

maintained so as to achieve a roll rate not less than that obtained in paragraph (b).

(d) At V_D , the cockpit roll control must be moved suddenly and maintained so as to achieve a roll rate not less than one third of that obtained in paragraph (b).

Issued in Renton, Washington, on September 30, 2009.

Ali Bahrami,

Manager, Transport Airplane Directorate,
Aircraft Certification Service.

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BILLING CODE 4910-13-P

POSTAL REGULATORY COMMISSION

39 CFR Parts 3001 and 3005

[Docket No. RM2009-12; Order No. 293]

Subpoena Procedures

AGENCY: Postal Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Commission is proposing rules to address issuance of, compliance with, and enforcement of administrative subpoenas directed to the Postal Service. The proposed rules also address orders related to depositions and interrogatory responses. The Commission has developed this proposal in response to new statutory authority. It invites comments on its proposed approach to implementation of this new authority.

DATES: Comments due November 9, 2009. Reply comments due November 23, 2009.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at <http://www.prc.gov>.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, 202-789-6820 or stephen.sharfman@prc.gov.

SUPPLEMENTARY INFORMATION:

- I. Introduction
- II. Background
- III. Changes Made by the PAEA
- IV. Discussion of the Proposed Rules
- V. Section-by-Section Analysis
- VI. Public Representative
- VII. Ordering Paragraphs

I. Introduction

This notice of proposed rulemaking is the latest in a series of actions being taken by the Postal Regulatory Commission (Commission) to implement provisions of the Postal Accountability and Enhancement Act (PAEA), Public Law 109-435, 120 Stat.

3198, December 20, 2006. Section 602 of the PAEA amends section 504 of title 39 of the United States Code by adding a new paragraph 504(f)¹ which, among other things, authorizes: (a) The issuance of subpoenas requiring officers, employees, agents, or contractors of the United States Postal Service (Postal Service) to appear and present testimony or to produce documentary or other evidence; and (b) the issuance of orders that require the taking of depositions and responses to written interrogatories by any of those same persons. As amended, section 504 further authorizes the enforcement of subpoenas by appropriate district courts of the United States. *See* 39 U.S.C. 504(f)(3).

II. Background

Prior to passage of the PAEA, the Commission's authority to compel the production of relevant information from the Postal Service was limited. Section 3603 of the Postal Reorganization Act (PRA)² gave the Commission's predecessor, the Postal Rate Commission, the authority to

promulgate rules and regulations and establish procedures, subject to chapters 5 [Administrative Procedure] and 7 [Judicial Review] of * * * [the Administrative Procedure Act, 5 U.S.C. 101, *et seq.*] * * *, and [to] take any other action they deem necessary and proper to carry out their functions and obligations to the Government of the United States and the people as prescribed under this chapter [of the PRA].

Acting pursuant to these authorities, the Postal Rate Commission established a number of procedures and adopted rules of practice.

Among the procedures regularly used by the Commission and presiding officers in proceedings over the years has been the procedure of issuing information requests. Such requests have been routinely issued to obtain information that supplemented, clarified or more fully explained information presented by, or positions taken by, the Postal Service and other participants in Commission proceedings.

In addition, the Commission's original rules of practice were codified as 39 CFR part 3001. Rule 3 of those rules states that "[t]he rules of practice in this part are applicable to proceedings before the * * * Commission under the Act,

including those which involve a hearing on the record before the Commission or its designated presiding officer." Several rules govern discovery in Commission proceedings: Rule 25 (Discovery—general policy); rule 26 (Interrogatories for the purpose of discovery); rule 27 (Requests for production of documents or things for purpose of discovery); and rule 28 (Requests for admission for purpose of discovery).

Prior to passage of the PAEA, there were occasions on which the Commission and the Postal Service could not agree on whether certain information requested by the Commission had to be produced. While in most cases the Commission and the Postal Service were able to resolve their disagreements in a mutually satisfactory manner, there were cases in which disagreements proved to be irreconcilable. In those instances, the Postal Service's refusal to provide information delayed and complicated the Commission's ability to carry out its duties.³ The Postal Service's refusal to provide the requested information forced the Commission to rely upon alternate and less desirable information in order to carry out its statutory responsibilities.

The Commission's inability to obtain the specific information it had requested in those cases was ultimately due to the fact that the Commission could not enforce its orders. Neither the PRA, nor the Administrative Procedure Act (APA), authorized the Commission to seek a court order directing production of the requested information.

The typical mechanism for enabling an administrative agency to compel production of information is the judicially enforceable administrative subpoena.⁴ Without the authority to

³ *See* PRC Op. R94-1, paras. 3188-93 (refusal of Postal Service to comply with order compelling responses to interrogatories); and PRC Op. MC96-3 at 35 (refusal of Postal Service to comply with order directing it to present additional cost presentations).

