

This proposed regulatory action is not a significant regulatory action subject to review by OMB under section 3(f) of Executive Order 12866.

We have also reviewed this proposed regulatory action under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order 13563 requires that an agency—

(1) Propose or adopt regulations only on a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account—among other things and to the extent practicable—the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including economic incentives—such as user fees or marketable permits—to encourage the desired behavior, or provide information that enables the public to make choices.

Executive Order 13563 also requires an agency “to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.” The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include “identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes.”

We are issuing this proposed priority only on a reasoned determination that its benefits would justify its costs. In choosing among alternative regulatory approaches, we selected those approaches that maximize net benefits. Based on the analysis that follows, the Department believes that this regulatory action is consistent with the principles in Executive Order 13563.

We also have determined that this regulatory action would not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

In accordance with both Executive orders, the Department has assessed the potential costs and benefits, both quantitative and qualitative, of this regulatory action. The potential costs are those resulting from statutory requirements and those we have determined as necessary for administering the Department’s programs and activities.

The benefits of the Rehabilitation Long-Term Training program have been well established over the years through the successful completion of similar projects. This proposed priority would promote rehabilitation counseling programs that will better prepare students to assist individuals to achieve employment in today’s challenging economy.

*Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR Part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for this program.

*Accessible Format:* Individuals with disabilities can obtain this document in an accessible format (e.g., braille, large print, audiotope, or compact disc) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**.

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Dated: June 11, 2013.

**Michael K. Yudin,**

*Delegated the authority to perform the functions and duties of the Assistant Secretary for Special Education and Rehabilitative Services.*

[FR Doc. 2013–14186 Filed 6–13–13; 8:45 am]

**BILLING CODE 4000–01–P**

## POSTAL REGULATORY COMMISSION

### 39 CFR Part 3001

[Docket No. RM2012–4; Order No. 1738]

#### Revisions to Procedural Rules

**AGENCY:** Postal Regulatory Commission.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Commission is proposing revisions to its rules of practice related to Postal Service requests for an advisory opinion from the Commission on a nationwide (or substantially nationwide) change in the nature of service. The proposed revisions are intended to expedite issuance of advisory opinions while preserving due process. The Commission invites public comment on the proposed revisions to assist with development of a final set of revised rules.

**DATES:** *Comments are due:* July 29, 2013. *Reply comments are due:* August 28, 2013.

**ADDRESSES:** Submit comments electronically via the Commission’s Filing Online system at <http://www.prc.gov>. Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

**FOR FURTHER INFORMATION CONTACT:** Stephen L. Sharfman, General Counsel, at 202–789–6820.

**SUPPLEMENTARY INFORMATION:** *Regulatory history:* 77 FR 23176 (April 18, 2012).

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#### I. Introduction

This is the second in a series of orders addressing the need for more timely completion of nature of service proceedings. The Commission’s initial order was issued as an advance notice of proposed rulemaking and solicited comments on whether changes to existing procedures and regulations are

warranted and, if so, what those changes should be.<sup>1</sup> In that same order, the Commission invited interested persons to comment on other relevant subjects. *Id.* at 2. Comments were filed by eight parties.<sup>2</sup>

In this order, the Commission proposes to amend 39 CFR Part 3001, subpart D, which sets forth new procedures for all nature of service proceedings. Under the proposed procedures, nature of service proceedings would be completed within 90 days of the date on which the Postal Service files its request under 39 U.S.C. 3661 for an advisory opinion. Comments are due 45 days after publication in the **Federal Register**. Reply comments are due 75 days after publication in the **Federal Register**.

## II. Proposed N-Case Procedures

### A. Background

Nature of service proceedings (N-Cases) involve Commission consideration of proposals by the Postal Service for “a change in the nature of postal services which will generally affect service on a nationwide, or substantially nationwide basis . . . .” 39 U.S.C. 3661(b). At the conclusion of each N-Case, the Commission must issue an advisory opinion which “conforms to the policies established under [title 39 of the United States Code].” 39 U.S.C. 3661(c). The first N-Case advisory opinion was issued in 1976.<sup>3</sup> Over the intervening 30 years, four other N-Cases were initiated.<sup>4</sup> Since 2006, five N-Cases have been docketed.<sup>5</sup>

The increasing frequency of N-Cases has been accompanied by an increase in their complexity which, in turn, has increased their length. Of the five N-Cases filed since 2006, three of those cases took 8 months or more to

complete. *See* “Survey of N-Cases” attached to APWU Reply Comments. The longest of those cases (Docket No. N2010–1) took nearly 1 year to complete. *Id.* In its comments in this proceeding and elsewhere, the Postal Service has asserted that its extremely challenging financial situation requires prompt resolution of N-Cases. *E.g.*, Postal Service Comments at 3. According to the Postal Service, the value and relevance of advice provided by the Commission in its advisory opinions depend upon timely receipt of that advice. *Id.* Moreover, although not enacted, the Senate passed legislation in the last Congress that would have required the Commission to complete N-Cases within 90 days of filing.<sup>6</sup>

A number of stakeholders, such as commercial mailers and postal employee organizations, have responded to the Postal Service’s request for the expedition of N-Cases by pointing to legal requirements, as well as practical considerations, which, they assert, weigh against the imposition of a rigid timeframe for the completion of N-Cases. Valpak Comments at 9–11. They claim that the 90-day time limit proposed by the Postal Service is just such a rigid and unrealistic time frame. *Id.*

### B. Commission’s Legal Authority

The Commission’s legal authority to issue advisory opinions is set forth in 39 U.S.C. 3661(c). That subsection provides that:

[t]he Commission shall not issue its opinion on any proposal until an opportunity for hearing on the record under sections 556 and 557 of title 5 has been accorded to the Postal Service, users of the mail, and an officer of the Commission who shall be required to represent the interests of the general public. The opinion shall be in writing and shall include a certification by each Commissioner agreeing with the opinion that in his judgment the opinion conforms to the policies established under this title.

39 U.S.C. 3661(c).

The Commission’s procedural rules implementing the requirements of section 3661 are set forth in 39 CFR part 3001, subpart D. Procedural rules of general applicability in 39 CFR part 3001, subpart A also apply.

The prohibition on the issuance of an advisory opinion “until an opportunity for hearing on the record under sections 556 and 557 of title 5 has been accorded” has historically been interpreted by the Commission to

require formal, trial-type proceedings.<sup>7</sup> Notwithstanding this interpretation, section 3661 does not prohibit the Postal Service from implementing proposed changes in postal services prior to the conclusion of Commission proceedings. Nor does section 3661 prohibit the Postal Service from implementing proposed changes in postal services found by the Commission in its advisory opinion to be inappropriate or unwise. In other words, advisory opinions issued under section 3661 are advisory in nature.

Commission rules under 39 CFR 3001.72 require the Postal Service to file its formal request for an advisory opinion not less than 90 days in advance of the date on which the Postal Service proposes to make effective the change in the nature of postal services involved. As noted, however, three of the last five N-Case decisions since 2006, took 8 months or longer to complete.

### C. Summary of Commenter Positions and Commission Analysis

C. The Postal Service believes that the Commission’s goal should be to ensure N-Case decisions are issued within 90 days. Postal Service Comments at 3. In the Postal Service’s view, the most effective way to improve N-Case efficiency would be to enact legislation, such as S. 1789, which amends or replaces section 3661. *Id.* at 6. In that regard, Senator Carper cites section 208 of S. 1789 as a guide to Commission action. Carper Comments at 2.

In the absence of legislative changes, the Postal Service urges the Commission to adopt a number of changes that it claims would streamline N-Cases. Postal Service Comments at 2–29. The Postal Service’s principal recommendation is for the Commission to “adopt a cap on the length of N-Cases that applies to all such cases . . . and . . . [to] adopt a multi-track approach to proceedings, with definite, shorter timeframes based on the complexity of the case . . . .” *Id.* at 5; *see generally id.* at 5–11. Within this framework, the Postal Service offers alternatives for reforming discovery processes in N-Cases. *Id.* at 12–20. These alternatives include Commission-led discovery, as opposed to participant-led discovery; limits on the number of interrogatories; and clearer and stricter boundaries for relevance that would restrict the scope and number of discovery requests. *Id.* It also offers other suggestions independent of its

<sup>1</sup> Order No. 1309, Advance Notice of Proposed Rulemaking on Modern Rules of Procedure for Nature of Service Cases Under 39 U.S.C. 3661, April 10, 2012 (ANOPR).

<sup>2</sup> The Appendix to this order contains a list of the parties filing comments.

<sup>3</sup> Docket No. N75–1, Advisory Opinion Concerning a Proposed Change in the Nature of Postal Services, April 22, 1976.

<sup>4</sup> Docket No. N75–2, Changes in Operating Procedures Affecting First-Class Mail and Airmail; Docket No. N86–1, Change in Service, 1986, Collect on Delivery Service; Docket No. N89–1, Change in Service, 1989, First-Class Delivery Standards Realignment; and Docket No. N2006–1, Evolutionary Network Development Service Changes, 2006.

<sup>5</sup> Docket No. N2009–1, Station and Branch Optimization and Consolidation Initiative, 2009; Docket No. N2010–1, Six-Day to Five-Day Street Delivery and Related Service Changes, 2010; Docket No. N2011–1, Retail Access Optimization Initiative, 2011; Docket No. N2012–1, Mail Processing Network Rationalization Service Changes, 2012; and N2012–2, Post Office Structure Plan, 2012.

