

manner directed by the presiding officer.

(h) *Rulings on motions.* The presiding officer is authorized to rule upon any such motion not formally acted upon by the Commission prior to the commencement of a prehearing conference or hearing where immediate ruling is essential in order to proceed with the prehearing conference or hearing, and upon any motion to the presiding officer filed or made after the commencement thereof, except that no motion made to the presiding officer, a ruling upon which would involve or constitute a final determination of the proceeding, shall be ruled upon affirmatively by the presiding officer except as a part of his intermediate decision. This section shall not preclude a presiding officer, within his discretion, from referring any motion made in hearing to the Commission for ultimate determination.

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

[36 FR 396, Jan. 12, 1971, as amended at 60 FR 12116, Mar. 6, 1995; 65 FR 6543, Feb. 10, 2000; 67 FR 67563, Nov. 6, 2002]

§ 3001.31 Evidence.

(a) *Form and admissibility.* In any public hearing before the Commission, or a presiding officer, relevant and material evidence which is not unduly repetitious or cumulative shall be admissible. Witnesses whose testimony is to be taken shall be sworn, or shall affirm, before their testimony shall be deemed evidence in the proceeding or any questions are put to them.

(b) *Documentary material*—(1) *General.* Documents and detailed data and information shall be presented as exhibits. Exhibits should be self-explanatory. They should contain appropriate footnotes or narrative explaining the source of each item of information used and the methods employed in statistical compilations. The principal title of each exhibit should state what it contains or represents. The title may also contain a statement of the purpose for which the exhibit is offered; however, this statement will not be considered part of the evidentiary record.

Where one part of a multi-part exhibit is based on another part or on another exhibit, appropriate cross-references should be made. Relevant exposition should be included in the exhibits or provided in accompanying testimony. Testimony, exhibits and supporting workpapers prepared for Commission proceedings that are premised on data or conclusions developed in a library reference shall provide the location of that information within the library reference with sufficient specificity to permit ready reference, such as the page and line, or the file and the worksheet or spreadsheet page or cell. Where relevant and material matter offered in evidence is embraced in a document containing other matter not material or relevant or not intended to be put in evidence, the participant offering the same shall plainly designate the matter offered excluding the immaterial or irrelevant parts. If other matter in such document is in such bulk or extent as would unnecessarily encumber the record, it may be marked for identification, and, if properly authenticated, the relevant and material parts may be read into the record, or, if the Commission or presiding officer so directs, a true copy of such matter in proper form shall be received in evidence as an exhibit. Copies of documents shall be delivered by the participant offering the same to the other participants or their attorneys appearing at the hearing, who shall be afforded an opportunity to examine the entire document and to offer in evidence in like manner other material and relevant portions thereof.

(2) *Library references.* (i) The term “library reference” is a generic term or label that participants and others may use to identify or designate certain documents or things (“material”) filed with the Commission’s docket section. To the extent possible, material filed as a library reference shall be identified and referred to by participants in terms of the following categories: Category 1—Reporting Systems Material (consisting of library references relating to the Service’s statistical cost and revenue reporting systems, and their primary outputs); Category 2—Witness Foundational Material (consisting of material relating to the testimony of

specific witnesses, primarily that which is essential to the establishment of a proper foundation for receiving into evidence the results of studies and analyses); Category 3—Reference Material (consisting of previously published material provided for the convenience of the reader, such as books, chapters or other portions of books, articles, reports, manuals, handbooks, guides, and contracts); Category 4—Material Provided in Response to Discovery (consisting of material provided in response to discovery requests); Category 5—Disassociated Material (consisting of material filed at the request of another, from which the filing party wishes to be disassociated, is not vouching for or sponsoring the material provided); Category 6—All Other Material (consisting of library references not fitting any of the other categories).

(ii) The practice of filing a library reference is authorized primarily as a convenience to filing participants and the Commission under certain circumstances. These include when the physical characteristics of the material, such as number of pages, bulk, or format, are reasonably likely to render compliance with the service requirements unduly burdensome; and one of the following considerations apply:

(A) Interest in the material or things so labeled is likely to be so limited that service on the entire list would be unreasonably burdensome, and the participant agrees to serve the material on individual participants upon request within three days of a request, or to provide, within the same period, an explanation of why the material cannot be provided within three days, and to undertake reasonable efforts to promptly provide the material; or

(B) The participant satisfactorily demonstrates that designation of material as a library reference is appropriate because the material constitutes a secondary source. A secondary source is one that provides background for a position or matter referred to elsewhere in a participant's case or filing, but does not constitute essential support and is unlikely to be a material factor in a decision on the merits of issues in the proceeding; or

(C) Reference to, identification of, or use of the material would be facilitated if it is filed as a library reference; or

(D) The material is filed in compliance with a discovery request for production of documents or things.