⁴ *See Report to Congress on the Use of Administrative Subpoena Authorities by Executive Branch Agencies and Entities*, U.S. Department of Justice Office of Legal Policy (December 2002). Administrative subpoenas and their enforcement by courts must be specifically provided for by statute. *Id.* The PRA contains no provision for issuing administrative subpoenas. Section 555(d) of the APA provides that "[a]gency subpoenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought." (Emphasis added.) Without further authorization by law, § 555(d) does not give an agency the power to issue subpoenas. Similarly, § 556(c)(2) authorizes presiding officers at agency hearings to "issue subpoenas authorized by law * * *." (Emphasis added.) Once again, further authorization is needed for an agency to issue an administrative subpoena. Without the

Continued

issue subpoenas and enforce them in court, the Commission's only recourse was to deal indirectly with the Postal Service's refusal to provide the desired information.⁵

III. Changes Made by the PAEA

While limitations on the Commission's ability to compel the production of information may have been acceptable prior to the passage of the PAEA, that is no longer the case. Implementation of the PAEA's "modern system of regulation" requires that the Commission have access to information needed to insure financial transparency and to make informed decisions.⁶ To enable the Commission to carry out its mission, the PAEA strengthened the Commission's ability to obtain information by giving it authority under section 504(f) to compel the production of relevant and material information by order and by subpoena.

The pre-PAEA mechanisms for seeking information from the Postal Service remain available to the Commission. For example, the Commission continues to issue information requests.⁷ In addition, the

authority to issue a subpoena, an agency cannot seek judicial enforcement of its attempts to obtain information.

⁵ For example, the remedy for failing to obey a Commission order directing compliance with a discovery request is narrowly limited. Rule 25 of the rules of practice states that "[t]he Commission or the presiding officer may make such orders in regard to the failure as are just, and among others, may direct that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the proceeding in accordance with the claim of the participants obtaining the order, or prohibit the disobedient participant from introducing designated matters in evidence, or strike the evidence, complaint or pleadings or parts thereof." 39 CFR 3001.25(c). Notwithstanding the potential availability of those remedies, there have been occasions on which the Postal Service has refused to produce data requested by a party to a Commission proceeding. See, e.g., Docket No. 94-1, Statement of the United States Postal Service Concerning Order No. 1034, November 3, 1994, at 2 (Postal Service refusal to release disputed international mail data under amended protective order).

⁶ Prior to enactment of the PAEA, the Commission's need for enhanced authority to compel the production of needed information was expressly recognized by the 2003 Report of the President's Commission on the United States Postal Service entitled *Embracing the Future: Making the Tough Choices to Preserve Universal Mail Service* (Presidential Commission Report). That report recommended that the Commission be given "the authority to request accurate and complete financial information from the Postal Service, including through the use of subpoena powers, if necessary. * * * Commission access to such information was deemed essential for it "to ensure financial transparency and make fully informed determinations on issues ranging from rate ceilings to cross-subsidies. * * * *Id.* at 69.

⁷ E.g., Docket No. ACR2008, Commission Information Request No. 1, January 14, 2009; Docket No. CP2009-20, Chairman's Information Request

rules of practice in 39 CFR part 3001 remain in effect and will continue to provide important mechanisms for seeking needed information and data from the Postal Service.

Building upon the Commission's existing information collection mechanisms, Congress enacted 39 U.S.C. 504(f)(2)(A) authorizing the issuance of subpoenas and 39 U.S.C. 504(f)(2)(B) authorizing the issuance of orders to take depositions and to provide responses to written interrogatories.

Hopefully, the mere availability of the new authorities in section 504 will facilitate the resolution of future disagreements between the Commission and the Postal Service over the appropriateness of producing requested information and resort to compulsory measures will be rare.⁸

IV. Discussion of the Proposed Rules

The Commission is proposing the adoption of a new part 3005 organized in three subparts. Subpart A integrates subpart 3005 into the Commission's existing rules and regulations by making various existing rules applicable to part 3005. Conforming changes are proposed to 39 CFR 3001.3 of the rules of practice to make clear that the rules of practice apply to the new part 3005. Subpart B establishes regulations governing the issuance and enforcement of subpoenas under the authority of 39 U.S.C. 504(f)(2)(A) and 504(f)(3). Finally, subpart C implements 39 U.S.C. 504(f)(2)(B), which authorizes the ordering of depositions and responses to written interrogatories. Both the regulations in subpart B (governing subpoenas) and subpart C (providing for orders that require depositions and responses to written interrogatories) apply to "covered persons" as defined in 39 U.S.C. 504(f)(4).

A. Part 3001—Rules of Practice and Procedure

Subpart A—Rules of General Applicability. The Commission's authority under 39 U.S.C. 504(f)(2) to compel the Postal Service to provide information applies both to proceedings before the Commission and to situations in which the Commission requires information from the Postal Service to prepare a report in order to carry out its

No. 1 and Notice of Filing of Questions (Under Seal), January 18, 2009.

⁸ Successful implementation of the PAEA depends heavily upon the cooperation of all participants, including the Postal Service. While the Commission considers its authority to compel the production of information an important addition to its regulatory tools, it hopes that resort to that new authority will be unnecessary.

functions and obligations. In both situations, procedures are needed to invoke the authority of 39 U.S.C. 504(f)(2). The proposed amendment to rule 3 is being made to clarify that the rules of practice are to be used in conjunction with part 3005. This change is consistent with the inclusion of references in part 3005 to specific rules of practice.

B. Part 3005—Procedures for Compelling Production of Information by the Postal Service

Subpart A—General. This subpart confirms that part 3005 implements 39 U.S.C. 504(f); makes the Commission's rules of practice applicable to part 3005; and defines certain terms consistent with the definitions and usage of those terms in 39 U.S.C. 504(f).

