures could, in some cases, raise due process problems. Commission oversight over which complaints are permitted to use the accelerated procedures could ameliorate those problems. Placing complaints raising non-404a claims in abeyance could ameliorate the problems that occur when complaints arise under multiple provisions of title 39. Interested parties should be permitted to submit comments in complaints that use the accelerated procedures.

The Commission's broad definition of "rule, regulation, and standard" in proposed section 3032.5(c) is appropriate. So is the Commission's treatment in proposed section 3032.8(b) of defenses relying on authority under 39 U.S.C. §§ 401 and 404. The proposal in section 3032.5(a)(2) to require complainants to show injury to a person and to competition should be excised. While the Postal Service should be required to show that consent was informed and not coerced in order to avail itself of section 3032.7(c)'s consent defense, it should not be required to show that it also made an affirmative prior communication explaining the risks of providing consent. The Commission should

decline the invitation to state *ex ante* what conduct will constitute a violation of section 404a.

Respectfully Submitted,

Sean C. Duffy
Public Representative

901 New York Avenue NW, Suite 200
Washington, DC 20268-0001
(202) 789-6819; Fax (202) 789-6861
sean.duffy@prc.gov