<sup>6</sup> S. 1789, 21st Century Postal Service Act of 2012, 112th Cong. § 208 (2012) (S. 1789).

<sup>7</sup> Docket No. N2012–1, Order No. 1183, Order Denying Motion for Reconsideration of Ruling Establishing Procedural Schedule, January 31, 2012.

main proposal for improving N-Case processing. *Id.* at 20–29.

To support its regulatory alternatives to legislative action, the Postal Service relies upon *Citizens Awareness Network v. U.S.*, 391 F.3d 338 (1st Cir. 2004) in asserting that the Administrative Procedure Act (APA) “provides agencies with broad discretion to fashion procedures that make the hearing process more efficient.” *Id.* at 4 (footnote omitted). The *Citizens Awareness* decision was cited by the Commission as an example of judicial recognition of the authority of regulatory agencies “to place limits on the use of formal litigation procedures in certain types of cases . . . .” ANOPR at 6. The Commission encouraged commenters to address what form any new procedures might take, and what procedural safeguards must be preserved to assure that meaningful public participation and Commission decisions are helpful to the Postal Service’s decision making process as required by law. *Id.* at 7.

Several commenters oppose the Postal Service’s principal recommendation regarding time limits on N-Cases. *See, e.g.*, Valpak Comments at 9–11; APWU Reply Comments at 6–9. They base their opposition, in part, on the language of section 3661 that requires “a hearing on the record under sections 556 and 557 [of the APA].” *See* Valpak Comments at 2. They argue further that the 90-day limit on N-Cases proposed by the Postal Service is both impossible and inconsistent with procedural due process. *See id.* at 9–11. They also take issue with the Commission’s citation to the *Citizens Awareness* decision, asserting, for example, that “*Citizens Awareness* is not, and likely will never be, controlling authority over the Commission’s rules” and is currently “merely persuasive authority for the Commission’s formulation of new rules.” *Id.* at 13 n.17; *see also* APWU Reply Comments at 2–5.

The Public Representative believes that some changes in N-Case rules are warranted, but that the nature of those changes depends upon what “a hearing on the record under APA sections 556 and 557” requires. Public Representative Comments at 11. Although the Public Representative does not believe the *Citizens Awareness* decision supports major departures from current N-Case practice, she does not interpret that decision as precluding the exploration of ways to expedite N-Cases. *Id.* at 2. The Public Representative asserts that N-Case procedures must assure meaningful public participation and must foster the development of a sound record that permits the

Commission to provide sound expert advice to the Postal Service in a timely manner. *Id.* at 7.

The ANOPR cited *Citizens Awareness* as support for “the general proposition that agencies have flexibility to tailor their procedures to make hearing processes more efficient.” ANOPR at 7. That general proposition is well settled. *See Am. Trucking Ass’n, Inc. v. United States*, 627 F.2d 1313, 1321 (D.C. Cir. 1980) cited by the Court in *Citizens Awareness*, 391 F.3d at 349. As also pointed out by the Court in *Citizens Awareness*, it is equally well settled that “[a]n agency’s rules, once adopted, are not frozen in place . . . [and that] . . . [t]he opposite is true: an agency may alter its rules in light of its accumulated experience in administering them [citation omitted].” *Id.* at 351.

What appears to be of greatest concern to commenters who have attempted to distinguish the *Citizens Awareness* decision is their suspicion that the Commission intends to implement the particular regulatory changes at issue in *Citizens Awareness*, (such as the substitution of “open file discovery” for traditional forms of discovery), in N-Cases solely because these changes were approved by the *Citizens Awareness* Court for use in Nuclear Regulatory Commission proceedings. This suspicion is unfounded. As the Commission expressly stated in the ANOPR, “procedures differ from agency to agency and . . . changes in those procedures require careful consideration in the specific statutory and regulatory contexts presented.” ANOPR at 7. It is in the context of section 3661 and experience in adjudicating N-Cases that the procedures discussed below are being proposed.

Notwithstanding their objections to the Postal Service’s main proposal, several commenters have suggested various procedural changes intended to accelerate the pace of N-Cases and expedite the issuance of advisory opinions. Among the proposed changes are: (1) A proposal to require pre-filing briefings by the Postal Service; (2) a proposal to tighten the timeframes for objecting to discovery requests and for moving to compel production of discovery materials; and (3) a proposal to accelerate access to non-public materials, *e.g.*, APWU Comments at 2–3, 6, 6–7. NNA does not oppose shorter procedural schedules, provided they do not impose unrealistic litigation deadlines that place additional costs on interested parties. NNA Comments at 3. NNA does oppose the elimination of fact finding and a shorter administrative process that defeats the purpose of oversight and leads to less transparency.

*Id.* These and other suggestions have been considered by the Commission in preparing the proposal that is the subject of this notice of proposed rulemaking.

#### D. Overview of the Proposed Procedures

Comments filed in response to the ANOPR suggest two significantly different approaches to reduce delays in the issuance of N-Case advisory opinions. On the one hand, the Postal Service proposes strict time deadlines on N-Case proceedings and offers suggested procedural changes that it believes would enable the Commission to meet those deadlines. It urges adoption of a “multi-track approach” that would distinguish between relatively simple N-Cases to be completed within 45 days, cases of intermediate complexity to be completed within 60 days, and all other N-Cases, which would be subject to a 90-day time limit.

In order to meet the applicable 45-day or 90-day deadline, fundamental changes would be made in the manner in which discovery and hearings would be conducted. For example, the traditional method of discovery on the Postal Service would be replaced by the method used in exigent rate cases conducted under 39 U.S.C. 3622(d)(1)(E) and 39 CFR part 3010, subpart E. Postal Service Comments at 12–16. This latter method permits participants to suggest lines of discovery to the Commission, but gives the Commission the ultimate authority to decide whether and, if so, which suggested discovery requests to use. Similarly, the Postal Service asserts that cross-examination at hearings either be eliminated entirely or more tightly controlled. *Id.* at 20–25. Other suggested procedural changes include a shortened period for intervention, *id.* at 27; the elimination of field hearings, *id.* at 25–27; and the elimination of multiple rounds of hearings, *id.* at 5.

A different approach is proposed by the commenters opposed to the Postal Service’s multi-track approach. These commenters object to the establishment of time deadlines. APWU Reply Comments at 6–9; Valpak Comments at 9–11. Instead, they offer suggestions to improve and refine traditional procedures in order to reduce delays. For example, they suggest a more cooperative exchange of information prior to the filing by the Postal Service of its request for an advisory opinion. APWU Comments at 2–3. They also suggest limiting the number of discovery requests that can be made by limited participators, shortening the time periods for responding to motions and discovery requests, and improving

procedures for gaining access to relevant non-public information in the possession of the Postal Service. *Id.* at 5–7.

Based upon its initial review of the ANOPR comments, the Commission tentatively concludes that the most effective way of assuring timely issuance of advisory opinions is to adopt a time deadline for N-Case completion. Since, however, the goal of N-Cases is not simply to issue prompt opinions, but to issue meaningful opinions that adequately address relevant issues, participants must be afforded an opportunity to discover facts and challenge the factual assertions of others that bear upon relevant issues.

The imposition of time deadlines on N-Cases without fatally impairing the ability of participants to develop an adequate factual record by means of discovery and cross-examination presents a number of challenges. Perhaps the greatest challenge is to provide for adequate discovery within a restricted time period. Another significant challenge is to ensure that participant cross-examination is adequate to explore relevant issues while not unnecessarily or unduly prolonging hearings.

Although the requirement for the Postal Service to file its formal request for an advisory opinion not less than 90 days in advance of the proposed effective date has been in effect since 1973, the current rules challenge the Commission's ability to issue timely advisory opinions within such 90-day period.

In this notice, the Commission proposes procedural changes intended to preserve adequate opportunities for discovery and cross-examination within a fixed time period of 90 days from the date of filing of the Postal Service's request until the issuance of an advisory opinion. The principal elements of the proposed N-Case format are:

- A requirement that N-Cases conducted within a fixed time period provide a pre-filing phase during which a free and open exchange of information is conducted;
- Revised filing requirements intended to confirm that information was freely exchanged during the pre-filing period and which encourage submission of a complete and final service change proposal;
- The issuance of an initial notice and scheduling order based upon a pro forma procedural schedule that provides for completion of the proceeding within a fixed time period;
- Elimination of the "limited participator" status in N-Cases;
- Expedited filing deadlines for filing and responding to motions;

- New N-Case discovery procedures that build upon the pre-filing conference and which include a provision for an initial mandatory technical conference; a limitation on the number of written interrogatories; and the continued use of document requests, and requests for admissions traditionally used in connection with hearings conducted on the record;
- Revised procedures for prompter access to non-public materials;
- The expedited filing of rebuttal and surrebuttal testimony, if any;
- A process by which participants elect to file rebuttal testimony and a restriction on rebuttal cases that limits the scope of such cases to material issues relevant to the specific proposal made by the Postal Service in its advisory opinion request;
- A limitation on the filing of surrebuttal cases that requires a prior Commission determination that exceptional circumstances make the filing of a participant's proposed surrebuttal necessary;
- The elimination, in most cases, of field hearings;
- Revised hearing procedures providing for back-to-back hearings for the Postal Service's direct case, rebuttal testimony, if any, and surrebuttal testimony, if any;
- The implementation on a case-by-case basis of limitations on cross-examination to factual issues relevant to the Postal Service's proposal;
- A limitation on the length of initial and reply briefs and the adoption of an expedited schedule for filing such briefs; and
- The adoption of a policy of issuing advisory opinions that are targeted more precisely to the Postal Service's proposals and, when appropriate, instituting special studies that explore related subjects.