C. Part 3005—Procedures for Compelling the Production of Information by the Postal Service

Subpart B—Subpoenas. Under the provisions of 39 U.S.C. 504(f)(2)(A), the Chairman, Commissioners designated by the Chairman, and administrative law judges appointed by the Commission may, upon compliance with certain statutory requirements, issue subpoenas to a "covered person." A "covered person" is defined in 39 U.S.C. 504(f)(4) to mean "an officer, employee, agent, or contractor of the Postal Service." For a subpoena to be issued, a majority of the Commissioners holding office must concur in writing prior to its issuance. 39 U.S.C. 504(f)(2). The Commission can apply to an appropriate United States district court to enforce its subpoena. 39 U.S.C. 504(f)(3). Failure to obey an order of the court is punishable as contempt.

The Commission expects that in most cases, its subpoena authority will be exercised as an enforcement mechanism in the sense that it will be used to compel the production of information if a prior attempt to obtain the information was unsuccessful.⁹ Any Commissioner, administrative law judge, presiding officer, or third party will have an opportunity to invoke the procedures for issuing a subpoena.¹⁰

⁹ The exception, discussed below, would be presented in those situations in which the Commissioners authorize the issuance of a subpoena without an information request having previously been made because of unique circumstances that require the immediate production of information.

¹⁰ While § 504(f) authorizes only the Chairman, Commissioners designated by the Chairman, and administrative law judges to issue subpoenas, nothing in that section precludes other persons from seeking the issuance of a subpoena by one of the three authorized officials.

The Commission would emphasize that a subpoena issued under 39 U.S.C. 504(f)(2)(A) is not intended to be a new discovery tool for third parties. Instead, it will, in most cases, be a mechanism for enforcing information requests and discovery orders. Issuance of a subpoena will give the Commission the power to obtain information, but will not unnecessarily burden the Postal Service. Accordingly, when discovery disputes arise during a Commission proceeding, the Commission will not, in general, consider the issuance of a subpoena until the normal process of seeking information by means of an order to compel has been unsuccessful. It is at that point that enforcement could be sought by subpoena.

As a means of enforcing information requests or Commission orders to compel, a Commission subpoena differs in important ways from judicial subpoenas.¹¹ For example, in the district courts of the United States, rule 45 of the Federal Rules of Civil Procedure authorizes the issuance of subpoenas by the clerk of the court or by attorneys as officers of the court without prior court approval. By contrast, the Commission's subpoena power under 39 U.S.C. 504(f)(2) is more narrowly circumscribed and can only be issued by the Chairman, Commissioners designated by the Chairman, or administrative law judges appointed by the Commission under 5 U.S.C. 3105. Moreover, to be issued, a subpoena must receive prior written concurrence from the majority of Commissioners then holding office.

While third parties, such as parties or participants in Commission proceedings, will not be able to issue their own subpoenas unilaterally as is the case in court litigation, they can benefit indirectly from the availability of subpoenas by having the opportunity to request the Commissioners or an administrative law judge to issue a subpoena. The proposed regulations expressly authorize such requests. These requests are analogous to, and a further extension of, the long-standing procedure available to participants in Commission hearings under which they can seek a Commission order compelling compliance with a discovery request. For example, proposed rule 3005.13(a)(1) would permit a party to

seek Commission enforcement by subpoena of a Commission order to compel a Postal Service response to the party's discovery request.¹²

Another important difference between a judicial subpoena and a subpoena authorized by 39 U.S.C. 504(f)(2)(A) is that while a judicial subpoena can be issued to obtain information from almost anyone upon whom service can be made, a subpoena authorized by 39 U.S.C. 504(f)(2)(A) can only seek information in the possession of a "covered person," i.e., "an officer, employee, agent, or contractor of the Postal Service."

The process whereby a third party seeks issuance of a subpoena would begin by filing a written motion under rule 21(a) of the rules of practice. In cases in which hearings have been ordered by the Commission, the motion would be filed with the presiding officer.¹³ In the interest of avoiding delay, the Commission is proposing that requests for administrative subpoenas be served on the Postal Service even if the information being sought is apt to be in the possession of a third party, such as a Postal Service contractor. Service upon the Postal Service would seem appropriate since the information being sought is information related to the Postal Service and the Postal Service is therefore the real party in interest. Moreover, the Postal Service is in the best position to know who within, or outside of, the Postal Service is in possession of the information. In the event the information is in the possession of such a third party covered person, the Postal Service would be required to transmit the request to the third party.

The Postal Service and others would be permitted to file answers under rule 21(b). Since a covered person other than the Postal Service could ultimately be responsible for producing the requested information, the Postal Service will be required to obtain from that covered person any objections that are personal to that covered person and to presenting

such objections in the answer that it files pursuant to rule 21(b).¹⁴

Upon consideration of the motion, the responses, and any oral presentations, the presiding officer would forward a recommendation to the Commission together with the pleadings and relevant portions of the record. The Commissioners would decide whether issuance of a subpoena is appropriate and, if so, whether any conditions should be attached to the subpoena, including conditions requiring confidential treatment pursuant to part 3007 of the Commission's regulations. In reaching their decision, the Commissioners could, if they deemed it necessary, entertain further written or oral submissions before deciding whether to approve the issuance of a subpoena.

The Commissioners who approve of the issuance of a subpoena would give their approval in writing and the subpoena would be issued by the Chairman, a Commissioner designated by the Chairman, or by the presiding officer (provided the presiding officer was an administrative law judge appointed under 5 U.S.C. 3105).¹⁵

A similar process for requesting the issuance of subpoenas would apply in situations in which hearings have not been ordered by the Commission. For example, if the Postal Service fails or refuses to respond to an information request issued by the Commission, a third party could file a request for the issuance of a subpoena. In such a case, a motion would be filed with the Secretary of the Commission under rule 21(a). The Postal Service and other interested persons could file answers pursuant to rule 21(b) and the Commission would determine whether the subpoena should be issued.