(iii) *Other circumstances.* If a participant considers it appropriate to file material as a library reference because its physical characteristics render service unduly burdensome, but cannot satisfy the terms set out in paragraphs (b)(2)(ii)(A) through (D) of this section, the material may be filed (by means of a notice) subject to the following conditions:

(A) Inclusion in the accompanying notice of a detailed explanation of the reason for filing the material under this provision;

(B) Satisfaction of all other applicable requirements relating to library references; and

(C) The Commission's right to refuse acceptance of the material in its docket room and its right to take other action to ensure participants' ability to obtain access to the material.

(iv) *Filing procedure.* Participants filing material as a library reference shall file contemporaneous written notice of this action in conformance with §§3001.9 through 3001.12. The notice shall:

(A) Set forth the reason(s) why the material is being designated as a library reference, with specific reference to paragraphs (b)(2)(ii) and (iii) of this section;

(B) Identify the category into which the material falls and describe in detail what the material consists of or represents, noting matters such as the presence of survey results;

(C) Explain in detail how the material relates to the participant's case or to issues in the proceeding;

(D) Identify authors or others materially contributing to substantive aspects of the preparation or development of the library reference;

(E) Identify the documents (such as testimony, exhibits, and an interrogatory) or request to which the library reference relates, to the extent practicable;

(F) Identify other library references or testimony relied upon or referred to

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in the designated material, to the extent practicable;

(G) Indicate whether the library reference is an update or revision to another library reference and, if it is, clearly identify the predecessor material.

(H) To the extent feasible, identify portions expected to be entered into the record and the expected sponsor (if the participant filing a library reference anticipates seeking, on its own behalf, to enter all or part of the material contained therein into the evidentiary record).

(v) *Labeling.* Material filed as a library reference shall be labeled in a manner consistent with standard Commission notation and any other conditions the presiding officer or Commission establishes.

(vi) *Optional preface or summary.* Inclusion of a preface or summary in a library reference addressing the matters set out in paragraphs (b)(2)(iv)(A) through (H) of this section is encouraged but optional.

(vii) *Electronic version.* Material filed as a library reference shall also be made available in an electronic version, absent a showing of why an electronic version cannot be supplied or should not be required to be supplied. Participants are encouraged to include in the electronic version the information and disclosures required to be included in the accompanying notice.

(viii) *Number of copies.* Except for good cause shown, two hard copies of each library reference shall be filed.

(ix) *Special requests and motions seeking service.* In situations other than that covered in paragraph (b)(2)(ii)(A) of this section, special requests for service of material contained in a library reference may be made by the participant that filed the interrogatory or inquiry that generated a response in the form of a library reference. Service shall be made within a reasonable time. Others seeking service of the material contained in a library reference shall file a detailed motion setting forth the reasons why service is necessary or appropriate.

(x) *Waiver.* Upon the filing of a motion showing good cause, the Commission may waive one or more of the pro-

visions relating to library references. Motions seeking waiver may request expedited consideration and may seek waiver for categories of library references.

(xi) *Status of library references.* Designation of material as a library reference and acceptance in the Commission's docket section do not confer evidentiary status. The evidentiary status of the material is governed by this section.

(c) *Commission's files.* Except as otherwise provided in § 3001.31(e), in case any matter contained in a report or other document on file with the Commission is offered in evidence, such report or other document need not be produced or marked for identification, but may be offered in evidence by specifying the report, document, or other file containing the matter so offered.

(d) *Public document items.* Whenever there is offered in evidence (in whole or in part) a public document, such as an official report, decision, opinion or published scientific or economic statistical data issued by any of the Executive Departments (or their subdivisions), legislative agencies or committees, or administrative agencies of the Federal Government (including Government-owned corporations) and such document (or part thereof) has been shown by the offeror thereof to be reasonably available to the public, such document need not be produced or physically marked for identification, but may be offered in evidence as a public document item by clearly identifying the document and the relevant parts thereof.