Each of these features of the proposed N-Case format is explained more fully below.

#### 1. Generally Applicable Rules of Practice

Nature of service proceedings currently conducted under subpart D are subject to the Commission's generally applicable procedural rules in subpart A. 39 CFR 3001.71. In some cases, the proposed N-Case procedures require departures from the generally applicable subpart A procedures. Some of these departures are relatively easy to accommodate by language changes to subpart A rules. For example, the proposed revision to 39 CFR 3001.17 would add an additional element to the content requirements of Commission notices in N-Case proceedings; *see also* proposed changes to 39 CFR 3001.5(h).<sup>8</sup>

<sup>8</sup> On March 19, 2013, the Commission instituted a rulemaking proceeding to make certain minor changes to its rules of practice in 39 CFR Part 3001. Notice of Proposed Rulemaking Regarding Minor Adjustments to the Rules of Practice, Docket No. RM2013–1, March 19, 2013. The changes proposed to 39 CFR 3001.5(h) in Docket No. RM2013–1 are independent of the changes being proposed to that same rule in this proceeding.

Other proposed changes to N-Case procedures would require more substantial changes to subpart A rules of practice. For example, significant changes would be required in the rules governing motions (39 CFR 3001.21), discovery (39 CFR 3001.25–3001.28), hearings (39 CFR 3001.30), and legal briefs (39 CFR 3001.34). To accommodate the more significant changes, the Commission proposes to exclude specific subpart A rules from use in N-Cases and, in their place, establish specific N-Case rules in subpart D to cover these subjects. In this manner, the Commission seeks to foster the continued use of subpart A rules of practice, while establishing more specialized procedures in subpart D that are needed to expedite N-Cases.

#### 2. Pre-Filing Phase

APWU suggests that the N-Case process could be shortened if the Postal Service briefed the Commission and interested parties in advance of its filing. APWU Comments at 2. It states that the Postal Service often knows the parameters of its formal proposal months before it files its request for an advisory opinion. APWU also observes that the first few weeks after an N-Case has been filed are often without much activity because parties are reviewing the materials and determining whether intervention is warranted. *Id.* APWU asserts that pre-filing briefings would allow parties to identify potential issues of concern in advance and find and contract with experts early. It would also allow the Postal Service to pre-empt discovery requests and/or discovery disputes by addressing issues of concern in its initial filing. *Id.* at 3.

In response, the Postal Service states that absent any actual limits on N-Case procedures, it is not a foregone conclusion that this head start would actually reduce the time spent on discovery and witness preparation. Postal Service Reply Comments at 12. It maintains that parties already have ample access to baseline information about Postal Service operations in the form of Annual Compliance Reports, Annual Compliance Determinations, Sarbanes-Oxley Act disclosures, and other periodic reports and claims that it often provides advance public notice of its plans to change the nature of postal services already. *Id.* at 13.

Expanding and formalizing the pre-filing process are critical components of expedited N-Case procedures. Participants will be able to voice their concerns at an earlier point in time, which the Commission expects will aid the Postal Service in development of its formal proposal. The information

obtained prior to the initial filing will also expedite the review of the Postal Service's formal proposal when it is filed and therefore reduce the need for extensive discovery while still allowing for issuance of an informed advisory opinion. The Postal Service has affirmed that, on occasion, it has provided advance notice of its own volition. The Commission believes that making this practice routine will maximize its potential benefit.

The proposal to formalize pre-filing consultations is not intended to prevent the Postal Service from conducting private discussions with individual mailers or other interested persons. Such discussions with customers, suppliers, and others can, themselves, allow the Postal Service to obtain information useful in providing, and in considering changes to, postal services. The Commission's proposal is intended to ensure that all participants with a reasonably foreseeable interest in an N-Case have a fair opportunity to discuss proposed changes in the nature of postal services with the Postal Service before a request for an advisory opinion is filed. The discussions envisioned by the Commission would be informal and off the record.

As proposed, the new rules would require potential stakeholders be consulted and invited to comment on the Postal Service's proposal. The Postal Service would be required to notify the Commission that it was commencing pre-filing discussions. Upon receipt of such notice, the Commission shall issue a notice of pre-filing conference(s), which shall be published in the **Federal Register**, and appoint a Public Representative.

### 3. Initiation of a Case

#### a. Postal Service Request

When filing a request for an advisory opinion, the Postal Service would be required to indicate that the required pre-filing conference(s) occurred. The Postal Service would also be required to specify the time and place of the conference(s) and provide a summary of discussions conducted at the conference(s). In addition, the Postal Service would be required to explain how it made a good faith effort to address criticisms and suggestions made by interested persons prior to the filing of the request. All other filing requirements previously imposed by 39 CFR 3001.72 will remain applicable, including the mandatory supporting data to be filed with the request. The discovery period would commence on the date of the filing.

#### b. Notice and Scheduling Order

As soon as is practicable after receipt of the Postal Service's formal request, the Commission will issue a notice and scheduling order. This order will set deadlines for initial and reply comments, and set a tentative schedule for the case including: (1) A deadline for notices of intervention; (2) the date(s) for the mandatory technical conference between the Postal Service, Commission staff, and interested parties; (3) the deadline for discovery on the Postal Service's direct case; (4) the deadline for responses to participant discovery on the Postal Service's case; (5) the deadline for participants to confirm their intent to file a rebuttal case; (6) the date for filing participant rebuttal cases, if any; (7) the date for filing motions for leave to file surrebuttal testimony and answers thereto; (8) the date for filing surrebuttal testimony, if any; (9) the date(s) for hearings on the Postal Service's direct case, rebuttal testimony, if any, and surrebuttal testimony, if any; (10) the date for filing initial briefs; (11) the date for filing reply briefs; and (12) a deadline for issuance of an advisory opinion, which is 90 days from the date of filing. These dates are subject to change for good cause only.

APWU asserts that incomplete or frequently revised proposals are a significant cause of delay in the process. APWU Comments at 3. If the Commission makes the determination that the Postal Service's formal proposal is incomplete, or if significant modifications are made while the case is in progress, deadlines for the case may be extended.

A pro forma schedule is attached to the regulations for illustrative purposes. Due dates would remain within the general range of the sample schedule, but would be adjusted to accommodate holidays and weekends. The new procedural schedule would eliminate several steps traditionally present in N-Cases, such as discovery on intervenor testimony and exhibits. The proposed schedule also reflects abbreviated motion deadlines, mandatory pre-filing discussions, and changes in traditional discovery procedures.

#### c. Participants

Under the current rules for N-Cases, participants must file interventions designating whether they wish to be full or limited participants in the proceeding. See 39 CFR 3001.20 and 3001.20a. APWU claims that "[t]his distinction as currently applied makes no difference as to the level of participation in discovery an intervenor is allowed to undertake." *Id.* at 5.

Therefore, it requests that the Commission consider revising the definitions of limited and full participants to better describe the type of participation in discovery allowed or required by each. *Id.*

In the interest of simplifying the process and standardizing the level of participation among all parties, the Commission proposes to eliminate the distinction between full and limited participants in an N-Case proceeding. This change is being made by excluding 39 CFR 3001.20a from subpart A rules applicable to N-Cases. See proposed section 3001.71. All formal intervenors shall be considered full participants and allowed equal opportunity to participate in discovery.

#### d. Motions

##### (i) In General

Under 39 CFR 3001.21 of the Commission's current rules of practice, answers to motions must be filed within 7 days. Shortening the time period for answers to motions may help reduce overall delay. The Commission is therefore proposing that the time permitted for answers to all motions, except those discussed below, be reduced from 7 days to 5 calendar days. See proposed 39 CFR 3001.75. This will allow the participants adequate opportunity to contest motions while also preserving a more expeditious pace of the proceeding.

##### (ii) Motions To Be Excused From Answering Discovery Requests

Disputes frequently arise in N-Cases over the appropriateness of discovery requests directed at the Postal Service. In some cases, the Postal Service challenges the relevance of a request because it is alleged to go beyond the scope of the Postal Service's proposed changes in postal services. In other cases, the Postal Service opposes a discovery request because of the alleged burden it would impose. Under the Commission's current rules of practice, the process of resolving these disputes begins with a Postal Service objection to a discovery request and is followed by a participant's motion to compel and a Postal Service answer to the motion to compel.

The Commission is proposing to accelerate the resolution of such disputes by eliminating the antecedent requirement of a Postal Service objection to a discovery request before commencement of the motions' practice aimed at resolving the dispute. In lieu of an initial objection to a discovery request, the Postal Service would be required to file a motion to be excused

from answering the request, within 3 days of the filing of the discovery request at issue. The proponent of the request would file an answer within 2 days, and the dispute would be resolved either by the Commission or the presiding officer. The shortened procedure, coupled with shortened filing deadlines for both the motion and answer, is designed to accelerate resolution of discovery requests.

Although the Postal Service has an obligation in all cases to provide complete and responsive answers to discovery requests, the Commission recognizes that in some cases, discovery responses could arguably be unresponsive to a request. In such cases, the participant seeking discovery could file a motion to compel a responsive answer under the new, expedited provisions governing the filing of motions.