Individual Commissioners and presiding officers would also be able to seek the enforcement of information and discovery requests by subpoena in the absence of a third party request. Requests by a Commissioner or presiding officer would be made directly to the full Commission. If a majority of the Commissioners give

¹² The same would be true with respect to a Commission information request. Under current practice, any interested person can request the Commission to issue an information request. See, e.g., Docket No. ACR2008, Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. Motion For Issuance of Commission Information Request Concerning Core Costing Data On Detached Address Labels, January 13, 2009; and United States Postal Service FY2008 Annual Compliance Report, January 30, 2009. If the Commission issues the requested information request, an interested person could also request the issuance of a subpoena to enforce the information request.

¹³ The presiding officer could be the Chairman, another Commissioner, an administrative law judge appointed under 5 U.S.C. 3105 or a Commission employee.

¹⁴ By giving individuals served with a subpoena the opportunity to raise objections unique to them, the procedure will ensure their rights to due process are protected. This procedure will also obviate the need, as there is in court litigation, for a motion to quash the subpoena. See Fed. R. Civ. P. 45(c)(3). While there would be no motion to quash, per se, objections, attempts to reduce the scope of a subpoena, or requests for protective conditions by the Postal Service, covered persons, and others would be made and considered before issuance of the subpoena.

¹⁵ Attached to this notice is a suggested form for subpoenas that would be issued under this part 3005. Comments are invited on this illustrative sample.

¹¹ This is not unusual since the issuance of an administrative subpoena is typically authorized by specific statutory provisions that reflect the unique mission and needs of a particular agency. See *Report to Congress on the Use of Administrative Subpoena Authorities by Executive Branch Agencies and Entities Pursuant to Public Law 106-544*, U.S. Department of Justice, Office of Legal Policy (2001).

written approval, a subpoena would be issued by the Chairman, a Commissioner designated by the Chairman, or an administrative law judge. Since neither the Postal Service, nor any other interested person would have had an opportunity to oppose the subpoena, the subpoena would be subject to motions to quash, limit, or condition the subpoena.

Although the Commission views the principal purpose of a subpoena to be the enforcement of information or discovery requests, a subpoena could also be used as a primary information collection tool. For example, a properly authorized and issued subpoena could be used to obtain information even if an information or discovery request has not previously been presented to the Postal Service. To insure the availability of subpoenas for this purpose, the Commission has included provisions in its proposed regulations expressly providing for the issuance of subpoenas without requiring prior information requests as a precondition to such issuance.¹⁶ Subpoenas issued as primary information collection tools would also be subject to motions to quash, limit, or condition the subpoena.

Section 504(f)(2)(A) does not specify on whom the subpoena must be served. In a judicial context, when a subpoena seeks information from a particular person or entity, such as a corporation, the subpoena is served upon that person or entity. The judicial procedure is facilitated by the fact that in court litigation there is usually both sufficient time and opportunity (by means of other discovery methods) to ascertain who possesses the needed information. By contrast, the timeframe in which the Commission must act in the wake of the PAEA is relatively tight given the amount of review and analysis that must be accomplished. Moreover, the identity of the individuals or entities in possession of the required information may not be known to the Commission at the time the information is sought.

To facilitate the transmission of the subpoena to the appropriate person or persons, the proposed rules provide that subpoenas would be served on the Postal Service. The Postal Service would, in turn, be required to transmit the subpoena to the persons responsible for providing the requested information. After delivery of the subpoena to the appropriate person, the Postal Service would be required to certify to the Commission that the subpoena had been delivered and to advise the Commission of the manner, date, and time of

delivery, and the name, business address, telephone number and e-mail address of the person receiving the subpoena. The Postal Service would also be required to confirm that the person receiving the subpoena had been advised of the return date of the subpoena.

The proposed rules would also establish the parameters for responses to subpoenas. For example, documents are to be produced in the form they are kept in the usual course of business; and claims of undue burden and confidentiality must be adequately supported.

Finally, the rules contemplate the possible need for judicial enforcement of an administrative subpoena issued by the Commission. The filing and service requirements are governed by other federal statutes and rules of court applicable to proceedings in the United States district courts.

D. Part 3005—Procedures for Compelling the Production of Information by the Postal Service

Subpart C—Orders Regarding Depositions and Responses to Written Interrogatories. Section 504(f)(2)(B) of title 39 expressly authorizes the Chairman, Commissioners authorized by the Chairman, and administrative law judges appointed by the Commission to “order the taking of depositions and responses to written interrogatories by a covered person.” Concurrence by a majority of the Commissioners is not required for the issuance of such an order.

The authorities contained in this section are in addition to the authorities provided by the PRA and APA which underlie the part 3001 rules of practice and authorize orders compelling discovery. It is the Commission’s view that the authority to issue orders under § 504(f)(2)(B) can therefore be exercised in the context of an adjudicatory hearing as an alternative to the procedures in part 3001 for compelling discovery. An order can also be issued under § 504(f)(2)(B) outside the context of a Commission proceeding.

V. Section-By-Section Analysis

Section 3001.3 Scope of rules. The amendment to rule 3 of the rules of practice is intended to clarify that the rules of practice apply both to proceedings before the Commission and to the procedures in part 3005 for compelling the production of information by the Postal Service. This change is consistent with the inclusion in part 3005 of references to specific rules of practice.