(e) *Designation of evidence from other Commission dockets.* Participants may request that evidence received in other Commission proceedings be entered into the record of the current proceeding. These requests shall be made by motion, shall explain the purpose of the designation, and shall identify material by page and line or paragraph number. Absent extraordinary justification, these requests must be made at least 28 days before the date for filing the participant's direct case. Oppositions to motions for designations and/or requests for counter-designations

shall be filed within 14 days. Oppositions to requests for counter-designations are due within seven days. At the time requests for designations and counter-designations are made, the moving participant must submit two copies of the identified material to the Secretary of the Commission.

(f) *Form of prepared testimony and exhibits.* Unless the presiding officer otherwise directs, the direct testimony of witnesses shall be reduced to writing and offered either as such or as an exhibit. All prepared testimony and exhibits of a documentary character shall, so far as practicable, conform to the requirements of §3001.10(a) and (b).

(g) *Copies to participants.* Except as otherwise provided in these rules, copies of prepared testimony and exhibits shall be furnished to the presiding officer and to the participants or counsel, unless the presiding officer otherwise directs. In addition, unless otherwise directed by the presiding officer, eight copies of all prepared testimony and exhibits shall be furnished for the use of the Commission.

(h) *Reception and ruling.* The presiding officer shall rule on the admissibility of evidence and otherwise control the reception of evidence so as to confine it to the issues in the proceeding.

(i) *Offers of proof.* Any offer of proof made in connection with any ruling of the presiding officer rejecting or excluding proffered oral testimony shall consist of a statement of the substance of the evidence which counsel contends would be adduced by such testimony; and if the excluded evidence consists of evidence in documentary or written form, or of reference to documents or records, a copy of such evidence shall be marked for identification and shall constitute the offer of proof.

(j) *Official notice of facts.* Official notice may be taken of such matters as might be judicially noticed by the courts of the United States or of any other matter peculiarly within the general knowledge of the Commission as an expert body: *Provided*, That any participant shall, on timely request, be afforded an opportunity to show the contrary.

(k) *Introduction and reliance upon studies and analyses—(1) General.* In the

case of all studies and analyses offered in evidence in hearing proceedings or relied upon as support for other evidence, other than the kinds described in paragraphs (k) (2) and (3) of this section, there shall be a clear statement of the study plan, all relevant assumptions and a description of the techniques of data collection, estimation and/or testing. In addition, there shall be a clear statement of the facts and judgments upon which conclusions are based, together with an indication of the alternative courses of action considered. Tabulations of input data shall be made available upon request at the offices of the Commission.

(2) *Statistical studies.* All statistical studies offered in evidence in hearing proceedings or relied upon as support for other evidence shall include a comprehensive description of the assumptions made, the study plan utilized and the procedures undertaken. Where a computer analysis is employed to obtain the result of a statistical study, all of the submissions required by §3001.31(k)(3) shall be furnished, upon request. In addition, for each of the following types of statistical studies, the indicated information should be furnished:

(1) *Market research.* (a) The following data and information shall be provided:
(1) A clear and detailed description of the sample, observational, and data preparation designs, including definitions of the target population, sampling frame, units of analysis, and survey variables;

(2) An explanation of methodology for the production and analysis of the major survey estimates and associated sampling errors;

(3) A presentation of response, coverage and editing rates, and any other potential sources of error associated with the survey's quality assurance procedures;

(4) A discussion of data comparability over time and with other data sources;

(5) An assessment of the effects of editing and imputation;

(6) Identification of applicable statistical models, when model-based procedures are employed; and

(7) An explanation of all statistical tests performed and an appropriate set

of summary statistics summarizing the results of each test.

(ii) *Other sample surveys.* (a) A clear description of the survey design, including the definition of the universe under study, the sampling frame and units, and the validity and confidence limits than can be placed on major estimates; and

(b) An explanation of the method of selecting the sample and the characteristics measured or counted.

(iii) *Experimental analyses.* (a) A complete description of the experimental design, including a specification of the controlled conditions and how the controls were realized;

(b) A complete description of the methods of making observations and the adjustments, if any, to observed data.