#### (iii) Motions To Strike

Under the Commission's current rules of practice, motions to strike testimony must be filed at least 14 days before a witness's scheduled appearance. 39 CFR 3001.21(c). The Commission is proposing to shorten that period by requiring that motions to strike testimony be filed at least 3 calendar days before a witness's scheduled appearance, unless good cause is shown. Answers to motions to strike would also be reduced from the current 7 days to 2 calendar days.

#### (iv) Motions for Leave To File Surrebuttal Testimony

Proposed section 3001.91, discussed below, requires participants who wish to submit surrebuttal testimony to obtain prior leave from the Commission to file such testimony. In order to obtain leave to file, participants must file a motion under proposed subsection 3001.75(d). This new subsection would require that such motions be filed on or before the date specified in the procedural schedule established pursuant to proposed section 3001.80. The deadline for filing a motion for leave to file surrebuttal testimony will be 2 days after the filing of that rebuttal evidence which is to be addressed by the proposed surrebuttal. Answers to motions for leave to file surrebuttal testimony, if any, must be filed within 2 days.

### 4. Discovery

#### a. General

The Postal Service asserts that "[l]engthy discovery periods contribute to the overall length of time to resolve N-Case proceedings, thereby postponing the issuance of an advisory opinion."

Postal Service Comments at 13. Other parties contend that the opportunity for robust discovery must be preserved. See APWU Comments at 4; NNA Comments at 2. The Commission's proposal seeks to eliminate delay in discovery while continuing to allow participants a reasonable amount of time to obtain the necessary information.

In seeking to reconcile these objectives, the Commission proposes changes to the manner in which relevant information is obtained by participants, including addition of a mandatory technical conference. In conjunction with pre-filing discussions, the mandatory conference would enable the participants to obtain a more comprehensive understanding of the Postal Service's proposal at an earlier stage in the process.

As part of this general scheme of streamlined discovery to promote expedition, each participant would be limited to serving 25 interrogatories, which includes all initial and follow-up questions. This limit would not apply to requests for admission or to requests for production of documents or information. However, requests for production of documents and information would be limited in scope. Participants would only be required to furnish existing data in response to a request by another participant. They would not be obligated to respond to requests for data by providing data that would have to be created or projected from existing data. The Commission anticipates that the information obtained from pre-filing discussions and technical conference will obviate the need for an extensive number of interrogatories.

The Commission is also proposing changes in the procedures for more expeditious resolutions of discovery disputes. See Section II.D.3.d.ii., *supra*.

#### b. Mandatory Technical Conference

On the day(s) set forth in the scheduling order and for all days within the second and third week after the filing of its formal proposal (excluding weekends and legal holidays), the Postal Service must make witnesses available for a mandatory technical conference with Commission staff and interested participants. This conference will be conducted off the record for the purpose of clarifying various technical issues in the Postal Service's initial request and for identifying and requesting information that is relevant to evaluation of the Postal Service's proposed changes in the nature of postal services. Information obtained during the conference may also be used to seek

additional information by means of formal discovery.

#### c. Written Interrogatories

Under the new rules, participants also would be limited to filing a total of 25 interrogatories for the entire N-Case. An interrogatory with subparts that are logically and factually subsumed within and necessarily related to the primary question will be counted as one interrogatory. This limit on the number of interrogatories is part of a comprehensive scheme to streamline discovery that would be supplemented by pre-filing consultations and mandatory technical conferences, among others.

APWU recommends shortening the time for answering interrogatories from 14 days to 10 days, and that the time for objections to interrogatories be shortened from 10 days to 5 days. APWU Comments at 6. The Commission has tentatively determined that further shortening the time for answering interrogatories from 14 days to 7 calendar days would be appropriate given the expedited nature of the discovery period.

Disputes over interrogatories would be resolved on an expedited basis under the motion procedures contained in proposed § 3001.75. Under those procedures, the Postal Service could challenge interrogatories directly in whole or in part by filing a motion to be excused from answering within 3 calendar days of service. See proposed section 3001.75(b).

#### d. Requests for Production

Requests for production of documents or information are appropriate for obtaining data actually in existence at the time of the request. Participants are not required to respond to requests for data by providing data that would have to be created or projected from existing data. The time period for responding to a request for production of documents would be shortened from 14 days to 7 calendar days.

As in the case of interrogatories, disputes over production requests would be resolved on an expedited basis under the motion procedures contained in proposed section 3001.75. Challenges to production requests could be made directly by the Postal Service's filing of a motion to be excused from answering within 5 calendar days of service. See section 3001.75(b).

#### e. Admissions

As under existing Commission practice, any participant may serve upon any other participant a written request for the admission of any

relevant, unprivileged facts, including the genuineness of any documents or exhibits to be presented at the hearing. Admissions are not considered interrogatories and therefore are not subject to the limit of 25 interrogatories. The time period for responding to a request for admission is shortened from 14 days to 7 calendar days.

As in the case of interrogatories and requests for production, disputes over requests for admissions would be resolved on an expedited basis under the motion procedures contained in proposed section 3001.75. Challenges to production requests could be made directly by the Postal Service's filing of a motion to be excused from answering. See proposed section 3001.75(b).

A motion to be excused from answering requests for admission would be due within 5 calendar days of service. Requests for admissions in response to which no motion to be excused from answering is filed would be deemed admitted. Answers to motions to be excused from answering would be due within 7 calendar days of the response or motion.

#### 5. Participant Rebuttal Cases

In order to ensure the timely issuance of advisory opinions, the scope of participant rebuttal cases must be limited to the proposal that is the subject of the Postal Service's advisory opinion request. Rebuttal cases that propose, or seek to address, alternatives to the Postal Service's proposal will no longer be permitted.

If participants wish to file rebuttal testimony, they must, by the date provided for in the procedural schedule, confirm this intent in writing with the Commission. No Commission leave will be required to file rebuttal testimony. Any rebuttal testimony filed by a participant is due approximately 5 days after the confirmation of intent to file a rebuttal case is filed.

If no participant files a notice of intent to submit a rebuttal case, hearings on the Postal Service's direct case shall commence approximately 5 days after the deadline for confirming an intent to submit rebuttal and the Commission may adjust such remaining procedural dates as it deems to be appropriate.

#### 6. Surrebuttal Cases

In some cases, the Postal Service or other participants may wish to file surrebuttal testimony. The filing of surrebuttal will only be permitted if the Commission first determines that exceptional circumstances warrant such filing. The scope of any surrebuttal must be limited to material issues relevant to the Postal Service's proposal and to the

rebuttal testimony that is to be addressed by the proposed surrebuttal.

Motions for leave to file surrebuttal must be filed with the Commission by the date provided in the procedural schedule. Participants requesting to file surrebuttal evidence bear the burden of demonstrating the need for surrebuttal. The motion may only be granted if the Commission, in its discretion, determines that exceptional circumstances exist.

If a motion for leave to file surrebuttal is granted, the moving participant must file its proposed surrebuttal by the date previously established in the procedural schedule.

In the event no motion for leave to file surrebuttal is filed, hearings on the Postal Service's request and rebuttal testimony, if any, will commence approximately 5 days after the deadline for requesting leave to file surrebuttal and the Commission may adjust such remaining procedural dates as it deems appropriate.

If one or more motions for leave to submit surrebuttal are filed, hearings shall commence approximately 5 days after the date surrebuttal would have otherwise been due under the previously established procedural schedule.

#### 7. Hearings

The rule currently governing hearings in N-Cases is rule 30 of the Commission's rules of practice. See 39 CFR 3001.30. A new rule applicable to hearings in N-Cases is being adopted which makes modifications in the N-Case hearing process. Under the new procedure, hearings will be held continuously and sequentially, as follows: (1) hearings on the Postal Service's case-in-chief; (2) hearings on participant rebuttal testimony, if any; and (3) hearings on surrebuttal testimony, if any.

The commencement date of hearings will depend upon whether rebuttal cases are filed and upon whether any participant requests leave to file a surrebuttal case. See, *infra*, proposed Appendix A to Part 3001, subpart D, Pro Forma N-Case Procedural Schedule, lines 8–13. For example, if, in particular cases, no participant wishes to file rebuttal or surrebuttal testimony (or if leave to file surrebuttal testimony is denied), hearings and adjustments in the procedural schedule may be made to accelerate the filing of briefs.

Hearings will be expedited by limiting cross-examination to material issues relevant to the Postal Service's proposal. Cross-examination that seeks to explore alternative proposals will not be permitted. Such proposals will, if

appropriate, be considered in special studies or new public inquiry proceedings. See proposed rule 3001.72.

#### 8. Briefing

The briefing process in N-Cases will be streamlined by the adoption of strict page limits and an accelerated briefing schedule. The length of initial and reply briefs shall be limited to 14,000 words and 7,000 words, respectively. Initial briefs shall be filed approximately 7 days following the conclusion of hearings. Reply briefs shall be filed 7 days thereafter.

#### 9. Procedure for Access to Non-Public Materials

APWU claims that the current process required for intervenors to access non-public information is burdensome and causes unnecessary delays. It advocates a simplified approach for those parties who do not have a competitive relationship with the Postal Service. APWU Comments at 7. The Postal Service states that it is not evident that the Commission's procedures for protecting sensitive information actually contribute to the protracted schedules of N-Cases, but that it "would not be averse to further exploration, in an appropriate venue, of ways in which these procedures could be made more efficient." Postal Service Reply Comments at 15–16.