Section 3005.1 Scope of rules. This proposed rule states that part 3005 implements 39 U.S.C. 504(f). It also makes applicable the rules of practice in part 3001, unless otherwise ordered by the Commission.

Section 3005.2 Terms defined. This proposed rule provides definitions for the terms “administrative law judge,” “Chairman,” “covered person,” and “designated Commissioner” as used in part 3005.

Section 3005.11 General rule—subpoenas. This proposed rule sets forth the basic requirements for the issuance of a subpoena pursuant to 39 U.S.C. 504(f)(2)(A). Subpoenas may only be issued by the Chairman, a designated Commissioner or an administrative law judge. When authorized in writing by a majority of the Commissioners then in office, a subpoena shall be issued by the Chairman, a designated Commissioner, or an administrative law judge. This rule also lists the purposes for which a subpoena may be issued; the types of conditions or limitations that may be imposed on the subpoena to protect the recipient of the subpoena from oppression, undue burden, or expense, including the possible imposition of confidentiality or non-disclosure conditions as provided in part 3007 of this chapter; and identifies the rule that establishes the service requirements for a subpoena. A proposed form of subpoena is provided as Appendix A to Part 3005—Subpoena Form.

Section 3005.12 Subpoenas issued without receipt of a third-party request. This proposed rule provides for the issuance of a subpoena without a request having been received from a third party. For example, the Commission could deem a subpoena necessary if the Postal Service were to refuse to provide information during preliminary review of a Postal Service filing. Or a subpoena could be needed if the Postal Service were to refuse to provide information needed for the preparation of a report. Finally, a presiding officer might deem it necessary to obtain the issuance of a subpoena to enforce a presiding officer’s information request. In such cases, there would be no “third party” request for the subpoena.

From a procedural standpoint, the request would be made directly to the full Commission by a Commissioner or presiding officer. To insure that the Postal Service and other interested persons, including covered persons potentially affected by the subpoena, have an opportunity to oppose the subpoena, or to limit or condition its scope and operation, any duly authorized subpoena would be subject

¹⁶ These provisions are contained in proposed section 3005.12 and are described, *infra*.

to a motion under rule 21(a) to quash, limit, or condition the subpoena. Replies to such a motion could be made by any interested person under rule 21(b).

As a general rule, the Postal Service would be given an opportunity to produce information voluntarily before a subpoena is issued under this section. However, provision is also made for the summary issuance of a subpoena without issuance of a prior information request. While the Commission would expect the summary issuance of a subpoena to rarely, if ever, be necessary, it is including provision for such summary issuance in order to insure the ability to act promptly if necessary. In such cases, the Postal Service would have an opportunity following issuance of the subpoena to file a motion to quash the subpoena, limit its scope, or to place conditions on the subpoena. Objections by covered persons could be asserted in any such filing by the Postal Service. Pending resolution of the Postal Service's motion, the Postal Service and all covered persons would be required to maintain the information being sought by the subpoena.

Section 3005.13 Subpoenas issued in response to a third-party request. This proposed rule establishes procedures by which subpoenas can be requested by third parties. One set of procedures applies to those situations in which the Commission has ordered hearings. Typically, in those cases the subpoena will be available as a means of enforcing the discovery rules in the Commission's part 3001 rules of practice. A second set of procedures applies to situations in which no hearings have been ordered, such as an annual compliance review. In these cases, information will typically be sought by means of information requests, including information requests that have been proposed by a third party and issued by the Commission or a Commissioner. In this latter situation, a third party would be able to request the issuance of a subpoena to enforce the information request. Requests under either procedure must include certain minimum showings and demonstrations in order to be granted, including showings of relevance of the information and adequate specification of the information requested.

Requirements are imposed upon the Postal Service to insure that the covered person expected to produce the requested information has an opportunity to present any objections to the issuance of a subpoena that are unique to that covered person.

Section 3005.14 Service of subpoenas. This proposed rule specifies

the manner in which subpoenas are to be served on covered persons. The Commission is proposing that subpoenas will be served initially upon the Postal Service with the requirement that the Postal Service transmit and deliver the subpoena to the person or contractor ultimately responsible for testifying or for otherwise providing the information being sought and that the Postal Service file proof of service with the Secretary of the Commission that identifies the covered person expected to supply the requested information. Finally, provision is made for advising the public as to the return date of the subpoena.

Section 3005.15 Duties in responding to a subpoena. This proposed rule specifies the manner in which the recipient of a subpoena will be required to respond to the subpoena. It covers such subjects as the form in which documentary information is to be produced; the manner in which electronically stored information is to be produced; and the showing that must be made if information is not disclosed on grounds of privilege, confidentiality, or trade secret. Requests for confidential treatment of information produced in response to a subpoena are to be made in the manner provided in part 3007 of the Commission's regulations.

Section 3005.16 Enforcement of subpoenas. This proposed rule implements the authority in 39 U.S.C. 504(f)(3) under which the Commission can seek judicial enforcement of an administrative subpoena issued pursuant to 39 U.S.C. 504(f)(2)(A).

Section 3005.21 Authority to order depositions and responses to written interrogatories. This proposed rule implements the authority of the Chairman, any designated Commissioner or any administrative law judge to order that a deposition be taken of a covered person or that the covered person respond to a written interrogatory.

VI. Public Representative

Pursuant to 39 U.S.C. 505, Cassandra Hicks is appointed to serve as officer of the Commission (Public Representative) to represent the interests of the general public in the captioned docket.