(iv) *Econometric Studies.* (a) A presentation of the economic theory underlying the study;

(b) A complete description of the econometric model(s) and the reasons for each major assumption and specification;

(c) The definition of the variables selected and the justification for their selection;

(d) For any alternative model whose computed econometric results influenced the choice of the preferred model, a statement of the reasons for rejecting that alternative, an identification of any differences between that alternative and the preferred model with respect to variable definitions, equation forms, data, or estimation methods, and, upon request, the computed econometric results for that alternative;

(e) A reference to a detailed description in a text, manual, or technical journal for every econometric technique used in the estimation process and the reasons for selecting the technique, or, in the alternative, a description and analysis of the technique that is sufficient for a technical evaluation;

(f) Summary descriptions and source citations for all input data and, upon request, a complete listing of the data. Complete descriptions of any alterations or transformations made to the data as received from the original sources, and the reasons for making the alterations;

(g) A complete report of the econometric results including, where applicable:

(1) coefficient estimates

(2) standard errors and t-values,

(3) goodness-of-fit statistics,

(4) other appropriate test statistics,

(5) the variance/covariance matrix of the estimates,

(6) computed residuals for results computed from samples composed of fewer than 250 observations, and, upon request, other computed residuals;

(h) Descriptions of all statistical tests of hypotheses and the results of such tests;

(v) *All other studies involving statistical methodology.* (a) The formula used for statistical estimates;

(b) The standard errors of each component estimated;

(c) Test statistics and the description of statistical tests and all related computations, and final results; and

(d) Summary descriptions of input data, and upon request the actual input data shall be made available at the offices of the Commission.

(3) *Computer analyses.* (i) In the case of computer studies or analyses which are being offered in evidence, or relied upon as support for other evidence, a foundation for the reception of such materials must be laid by furnishing a general description of the program that includes the objectives of the program, the processing tasks performed, the methods and procedures employed, and a listing of the input and output data and source codes (or a showing pursuant to paragraph (k)(3)(iii) of this section as to why such codes cannot be so furnished) and such description shall be furnished in all cases. For the purpose of completing such foundation, the following additional items shall be deemed presumptively necessary and shall be furnished upon request of a participant, the Commission, or the presiding officer, unless the presumption is overcome by an affirmative showing.

(a) For all input data, designations of all sources of such data, and explanations of any modifications to such data made for use in the program;

(b) Definitions of all input and output variables or sets of variables;

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(c) A description of input and output data file organization;

(d) A hard copy of all data bases;

(e) For all source codes, documentation sufficiently comprehensive and detailed to satisfy generally accepted software documentation standards appropriate to the type of program and its intended use in the proceeding;

(f) The source code in hardcopy form;

(g) All pertinent operating system and programming language manuals; and

(h) If the requested program is user interactive, a representative sample run, together with any explanation necessary to illustrate the response sequence.

(i) An expert on the design and operation of the program shall be provided at a technical conference to respond to any oral or written questions concerning information that is reasonably necessary to enable independent replication of the program output. Machine-readable data files and program files shall be provided in the form of a compact disk or other media or method approved in advance by the Administrative Office of the Postal Regulatory Commission. Any machine-readable data file or program file so provided must be identified and described in accompanying hardcopy documentation. In addition, files in text format must be accompanied by hard-copy instructions for printing them. Files in machine code must be accompanied by hardcopy instructions for executing them.

(j) Computer simulation models offered in evidence or relied upon as support for other evidence, shall be bound by all applicable provisions of paragraph (k)(3) of this section and the separate requirements of paragraph (k)(2) of this section, to the extent that portions of the simulation model utilize or rely upon such studies. Information that compares the simulation model output results to the actual phenomena being modelled, using data other than those from which the model was developed, shall be separately identified and submitted as evidence supporting the test and validation of the simulation model. Separate statements concerning the model limitations, including limiting model design

assumptions and range of data input utilized in model design, shall be provided. Where test and validation of the entire simulation model are not possible, test and validation information shall be provided for disaggregate portions of the model. If disaggregate testing and validation are not possible, separate statements to that effect and statements regarding operational experts' review of model validity shall be provided.

(ii) Upon timely and otherwise proper request of a participant, or sua sponte, the Commission or the Presiding Officer may rule that matters other than those listed in paragraphs (k)(3)(i) (a) through (h) of this section are necessary to establish the foundation for reception of the evidence concerned and must be furnished.

(iii) When the requestor is other than the Commission or the Presiding Officer, the cost of producing the material required in paragraph (k)(3)(i) (d), (f), and (g) of this section, shall be borne by the requesting party unless otherwise ordered, for good cause shown by the requestor. When the Commission or the Presiding Officer is the requestor, it may assume or equitably allocate such costs for good cause shown by the requestee.