In light of the shortened discovery period, the Commission agrees that an expeditious process is needed for making non-public information in nature of service proceedings available more promptly to qualified representatives of participants. However, the implications of APWU's proposals could extend beyond the boundaries of N-Cases and are therefore more properly the subject of review with the benefit of comments from a broader spectrum of interested persons.

The Commission notes that section 3007.40 of its regulations, 39 CFR 3007.40, provides mechanisms for expediting access to information designated as non-public by the Postal Service. In the absence of a Postal Service objection, access to non-public material can be obtained from the Commission within a few days of the request for access. See 39 CFR 3007.40(d)(2). For example, if a person requesting access reaches agreement with the Postal Service by the time it files its request with the Commission, that person can so represent in its filing. In such a case, the Commission would be prepared promptly to issue an order granting access.



## 10. Advisory Opinions and Special Studies

Proposed section 3001.72 provides that the Commission shall issue its advisory opinion no later than 90 days after the filing of the Postal Service's request unless the Commission makes a determination of good cause for extending the 90-day deadline. A determination of whether good cause exists would, of necessity, be case specific. The Commission is, however, committed to issuing advisory opinions within 90 days of filing.

As an additional means of expediting N-Cases, the Commission proposes to follow a policy of limiting the scope of its advisory opinion to the changes in postal services proposed by the Postal Service. While alternative changes might be noted, they would not be evaluated. If, in any proceeding, alternatives or related issues of significant importance arise, the Commission may, in its discretion, undertake an evaluation of such alternative or issues by means of special studies, public inquiry proceedings, or other appropriate means.

### III. Section-by-Section Analysis

*Subpart D revisions.* Part 3001, subpart D, of title 39, Code of Federal Regulations, which deals with rules applicable to requests for changes in the nature of postal services, is amended and establishes new procedural rules applicable to Postal Service requests for advisory opinions on proposed changes in the nature of postal services.

Section 3001.71 replaces current section 3001.71. New section 3001.71 makes the rules in subpart D applicable to requests by the Postal Service pursuant to 39 U.S.C. 3661 for Commission advisory opinions on proposed changes in the nature of postal services.

Section 3001.72 is a new section that provides that, in the absence of a determination of good cause, advisory opinions in nature of service proceedings will be issued not later than 90 days following the filing of the Postal Service's request for an advisory opinion. Section 3001.72 also provides for Commission authorization of special studies of issues arising out of nature of service proceedings.

Section 3001.73 is a new section that provides for the use of calendar days in computing time periods under subpart D.

Section 3001.74 replaces section 3001.75. New section 3001.74 requires the Postal Service to serve copies of formal requests for advisory opinions on intervenors and the officer of the

Commission designated to represent the interests of the general public.

Section 3001.75 is a new section that establishes shortened deadlines for the filing of motions and answers to motions in N-Cases. This section also establishes a procedure for filing motions to be excused from answering discovery requests and a procedure for requesting leave to file surrebuttal.

Section 3001.80 is a new section that describes the contents of the notice and scheduling order to be issued by the Commission after the Postal Service files a request for an advisory opinion on proposed changes in the nature of postal services.

Section 3001.81 is a new section containing pre-filing requirements. New section 3001.81 requires the Postal Service to engage in discussions with potentially affected participants before filing a request for an advisory opinion on proposed changes in the nature of postal services.

Section 3001.82 replaces section 3001.72. New section 3001.82 establishes requirements for the filing of Postal Service requests for advisory opinions in N-Cases.

Section 3001.83 replaces section 3001.74. New section 3001.83 establishes requirements for the contents of requests for advisory opinions.

Section 3001.84 replaces section 3001.73. New section 3001.84 establishes requirements for the filing by the Postal Service of prepared direct testimony with requests for advisory opinions.

Sections 3001.85 through 3001.89 are new sections that establish expedited discovery procedures in N-Cases.

Section 3001.90 is a new section governing the filing of participant rebuttal cases that respond to the Postal Service's direct case.

Section 3001.91 is a new section governing the filing of surrebuttal testimony that responds to rebuttal testimony filed under section 3001.90.

Section 3001.92 is a new section that prescribes procedures for hearings on the record in nature of service proceedings that differ from the procedures prescribed in section 3001.30.

Section 3001.93 is a new section that establishes page limitations for initial and reply briefs and provides for expedited briefing in nature of service proceedings.

Appendix A to Part 3001, subpart D, Pro Forma N-Case Procedural Schedule is a new appendix to N-Case rules that provides a template for use in establishing procedural schedules in individual cases.

*Conforming revisions to other subparts.* Section 3001.3 is amended to exclude specific subpart A rules of practice from use in N-Cases.

Section 3001.5(h) is amended to eliminate the distinction between participants and limited participants in N-Cases.

Section 3001.15 is amended to reflect that the computation of time periods of 5 days or less in proceedings conducted under subpart D includes Saturdays, Sundays, and federal holidays.

Section 3001.17 is amended to require the inclusion in notices of nature of service proceedings conducted under 39 CFR Part 3001, subpart D of the procedural schedule required by 39 CFR 3001.80.

Section 3001.20(a) is amended to preclude participation in N-Cases as a limited participant.

Section 3001.20(d) is amended to shorten the time period for filing oppositions to notices of intervention that are submitted in nature of service proceedings conducted under 39 CFR Part 3001, subpart D.

Section 3001.31(e) is amended to shorten the period for designating evidence received in other Commission proceedings for entry into the N-Case record. The amended subsection also shortens the period for objecting to designations.

Section 3001.31(k)(4) is amended to shorten the time periods for requesting entry into an N-Case record of evidence received in another Commission proceeding and for expending responses to requests made pursuant to this section.

### IV. Conclusion

The Commission seeks comments on its proposed rules applicable to requests by the Postal Service for changes in the nature of postal services.<sup>9</sup>

### V. Ordering Paragraphs

*It is ordered:*

1. Comments on proposed part 3001, subpart D of title 39, Code of Federal Regulations, are due 45 days after publication in the **Federal Register**.

2. Reply comments are due 75 days after publication in the **Federal Register**.

3. Patricia A. Gallagher, previously designated to represent the interests of the general public in this docket, will continue in that capacity.

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

<sup>9</sup> [Reserved]



## Appendix to Order No. 1738—Initial and Reply Comments

### Initial Comments

- Comments of National Newspaper Association Witness on Proposed Rules for Nature of Service Proceedings, June 8, 2012 (NNA Comments)
- Letter from Senator Tom Carper to the PRC, June 15, 2012 (Carper Comments)
- Comments of David B. Popkin, June 18, 2012 (Popkin Comments)
- Comments of the Public Representative in Response to Order No. 1309, June 18, 2012 (Public Representative Comments)
- United States Postal Service Initial Comments, June 18, 2012 (Postal Service Comments)
- Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. Comments on Advance Notice of Proposed Rulemaking, June 18, 2012 (Valpak Comments)
- APWU Initial Response to Advance Notice of Proposed Rulemaking on Modern Rules of Procedure For Nature of Service Cases Under 39 U.S.C. 3661, June 19, 2012 (APWU Comments)<sup>10</sup>
- Comments of Mark Jamison, June 25, 2012 (Jamison Comments)<sup>11</sup>

### Reply Comments

- Reply Comments of the Public Representative, July 17, 2012 (Public Representative Reply Comments)
- United States Postal Service Reply Comments, July 17, 2012 (Postal Service Reply Comments)
- Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. Reply Comments on Advance Notice of Proposed Rulemaking, July 17, 2012 (Valpak Reply Comments)
- APWU Reply Comments to Advance Notice of Proposed Rulemaking on Modern Rules of Procedure for Nature Of Service Cases Under 39 U.S.C. 3661 [Errata], July 18, 2012 (APWU Reply Comments)<sup>12</sup>

### List of Subjects in 39 CFR Part 3001

Administrative practice and procedure, Freedom of information, Postal Service, Sunshine Act.

For the reasons discussed in the preamble, the Commission proposes to

<sup>10</sup> Accompanying the APWU Comments was a Motion for Late Acceptance of APWU Initial Response to Advance Notice of Proposed Rulemaking on Modern Rules of Procedure for Nature of Service Cases Under 39 U.S.C. 3661, June 19, 2012. The motion is granted.

<sup>11</sup> Accompanying the Jamison Comments was a Motion for Late Acceptance of Mark Jamison Comments to Advance Notice of Proposed Rulemaking on Modern Rules of Procedure for Nature of Service Cases Under 39 U.S.C. 3661, June 25, 2012. The motion is granted.

<sup>12</sup> These reply comments were filed on July 18, 2012, to correct a number of typographical errors contained in reply comments filed the day before. See Notice of Errata APWU Reply Comments to Advance Notice of Proposed Rulemaking on Modern Rules of Procedure for Nature of Service Cases Under 39 U.S.C. 3661, July 18, 2012. The corrected July 18, 2012 APWU Reply Comments are hereby accepted for filing.

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 part 3001 continues to read as follows:

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

#### Subpart A—Rules of General Applicability

■ 2. Revise § 3001.3 to read as follows:

##### § 3001.3 Scope of rules.

Except as otherwise provided in § 3001.71 of this chapter, the rules 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. In § 3001.5, revise paragraph (h) to read as follows:

##### § 3001.5 Definitions.

(h) *Participant* means any party and the officer of the Commission who is designated to represent the interests of the general public. In a proceeding that is not conducted under subpart D of this part, for purposes of § 3001.11(e), §§ 3001.12, 3001.21, 3001.23, 3001.24, 3001.29, 3001.30, 3001.31, and 3001.32 only, the term “participant” includes persons who are limited participators.