VII. Ordering Paragraphs

It is ordered:

1. Docket No. RM2009-12 is established for the purpose of receiving comments on the Commission's proposed rules establishing procedures for obtaining information from the Postal Service under the Postal Accountability and Enhancement Act.

2. Interested persons may submit initial comments no later than 30 days from the date of publication of this notice in the **Federal Register**.

3. Reply comments may be filed no later than 45 days from the date of publication of this notice in the **Federal Register**.

4. Pursuant to 39 U.S.C. 505, Cassandra Hicks is appointed to represent the interests of the general public in this docket.

5. The Secretary shall arrange for publication of this notice in the **Federal Register**.

List of Subjects

39 CFR Part 3001

Administrative practice and procedure, Postal Service.

39 CFR Part 3005

Administrative practice and procedure, Confidential business information, Postal Service, Reporting and recordkeeping requirements.

By the Commission.

Shoshana M. Grove,
Secretary.

For the reasons discussed in the preamble, the Postal Regulatory Commission proposes to amend chapter III of title 39 of the Code of Federal Regulations as follows:

PART 3001—RULES OF PRACTICE AND PROCEDURE

1. The authority citation for 39 CFR part 3001 is revised to read as follows:

Authority: 39 U.S.C. 404(d); 503; 504; 3661.

2. Revise § 3001.3 to read as follows:

§ 3001.3 Scope of rules.

The rules of practice in this part are applicable to proceedings before the Postal Regulatory Commission under the Act, including those which involve a hearing on the record before the Commission or its designated presiding officer and, as specified in part 3005 of this chapter to the procedures for compelling the production of information by the Postal Service. They do not preclude the informal disposition of any matters coming before the Commission not required by statute to be determined upon notice and hearing.

3. Add part 3005 to read as follows:

PART 3005—PROCEDURES FOR COMPELLING PRODUCTION OF INFORMATION BY THE POSTAL SERVICE

Subpart A—General
Sec.

- 3005.1 Scope and applicability of other parts of this title.
- 3005.2 Terms defined for purposes of this part.

Subpart B—Subpoenas

- 3005.11 General rule—subpoenas.
- 3005.12 Subpoenas issued without receipt of a third-party request.
- 3005.13 Subpoena issued in response to a third-party request.
- 3005.14 Service of subpoenas.
- 3005.15 Duties in responding to a subpoena.
- 3005.16 Enforcement of subpoenas.

Subpart C—Depositions and Written Interrogatories

- 3005.21 Authority to order depositions and responses to written interrogatories.
- Appendix A to Part 3005—Subpoena Form
- Authority:** 39 U.S.C. 503; 504; 3651(c); 3652(d).

Subpart A—General

§ 3005.1 Scope and applicability of other parts of this title.

(a) The rules in this part govern the procedures for compelling the production of information by the Postal Service pursuant to 39 U.S.C. 504(f).

(b) Part 3001, subpart A of this chapter applies unless otherwise stated in this part or otherwise ordered by the Commission.

§ 3005.2 Terms defined for purposes of this part.

(a) *Administrative law judge* means an administrative law judge appointed by the Commission under 5 U.S.C. 3105.

(b) *Chairman* means the Chairman of the Commission.

(c) *Covered person* means an officer, employee, agent, or contractor of the Postal Service.

(d) *Designated Commissioner* means any Commissioner who has been designated by the Chairman to act under this part.

Subpart B—Subpoenas

§ 3005.11 General rule—subpoenas.

(a) Subject to the provisions of this part, the Chairman, any designated Commissioner, and any administrative law judge may issue a subpoena to any covered person.

(b) The written concurrence of a majority of the Commissioners then holding office shall be required before any subpoena may be issued under this subpart. When duly authorized by a majority of the Commissioners then holding office, a subpoena shall be issued by the Chairman, a designated Commissioner, or an administrative law judge.

(c) Subpoenas issued pursuant to this subpart may require the attendance and

presentation of testimony or the production of documentary or other evidence with respect to any proceeding conducted by the Commission under title 39 of the United States Code or to obtain information for preparation of a report under said title 39.

(d) Subpoenas issued pursuant to this subpart shall include such conditions as may be necessary or appropriate to protect a covered person from oppression, or undue burden or expense, including the following:

(1) That disclosure may be had only on specified terms and conditions, including the designation of the time or place;

(2) That certain matters not be inquired into, or that the scope of disclosure be limited to certain matters;

(3) That disclosure occur with no one present except persons designated by the Commission;

(4) That a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way as provided in part 3007 of this chapter; and

(5) Such other conditions deemed necessary and appropriate under the circumstances presented.

(e) Subpoenas shall be served in the manner provided by § 3005.14.

§ 3005.12 Subpoenas issued without receipt of a third-party request.

(a) A subpoena duly authorized by a majority of the Commissioners then holding office may be issued by the Chairman, a designated Commissioner, or an administrative law judge under § 3005.11 of this part without a request having been made by a third party under § 3005.13.

(b) Except as provided in paragraph (c) of this section, a subpoena shall not be issued until after the Postal Service has been provided an opportunity to produce the requested information voluntarily.

(c) A subpoena may be issued summarily without first providing an opportunity to produce the requested information voluntarily if a delay in the issuance of the subpoena could unreasonably limit or prevent production of the information being sought.