(iv) If the recipient of a request for materials pursuant to this paragraph (k)(3) of this section asserts that compliance with the request would conflict with patent, copyright, trade secret or contract rights applicable to the requested material, the recipient shall immediately notify the requestor and the Presiding Officer. If valid, the Presiding Officer shall devise means of accommodating such rights. Such means may include protective orders, including access under protective conditions to the computer facilities of the recipient of a request, making material available for inspection, compensation, or other procedures, according to the nature of the right affected by compliance with this paragraph (k)(3) of this section. If the Presiding Officer determines that compensation is necessary to accommodate the affected right, the cost of compensation shall be borne in the same manner that paragraph (k)(3)(iii) of this section prescribes for bearing the costs referenced there. If

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such right cannot be accommodated by reasonable compensation, or by protective orders or other procedures, and, as a result, materials required by this paragraph (k)(3) of this section cannot be provided, the Presiding Officer shall determine, in his/her discretion, whether evidence that relies upon the materials not provided shall be admissible or afforded limited weight.

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

[36 FR 396, Jan. 12, 1971, as amended at 45 FR 65580, Oct. 3, 1980; 47 FR 12796, Mar. 25, 1982; 50 FR 43392, Oct. 25, 1985; 51 FR 8827, Mar. 14, 1986; 51 FR 14992, Apr. 22, 1986; 54 FR 35494, Aug. 28, 1989; 58 FR 38976, July 21, 1993; 62 FR 45729, Aug. 29, 1997; 64 FR 67490, Dec. 2, 1999; 65 FR 6543, Feb. 10, 2000; 67 FR 67563, Nov. 6, 2002]

§ 3001.31a In camera orders.

(a) *Definition.* Except as hereinafter provided, documents and testimony made subject to *in camera* orders are not made a part of the public record, but are kept confidential, and only authorized parties, their counsel, authorized Commission personnel, and court personnel concerned with judicial review shall have access thereto. The right of the presiding officer, the Commission, and reviewing courts to disclose *in camera* data to the extent necessary for the proper disposition of the proceeding is specifically reserved.

(b) *In camera treatment of documents and testimony.* Presiding officers shall have authority, but only in those unusual and exceptional circumstances when good cause is found on the record, to order documents or oral testimony offered in evidence whether admitted or rejected, to be placed *in camera*. The order shall specify the date on which *in camera* treatment expires and shall include: (1) A description of the documents and testimony; (2) a full statement of the reasons for granting *in camera* treatment; and (3) a full statement of the reasons for the date on which *in camera* treatment expires. Any party desiring, for the preparation and

presentation of the case, to disclose *in camera* documents or testimony to experts, consultants, prospective witnesses, or witnesses, shall make application to the presiding officer setting forth the justification therefor. The presiding officer, in granting such application for good cause found, shall enter an order protecting the rights of the affected parties and preventing unnecessary disclosure of information. *In camera* documents and the transcript of testimony subject to an *in camera* order shall be segregated from the public record and filed in a sealed envelope, bearing the title and docket number of the proceeding, the notation “*In Camera* Record under § 3001.31a,” and the date on which *in camera* treatment expires.

(c) *Release of in camera information.* *In camera* documents and testimony shall constitute a part of the confidential records of the Commission and shall be subject to the provisions of § 3001.42 of this chapter. However, the Commission, on its own motion or pursuant to a request, may make *in camera* documents and testimony available for inspection, copying, or use by any other governmental agency. The Commission shall, in such circumstances, give reasonable notice of the impending disclosure to the affected party. However, such notice may be waived in extraordinary circumstances for good cause.

(d) *Briefing of in camera information.* In the submittal of proposed findings, briefs, or other papers, counsel for all parties shall make a good faith attempt to refrain from disclosing the specific details of *in camera* documents and testimony. This shall not preclude references in such proposed findings, briefs, or other papers to such documents or testimony including generalized statements based on their contents. To the extent that counsel consider it necessary to include specific details of *in camera* data in their presentations, such data shall be incorporated in separate proposed findings, briefs, or other papers marked “confidential,” which shall be placed *in camera* and become a part of the *in camera* record.

[44 FR 33880, June 13, 1979, as amended at 48 FR 15901, Apr. 13, 1983; 58 FR 38976, July 21, 1993]