■ 4. Revise § 3001.15 to read as follows:

##### § 3001.15 Computation of time.

Except as otherwise provided by law, in computing any period of time prescribed or allowed by this part, or by any notice, order, rule or regulation of the Commission or a presiding officer, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included unless it is a Saturday, Sunday, or federal holiday for the Commission, in which event the period runs until the end of the next day which is next day which is neither a Saturday, Sunday, nor a federal holiday. Except in proceedings conducted under subpart D of this part, in computing a period of time which is 5 days or less, all

Saturdays, Sundays, and federal holidays observed by the Commission are to be excluded.

■ 5. In § 3001.17, redesignate paragraph (c)(5) as paragraph (c)(6) and add new paragraph (c)(5) to read as follows:

##### § 3001.17 Notice of proceeding.

\* \* \* \* \*

(c) \* \* \*

(5) In proceedings under subpart D of this part involving Postal Service requests for issuance of an advisory opinion, the notice issued under § 3001.17 shall include the procedural schedule provided for under § 3001.80 of this chapter; and

\* \* \* \* \*

■ 6. In § 3001.20, revise paragraph (d) to read as follows:

##### § 3001.20 Formal intervention.

\* \* \* \* \*

(d) *Oppositions.*

(1) Except as otherwise provided in paragraph (d)(2) of this section, oppositions to notices of intervention may be filed by any participant in the proceeding no later than 10 days after the notice of intervention is filed.

(2) Oppositions to notices of interventions in proceedings conducted under subpart D of this part may be filed by any participant in the proceeding no later than 3 days after the notice of intervention is filed.

(3) Pending Commission action, an opposition to intervention shall delay on a day-for-day basis, the date for responses to discovery requests filed by that intervenor.

\* \* \* \* \*

■ 7. In § 3001.20a, revise the introductory text and republish paragraph (a) to read as follows:

##### § 3001.20a Limited participation by persons not parties.

Except for cases noticed for a proceeding under subpart D of this part, any person may, notwithstanding the provisions of § 3001.20, appear as a limited participator in any case that is noticed for a proceeding pursuant to § 3001.17(a) in accordance with the following provisions:

(a) *Form of intervention.* Notices of intervention as a limited participator shall be in writing, shall set forth the nature and extent of the intervenor's interest in the proceeding, and shall conform to the requirements of §§ 3001.9 through 3001.12.

\* \* \* \* \*

■ 8. In § 3001.31, revise paragraphs (e) and (k)(4) to read as follows:

##### § 3001.31 Evidence.

\* \* \* \* \*

(e) *Designation of evidence from other Commission dockets.* (1) 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.

(2) In proceedings conducted under subpart D of this part, these requests must be made at least 6 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 3 days. Oppositions to requests for counter-designations are due within 2 days.

(3) In all other proceedings subject to this section, these requests must, in the absence of extraordinary circumstances, 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 7 days.

(4) In all proceedings subject to this section, the moving participant must submit two copies of the identified material to the Secretary at the time requests for designations and counter-designations are made.

\* \* \* \* \*

(k) \* \* \*

(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:

(i) No later than 3 days after a request is made under paragraph (e)(2) of this section; or

(ii) No later than 14 days after a request is made under paragraph (e)(3) of this section.

■ 10. Revise Subpart D of part 3001 to read as follows:

**Subpart D—Rules Applicable to Requests for Changes in the Nature of Postal Services Requests for Changes in the Nature of Postal Services**

Sec.

3001.71 Applicability.

3001.72 Advisory opinion and special studies.

3001.73 Computation of time.

3001.74 Service by the Postal Service.

3001.75 Motions.

3001.76–3001.79 [Reserved]

3001.80 Procedural schedule.

3001.81 Pre-filing requirements.

3001.82 Filing of formal requests.

3001.83 Contents of formal requests.

3001.84 Filing of prepared direct evidence.

3001.85 Mandatory technical conference.

3001.86 Discovery—in general.

3001.87 Interrogatories.

3001.88 Production of documents.

3001.89 Admissions.

3001.90 Rebuttal testimony.

3001.91 Surrebuttal testimony.

3001.92 Hearings.

3001.93 Initial and reply briefs.

Appendix A to Subpart D of Part 3001—Pro Forma N-Case Procedural Schedule

**§ 3001.71 Applicability.**

The rules in this subpart govern the procedure with regard to proposals of the Postal Service pursuant to 39 U.S.C. 3661 requesting from the Commission an advisory opinion on changes in the nature of postal services that will generally affect service on a nationwide or substantially nationwide basis. The Rules of General Applicability in subpart A of this part are also applicable to proceedings conducted pursuant to this subpart except that § 3001.20a (limited participation by persons not parties); § 3001.21 (Motions); § 3001.25 (Discovery—general policy); § 3001.26 (Interrogatories for purposes of discovery); § 3001.27 (Requests for production of documents or things for the purpose of discovery); § 3001.30 (Hearings); § 3001.33 (Depositions); and § 3001.34 (Briefs) do not apply in proceedings conducted under this subpart.

**§ 3001.72 Advisory opinion and special studies.**

(a) *Issuance of opinion.* In the absence of a determination of good cause for extension, the Commission shall issue an advisory opinion in proceedings conducted under this subpart not later than 90 days following the filing of the Postal Service's request for an advisory opinion.

(b) *Special studies.* Advisory opinions shall address the specific changes proposed by the Postal Service in the nature of postal services. If, in any proceeding, alternatives or related issues of significant importance arise, the Commission may, in its discretion, undertake an evaluation of such alternative or issues by means of special studies, public inquiry proceedings, or other appropriate means.

**§ 3001.73 Computation of time.**

In computing any period of time prescribed or allowed by this subpart, the term “day” means a calendar day unless explicitly specified otherwise. The last day of the period so computed is to be included unless it is a Saturday, Sunday, or federal holiday for the Commission, in which event the period runs until the end of the next day which

is neither a Saturday, Sunday, or federal holiday. A part-day holiday shall be considered as other days and not as a federal holiday.

**§ 3001.74 Service by the Postal Service.**

By filing its request electronically with the Commission, the Postal Service is deemed to have effectively served copies of its formal request and its prepared direct evidence upon those persons, including the officer of the Commission, who participated in the pre-filing conference held under § 3001.81. The Postal Service shall be required to serve hard copies of its formal request and prepared direct evidence only upon those persons who have notified the Postal Service, in writing, during the pre-filing conference(s), that they do not have access to the Commission's Web site.

**§ 3001.75 Motions.**

(a) *In general.* (1) An application for an order or ruling not otherwise specifically provided for in this subpart shall be made by motion. A motion shall set forth with particularity the ruling or relief sought, the grounds and basis therefor, and the statutory or other authority relied upon, and shall be filed with the Secretary and served pursuant to the provisions of §§ 3001.9 through 3001.12 of this chapter. A motion to dismiss proceedings or any other motion that involves a final determination of the proceeding, any motion under § 3001.91 or a motion that seeks to extend the deadline for issuance of an advisory opinion shall be addressed to the Commission. After a presiding officer is designated in a proceeding, all other motions in that proceeding, except those filed under part 3007 of this chapter, shall be addressed to the presiding officer.

(2) Within 5 days after a motion is filed, or such other period as the Commission or presiding officer in any proceeding under this subpart may establish, any participant to the proceeding may file and serve an answer in support of or in opposition to the motion pursuant to §§ 3001.9 to 3001.12 of this chapter. Such an answer shall state with specificity the position of the participant with regard to the ruling or relief requested in the motion and the grounds and basis and statutory or other authority relied upon. Unless the Commission or presiding officer otherwise provides, no reply to an answer or any further responsive document shall be filed.

(b) *Motions to be excused from answering discovery requests.* (1) A motion to be excused from answering discovery requests shall be filed with

the Commission in conformance with this section within 3 days of the filing of the interrogatory, request for production, or request for admissions to which the motion is directed. If a motion to be excused from answering is made part of an interrogatory, request for production, or request for admissions, the part to which objection is made shall be clearly identified. Claims of privilege shall identify the specific evidentiary privilege asserted and state the reasons for its applicability. Claims of undue burden shall state with particularity the effort that would be required to answer or respond to the request, providing estimates of costs and workhours required, to the extent possible.

(2) An answer to a motion to be excused from answering a discovery request shall be filed within 2 days of the filing of the motion in conformance with § 3001.75. The text of the discovery request and any answer previously provided by the Postal Service shall be included as an attachment to the answer.

(3) Unless the Commission or the presiding officer grants the motion to be excused from answering, the Postal Service shall answer the interrogatory, production request, or request for admission. Answers shall be filed in conformance with §§ 3001.9 through 3001.12 of this chapter within 3 days of the date on which a motion to be excused from answering is denied.

(4) The Commission or the presiding officer may impose such terms and conditions as are just and may, for good cause, issue a protective order as provided in § 3001.26(g) of this chapter, including an order limiting or conditioning interrogatories, requests for production, and requests for admissions as justice requires to protect the Postal Service from undue annoyance, embarrassment, oppression, or expense.

(c) *Motions to strike.* Motions to strike are requests for extraordinary relief and are not substitutes for briefs or rebuttal evidence in a proceeding. A motion to strike testimony or exhibit materials must be submitted in writing at least 3 days before the scheduled appearance of a witness, unless good cause is shown. Responses to motions to strike are due within 2 days.