(d) Subpoenas issued under this section shall be issued subject to the right of the Postal Service and other interested persons to file a motion pursuant to § 3001.21(a) of this chapter to quash the subpoena, to limit the scope of the subpoena, or to condition the subpoena as provided in § 3005.11(d) of this section. Such motion shall include any objections to

the subpoena that are personal to the covered person responsible for providing the information being sought. Answers to the motion may be filed by any interested person pursuant to § 3001.21(a) of this chapter. Pending the resolution of any such motion, the Postal Service shall secure and maintain the requested information.

§ 3005.13 Subpoena issued in response to a third-party request.

(a) *Procedure for requesting and issuing subpoenas when hearings have been ordered.* A participant in any proceeding in which a hearing has been ordered by the Commission may request the issuance of a subpoena to a covered person pursuant to § 3005.11.

(1) Subpoenas may be requested to enforce an order to compel previously issued pursuant to the rules of practice with which the Postal Service has failed to comply.

(2) Requests for subpoenas under this section shall be made by written motion filed with the presiding officer in the manner provided in § 3001.21(a) of this chapter. The Postal Service shall transmit a copy of the request to any covered person that it deems likely to be affected by the request.

(3) Answers to the motion may be filed by the Postal Service and by any other participant. In filing an answer, the Postal Service must obtain from the covered person responsible for providing the information being sought any objections that are personal to that covered person and must provide those objections in its answer together with the objections, if any, that the Postal Service wishes to assert on its own behalf. Answers shall be filed as required by § 3001.21(b).

(4) The presiding officer shall forward copies of the motion and any responses to the Commission together with a recommendation of whether or not the requested subpoena should be issued and, if so, the scope and content thereof and conditions, if any, that should be placed on the subpoena. Copies of the presiding officer's recommendation shall be served in accordance with § 3001.12 of this chapter.

(5) Following receipt of the materials forwarded by the presiding officer, the Commissioners shall determine whether the requested subpoena should be issued and, if so, whether any conditions should be placed on the scope or content of the subpoena or on the responses to the subpoena. The Commissioners may, but are not required, to entertain further oral or written submissions from the Postal Service or the participants before acting on the request. In making their

determination, the Commissioners are not bound by any recommendation of a presiding officer.

(b) *Procedure for requesting and issuing subpoenas when no hearings have been ordered.* Any person may request the issuance of a subpoena to a covered person pursuant to § 3005.11 to enforce an information request issued by the Commission or a Commissioner even though no hearings have been ordered by the Commission.

(1) A request for the issuance of a subpoena shall be made by motion as provided by § 3001.21 of this chapter. A copy of the request shall be served upon the Postal Service as provided by § 3001.12 of this chapter and by forwarding a copy to the General Counsel of the Postal Service, or such other person authorized to receive process by personal service, by Express Mail or Priority Mail, or by First-Class Mail, Return Receipt requested. Proof of service of the request upon the Postal Service shall be filed with the Secretary by the person requesting the subpoena. The Secretary shall issue a notice of the filing of proof of service and the deadline for the Postal Service's answer to the request.

(2) Answers to the motion may be filed by the Postal Service and by any other participant. In filing an answer, the Postal Service must obtain from the covered person responsible for providing the information being sought any objections that are personal to that covered person responsible for providing the information being sought and must provide those objections in its answer together with the objections, if any, that the Postal Service wishes to assert on its own behalf. Answers shall be filed as required by § 3001.21 of this chapter.

(3) Following receipt of the request and any answers to the request, the Commissioners shall determine whether the requested subpoena should be issued and, if so, whether any conditions should be placed on the scope or content of the subpoena or on the responses to the subpoena. The Commissioners may, but are not required, to entertain further oral or written submissions before acting. A majority of the Commissioners then holding office must concur in writing before a subpoena may be issued.

(c) *Contents of requests for subpoenas.* Each motion requesting the issuance of a subpoena shall include the following:

(1) A demonstration that the subpoena is being requested with respect to a proceeding conducted by the Commission under title 39 of the United States Code or that the purpose of the

subpoena is to obtain information to be used by the Commission to prepare a report under title 39 of the United States Code;

(2) A showing of the relevance and materiality of the testimony, documentary or other evidence being sought;

(3) Specification with particularity of any books, papers, documents, writings, drawings, graphs, charts, photographs, sound recordings, images, or other data or data compilations stored in any medium from which information can be obtained, including, without limitation, electronically stored information which is being sought from the covered person;

(4) In situations in which a hearing has been ordered, the request must include in addition to the information required by paragraphs (c)(1), (2) and (3) of this section, a certification that the Postal Service has failed to comply with an order compelling discovery previously issued pursuant to the Commission's rules of practice; and

(5) In situations in which a hearing has not been ordered, the request must include in addition to the information required by paragraphs (c)(1), (2) and (3) of this section, an explanation of the reason for the request and the purposes for which the appearance, testimony, documentary or other evidence is being sought, and a certification that the Postal Service has failed to comply with a previously issued Commission order or information request.

§ 3005.14 Service of subpoenas.

(a) *Manner of service.* In addition to electronic service as provided by § 3005.12(a), subpoenas must be served by personal service upon the General Counsel of the Postal Service or upon such other representative of the Postal Service as is authorized to receive process. Upon receipt of the subpoena, the Postal Service shall transmit and deliver the subpoena to the person or contractor responsible for providing the information being sought by the subpoena. Service upon any such person or contractor shall be accompanied by a written notice of the return date of the subpoena.