(d) *Motions for leave to file surrebuttal testimony.* Motions for leave to file surrebuttal testimony submitted pursuant to § 3001.91 and any answers thereto must be filed and served on or before the dates provided in the procedural schedule established by the Commission.

#### §§ 3001.76–3001.79 [Reserved]

#### § 3001.80 Procedural schedule.

(a) *Notice.* Subject to paragraph (b) of this section, the Commission shall include in the notice of proceeding issued under § 3001.17 of this chapter a procedural schedule based upon the pro forma schedule set forth in Appendix A of this part. The procedural schedule shall include:

(1) A deadline for notices of interventions;

(2) The date(s) for the mandatory technical conference between the Postal Service, Commission staff, and interested parties;

(3) The deadline for discovery on the Postal Service's direct case;

(4) The deadline for responses to participant discovery on the Postal Service's case;

(5) The deadline for participants to confirm their intent to file a rebuttal case;

(6) The date for filing participant rebuttal testimony, if any;

(7) The dates for filing motions for leave to file surrebuttal testimony and answers thereto;

(8) The date for filing surrebuttal, if any;

(9) The date(s) for hearings on the Postal Service's direct case, rebuttal testimony, and surrebuttal testimony, if any;

(10) The date for filing initial briefs;

(11) The date for filing reply briefs; and

(12) A deadline for issuance of an advisory opinion which is 90 days from the date of filing.

(b) *Changes for good cause.* These dates are subject to change for good cause only.

(c) *Incomplete request.* If at any time the Commission determines that the Postal Service's request is incomplete or that changes made subsequent to its filing significantly modify the request, the Commission may extend the deadlines established or take any other action as justice may require.

#### § 3001.81 Pre-filing requirements.

(a) *Pre-filing conference required.*

Prior to the Postal Service filing a request that the Commission issue an advisory opinion on a proposed change in the nature of postal services subject to the procedures established in this subpart, the Postal Service shall conduct one or more pre-filing conference(s) with interested persons in the proceeding.

(b) *Purpose.* The purpose of a pre-filing conference under this section is to expedite consideration of the Postal Service's request for the issuance of

advisory opinions by informing interested persons of the Postal Service's proposal; by providing an opportunity for interested persons to give feedback to the Postal Service that can be used by the Postal Service to modify or refine its proposal before it is filed at the Commission; and by identifying relevant issues and information needed to address those issues during proceedings at the Commission.

(c) *Notice.* The Postal Service shall file with the Commission a notice of its intent to conduct any pre-filing conference(s) at least 10 days before the first scheduled conference. The notice filed by the Postal Service shall include a schedule of proposed date(s) and location(s) for the conference(s). Upon receipt of such notice, the Commission shall issue a notice of pre-filing conference(s), which shall be published in the **Federal Register** and appoint a Public Representative.

(d) *Nature of conferences.* Discussions during the pre-filing conference(s) under this section shall be informal and off the record. No formal record will be created during a pre-filing conference.

(e) *Informal meetings.* Interested persons may meet outside the context of a pre-filing conference, among themselves or with the Postal Service, individually or in groups, to discuss the proposed changes in the nature of postal services.

#### § 3001.82 Filing of formal requests.

Whenever the Postal Service determines to request that the Commission issue an advisory opinion on a proposed change in the nature of postal services subject to this subpart, the Postal Service shall file with the Commission a formal request for such an opinion in accordance with the requirements of §§ 3001.9 to 3001.11 and § 3001.83. The request shall be filed not less than 90 days before the proposed effective date of the change in the nature of postal services involved. Within 5 days after the Postal Service has filed a formal request for an advisory opinion in accordance with this section, the Secretary shall lodge a notice thereof with the director of the Federal Register for publication in the **Federal Register**.

#### § 3001.83 Contents of formal requests.

(a) *General requirements.* A formal request filed under this subpart shall include such information and data and such statements of reasons and basis as are necessary and appropriate to fully inform the Commission and interested persons of the nature, scope, significance, and impact of the proposed

change in the nature of postal services and to show that the change in the nature of postal services is in accordance with and conforms to the policies established under title 39, United States Code.

(b) *Specific information.* A formal request shall include:

(1) A detailed statement of the present nature of the postal services proposed to be changed and the change proposed;

(2) The proposed effective date for the proposed change in the nature of postal services;

(3) A full and complete statement of the reasons and basis for the Postal Service's determination that the proposed change in the nature of postal services is in accordance with and conforms to the policies of title 39, United States Code;

(4) A statement that the Postal Service has completed the pre-filing conference(s) required by § 3001.81, including the time and place of each conference and a summary of discussions at the pre-filing conference(s);

(5) The prepared direct evidence required by § 3001.84;

(6) The name of an institutional witness capable of providing information relevant to the Postal Service's proposal that is not provided by other Postal Service witnesses; and

(7) Confirmation that Postal Service witnesses, including its institutional witness, will be available for the mandatory technical conference provided for in § 3001.85.

(c) *Additional information.* The Commission may request additional information from the Postal Service concerning a formal request.

(d) *Reliance on prepared direct evidence.* The Postal Service may incorporate detailed data, information, and statements of reason or basis contained in prepared direct evidence submitted under paragraph (b)(5) of this section into its formal request by reference to specific portions of the prepared direct evidence.

#### **§ 3001.84 Filing of prepared direct evidence.**

As part of a formal request for an advisory opinion under this subpart, the Postal Service shall file all of the prepared direct evidence upon which it proposes to rely in the proceeding on the record before the Commission to establish that the proposed change in the nature of postal services is in accordance with and conforms to the policies of title 39, United States Code. Such prepared direct evidence shall be in the form of prepared written testimony and documentary exhibits

which shall be filed in accordance with § 3001.31 of this chapter.

#### **§ 3001.85 Mandatory technical conference.**

(a) *Date.* A date for a mandatory technical conference shall be included in the procedural schedule required by § 3001.80. The date for this technical conference shall be set based upon the pro forma schedule set forth in Appendix A of this subpart. The conference shall be held at the offices of the Commission.

(b) *Witnesses.* The Postal Service shall make available at the technical conference each witness whose prepared direct testimony was filed pursuant to § 3001.84.

(c) *Purpose.* The purpose of the technical conference is to provide an informal, off-the-record opportunity for participants, the officer of the Commission representing interests of the general public, and Commission staff to clarify technical issues and to identify and request information relevant to an evaluation of the nature of changes to postal services proposed by the Postal Service.

(d) *Relation to discovery process.* Information obtained during the mandatory technical conference may be used to discover additional relevant information by means of the formal discovery mechanisms provided for in §§ 3001.85 through 3001.89.

(e) *Record.* Information obtained during, or as a result of, the mandatory technical conference is not part of the decisional record unless admitted under the standards of § 3001.31(a) of this chapter.

#### **§ 3001.86 Discovery—in general.**

(a) *Purpose.* The rules in this subpart allow discovery against the Postal Service that is reasonably calculated to lead to admissible evidence during a proceeding. The notice and scheduling order issued pursuant to § 3001.80 shall provide that discovery will be scheduled to end at least 3 days prior to the commencement of hearings.

(b) *Informal discovery.* The discovery procedures of this section, § 3001.85, and §§ 3001.87 through 3001.89 are not exclusive. Participants are encouraged to engage in informal discovery whenever possible to clarify exhibits and testimony. The results of these efforts may be introduced into the record by stipulation, by supplementary testimony or exhibit, or by other appropriate means. In the interest of reducing motion practice, participants also are expected to use informal means to clarify questions and to identify portions of discovery requests considered overbroad or burdensome.

(c) *Failure to obey orders or rulings.* If the Postal Service fails to obey an order of the Commission or ruling of the presiding officer to provide or permit discovery pursuant to this section or §§ 3001.85 through 3001.89, the Commission or the presiding officer may issue orders or rulings in regard to the failure as are just. These orders or rulings may, among other things:

(1) Direct that certain designated facts are established for the purposes of the proceeding;

(2) Prohibit the Postal Service from introducing certain designated matters in evidence; or

(3) Strike certain evidence, requests, pleadings, or parts thereof.

#### **§ 3001.87 Interrogatories.**

(a) *Service and contents.* In the interest of expedition and limited to information which appears reasonably calculated to lead to the discovery of admissible evidence, any participant in a proceeding may propound to the Postal Service 25 written, sequentially numbered interrogatories, by witness, requesting non-privileged information relevant to the subject matter of the proceeding. An interrogatory with subparts that are logically and factually subsumed within and necessarily related to the primary question will be counted as one interrogatory. The Postal Service shall answer each interrogatory and furnish such information as is available. The participant propounding the interrogatories shall file them with the Commission in conformance with §§ 3001.9 through 3001.12 of this chapter. Follow-up interrogatories to clarify or elaborate on the answer to an earlier discovery request may be filed after the period for intervenor discovery on the Postal Service case ends if the interrogatories are filed within 7 days of receipt of the answer to the previous interrogatory. In extraordinary circumstances, follow-up interrogatories may be filed not less than 6 days prior to the filing date for the participant's rebuttal testimony.

(b) *Answers.* (1) Answers to interrogatories shall be prepared so that they can be incorporated into the record as written cross-examination. Each answer shall begin on a separate page, identify the individual responding and the relevant testimony number, if any, the participant who propounded the interrogatory, and the number and text of the question.

(2) Each interrogatory shall be answered separately and fully in writing by the individual responsible for the answer, unless it is objected to, in which event the reasons for objection shall be stated in a motion to be excused

from answering in the manner prescribed by paragraph (c) of this section.