(b) *Return of service.* Proof of service upon the covered person designated as responsible for responding to the subpoena must be filed with the Secretary by the Postal Service within 2 business days following service, unless a shorter period is ordered by the Commission, and must be accompanied by certifications of:

(1) The manner, date, and time of delivery of the subpoena to the person designated as responsible for responding to the subpoena;

(2) The name, business address, telephone number, and e-mail address of the person designated as responsible for responding to the subpoena; and

(3) The return date of the subpoena.

(c) *Notice of service.* The Secretary shall post a notice of service upon the Commission's Web site which specifies the return date of the subpoena.

§ 3005.15 Duties in responding to a subpoena.

(a) A covered person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the subpoena.

(b) If a subpoena does not specify the form or forms for producing electronically stored information, a covered person responding to a subpoena must produce the information in a form or forms in which the covered person ordinarily maintains it or in a form or forms that are reasonably usable.

(c) A covered person responding to a subpoena need not produce the same electronically stored information in more than one form.

(d) A covered person commanded to produce and permit inspection or copying of designated electronically stored information, books, papers, or documents need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing, or trial.

(e) A covered person who fails or refuses to disclose or provide discovery of electronically stored information on the grounds that the sources of such information is not reasonably accessible because of undue burden or cost must show by clear and convincing evidence that the burden or costs are undue.

(f) A covered person who fails or refuses to disclose or provide discovery of information on the grounds that the information is privileged or subject to protection as a trade secret or other confidential research, development, or commercial information must expressly support all such claims and shall provide a description of the nature of the information and the potential harm that is sufficient to enable the Commission to evaluate and determine the propriety of the claim.

(g) Request for confidential treatment of information shall be made in accordance with part 3007 of this chapter.

§ 3005.16 Enforcement of subpoenas.

In the case of contumacy or failure to obey a subpoena issued under this subpart, the Commission may apply for

an order to enforce its subpoena as permitted by 39 U.S.C. 504(f)(3).

Subpart C—Depositions and Written Interrogatories

§ 3005.21 Authority to order depositions and responses to written interrogatories.

The Chairman, any designated Commissioner, or any administrative law judge may order the taking of

depositions and responses to written interrogatories by a covered person with respect to any proceeding conducted under title 39 of the United States Code or to obtain information to be used to prepare a report under title 39.

BILLING CODE 7710-FW-P

Appendix A to Part 3005—Subpoena Form

UNITED STATES OF AMERICA POSTAL REGULATORY COMMISSION WASHINGTON, DC 20268-0001	
In the Matter of:	
[Case Name—If Applicable]	[Docket No.—If Applicable]
SUBPOENA	
TO:	
<input type="checkbox"/> YOU ARE COMMANDED to appear at the place, date, and time specified below to provide testimony in the above matter.	
PLACE OF TESTIMONY	DATE AND TIME
<input type="checkbox"/> YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above matter.	
PLACE OF DEPOSITION	DATE AND TIME
<input type="checkbox"/> YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (attach additional sheet if necessary):	
PLACE	DATE AND TIME
ISSUING OFFICIAL'S SIGNATURE	DATE

ISSUING OFFICIAL'S NAME AND PHONE NUMBER	
ISSUING OFFICIAL IS (CHECK ONE): <input type="checkbox"/> CHAIRMAN <input type="checkbox"/> COMMISSIONER DESIGNATED BY THE CHAIRMAN <input type="checkbox"/> ADMINISTRATIVE LAW JUDGE APPOINTED UNDER 5 U.S.C. 3105	
I HEREBY CERTIFY THAT THE MAJORITY OF THE COMMISSIONERS CURRENTLY HOLDING OFFICE HAVE PREVIOUSLY CONCURRED IN WRITING WITH THE ISSUANCE OF THIS SUBPOENA.	
ISSUING OFFICIAL'S SIGNATURE	DATE
39 CFR 3005.15: (a) A covered person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the subpoena. (b) If a subpoena does not specify the form or forms for producing electronically stored information, a covered person responding to a subpoena must produce the information in a form or forms in which the covered person ordinarily maintains it or in a form or forms that are reasonably usable. (c) A covered person responding to a subpoena need not produce the same electronically stored information in more than one form. (d) A covered person commanded to produce and permit inspection or copying of designated electronically stored information, books, papers, or documents need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing, or trial.	

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R03-OAR-2009-0593; FRL-8967-2]

Approval and Promulgation of Air Quality Implementation Plans; Delaware; Regulation To Reduce Idling of Heavy-Duty Vehicles

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA proposes to approve the State Implementation Plan (SIP) revision submitted by the State of Delaware for the purpose of reducing engine idling time for operation of most heavy-duty motor vehicles in the state, with certain exceptions. In the Final Rules section of this **Federal Register**, EPA is approving Delaware's SIP submittal as a direct final rule without

prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this action, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time. **DATES:** Comments must be received in writing by November 9, 2009.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA-R03-OAR-2009-0593 by one of the following methods:

A. <http://www.regulations.gov>. Follow the on-line instructions for submitting comments.

B. *E-mail:* fernandez.cristina@epa.gov.

C. *Mail:* EPA-R03-OAR-2009-0593, Cristina Fernandez, Chief, Air Quality

Planning Branch, Mailcode 3AP21, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. *Hand Delivery:* At the previously listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA-R03-OAR-2009-0593. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through <http://www.regulations.gov> or e-mail. The <http://www.regulations.gov> Web site is an "anonymous access" system, which means EPA will not know your identity