(3) An interrogatory otherwise proper is not necessarily objectionable because an answer would involve an opinion or contention that relates to fact or the application of law to fact, but the Commission or presiding officer may order that such an interrogatory need not be answered until a prehearing conference or other later time.

(4) Answers filed by the Postal Service shall be filed in conformance with §§ 3001.9 through 3001.12 of this chapter within 7 days of the filing of the interrogatories or within such other period as may be fixed by the Commission or presiding officer. Any other period fixed by the Commission or presiding officer shall end before the conclusion of the hearing.

(c) *Motion to be excused from answering.* The Postal Service may, in lieu of answering an interrogatory, file a motion pursuant to § 3001.75(b) to be excused from answering.

(d) *Supplemental answers.* The Postal Service has a duty to timely amend a prior answer if it obtains information upon the basis of which it knows that the answer was incorrect when made or is no longer true. The Postal Service shall serve supplemental answers to update or to correct responses whenever necessary, up until the date the answer could have been accepted into evidence as written cross-examination. The Postal Service shall indicate whether the answer merely supplements the previous answer to make it current or whether it is a complete replacement for the previous answer.

#### **§ 3001.88 Production of documents.**

(a) *Service and contents.*

(1) In the interest of expedition and limited to information which appears reasonably calculated to lead to the discovery of admissible evidence, any participant may serve on the Postal Service a request to produce and permit the participant making the request, or someone acting on behalf of the participant, to inspect and copy any designated documents or things that constitute or contain matters, not privileged, that are relevant to the subject matter involved in the proceeding and that are in the custody or control of the Postal Service.

(2) The request shall set forth the items to be inspected either by individual item or category, and describe each item and category with reasonable particularity, and shall specify a reasonable time, place, and manner of making inspection. The participant requesting the production of

documents or items shall file its request with the Commission in conformance with §§ 3001.9 through 3001.12 of this chapter.

(b) *Answers.* (1) The Postal Service shall file an answer to a request under paragraph (a) of this section with the Commission in conformance with §§ 3001.9 through 3001.12 of this chapter within 5 days after the request is filed, or within such other period as may be fixed by the Commission or presiding officer. The answer shall state, with respect to each item or category, whether inspection will be permitted as requested.

(2) If the Postal Service objects to an item or category, the Postal Service shall state the reasons for objection in a motion to be excused from answering as prescribed by paragraph (c) of this section.

(c) *Motions to be excused from answering.* The Postal Service may, in lieu of answering a request for production, file a motion pursuant to § 3001.75(b) to be excused from answering.

#### **§ 3001.89 Admissions.**

(a) *Service and content.* In the interest of expedition, any participant may serve upon the Postal Service a written request for the admission of any relevant, unprivileged facts, including the genuineness of any documents or exhibits to be presented in the hearing. The admission shall be for purposes of the pending proceeding only. The participant requesting the admission shall file its request with the Commission in conformance with §§ 3001.9 through 3001.12 of this chapter.

(b) *Answers.* (1) A matter for which admission is requested shall be separately set forth in the request and is deemed admitted unless, within 7 days after the request is filed, or within such other period as may be established by the Commission or presiding officer, the Postal Service files a written answer or motion to be excused from answering pursuant to paragraph (c) of this section. Postal Service answers to requests for admission shall be filed with the Commission in conformance with §§ 3001.9 through 3001.12 of this chapter.

(2) If the answer filed by the Postal Service does not admit a matter asserted in the participant's request, it must either specifically deny the matter or explain in detail why it cannot truthfully admit or deny the asserted matter. When good faith requires, the Postal Service must admit a portion of the asserted matter and either deny or qualify the remaining portion of such

asserted matter. Lack of knowledge for failing to admit or deny can be invoked only after reasonable inquiry if the information already possessed or reasonably obtainable is insufficient to enable an admission or denial.

(3) Grounds for objection to requests for admission must be stated. Objections cannot be based solely upon the ground that the request presents a genuine issue for trial.

(c) *Motion to be excused from answering.* The Postal Service may, in lieu of answering a request for admission, file a motion pursuant to § 3001.75(b) to be excused from answering.

#### **§ 3001.90 Rebuttal testimony.**

(a) *Timing.* Any participant may file rebuttal testimony on or before the date established for that purpose by the procedural schedule issued by the Commission pursuant to § 3001.80. Hearing on rebuttal testimony shall proceed as set forth in the procedural schedule.

(b) *Limitations.* The scope of rebuttal testimony shall be limited to material issues relevant to the specific proposal made by the Postal Service. Rebuttal testimony shall not propose, or seek to address, alternatives to the Postal Service's proposal.

(c) *Intent to file rebuttal testimony.* If a participant wishes to file rebuttal testimony, it must file a document confirming its intent to file rebuttal testimony with the Commission by the date provided in the procedural schedule.

(d) *Adjustment of dates.* If no participant files a confirmation of intent to file rebuttal testimony on or before the date established by the procedural schedule issued by the Commission pursuant to § 3001.80, the Commission may adjust other dates in the procedural schedule as it deems to be necessary and appropriate.

#### **§ 3001.91 Surrebuttal testimony.**

(a) *Scope.* Surrebuttal testimony shall be limited to material issues relevant to the Postal Service's proposal and to the rebuttal testimony which the surrebuttal testimony seeks to address. Testimony that exceeds the scope of the Postal Service's proposal or rebuttal testimony shall not be permitted.

(b) *Motion for leave to file surrebuttal.* A participant who wishes to file surrebuttal testimony must obtain prior approval by filing with the Commission a motion for leave to file surrebuttal pursuant to § 3001.75(d) on or before the date provided in the procedural schedule established by the Commission. The motion must

summarize the surrebuttal testimony the participant wishes to file and must identify and explain exceptional circumstances that require the filing of such testimony. The moving participant bears the burden of demonstrating exceptional circumstances that warrant a grant of the motion. Answers to such motions may be filed as provided in § 3001.75(d).

(c) *Deadline for filing surrebuttal authorized by the Commission.* In the event the Commission grants the motion for leave to file surrebuttal testimony, the moving participant must file its proposed surrebuttal testimony by the date provided in the procedural schedule established pursuant to § 3001.80.

(d) *Adjustment of procedural dates.* If no participant files a motion for leave to file surrebuttal testimony, or if the Commission denies all such motions as may be filed, the remaining dates in the procedural schedule may be adjusted by the Commission as it deems to be necessary and appropriate.

#### § 3001.92 Hearings.

(a) *Initiation.* Hearings for the purpose of taking evidence shall be initiated by the issuance of a notice and scheduling order pursuant to § 3001.80.

(b) *Presiding officer.* All hearings shall be held before the Commission sitting en banc with a duly designated presiding officer.

(c) *Entering of appearances.* The Commission or the presiding officer before whom the hearing is held will cause to be entered on the record all appearances together with a notation showing in whose behalf each such appearance has been made.

(d) *Order of procedure.* In requests for advisory opinions before the Commission, the Postal Service shall be the first participant to present its case. Unless otherwise ordered by the Commission, the presiding officer shall direct the order of presentation of all other participants and issue such other procedural orders as may be necessary to assure the orderly and expeditious conclusion of the hearing.

(e)(1) *Presentations by participants.* Any participant shall have the right in public hearings to present evidence relevant to the Postal Service's proposal, cross-examine (limited to testimony adverse to the participant conducting the cross-examination), object, move, and argue. The participant's presentation shall be in writing and may be accompanied by a trial brief or legal memoranda. (Legal memoranda on matters at issue will be welcome at any stage of the proceeding.) When objections to the admission or exclusion

of evidence before the Commission or the presiding officer are made, the grounds relied upon shall be stated. Formal exceptions to rulings are unnecessary.

(2) *Written cross-examination.* Written cross-examination will be utilized as a substitute for oral cross-examination whenever possible, particularly to introduce factual or statistical evidence. Designations of written cross-examination shall be served in accordance with §§ 3001.9 through 3001.12 of this chapter no later than 3 days before the scheduled appearance of a witness. Designations shall identify every item to be offered as evidence, listing the participant who initially posed the discovery request, the witness and/or party to whom the question was addressed (if different from the witness answering), the number of the request and, if more than one answer is provided, the dates of all answers to be included in the record. (For example, "OCA-T1-17 to USPS witness Jones, answered by USPS witness Smith (March 1, 1997) as updated (March 21, 1997))." When a participant designates written cross-examination, two hard copies of the documents to be included shall simultaneously be submitted to the Secretary of the Commission. The Secretary of the Commission shall prepare for the record a packet containing all materials designated for written cross-examination in a format that facilitates review by the witness and counsel. The witness will verify the answers and materials in the packet, and they will be entered into the transcript by the presiding officer. Counsel may object to written cross-examination at that time, and any designated answers or materials ruled objectionable will not be admitted into the record.

(3) *Oral cross-examination.* Oral cross-examination will be permitted for clarifying written cross-examination and for testing assumptions, conclusions or other opinion evidence. Notices of intent to conduct oral cross-examination shall be filed 3 or more days before the announced appearance of the witness and shall include specific references to the subject matter to be examined and page references to the relevant direct testimony and exhibits. A participant intending to use complex numerical hypotheticals, or to question using intricate or extensive cross-references, shall provide adequately documented cross-examination exhibits for the record. Copies of these exhibits shall be filed at least 2 days (including 1 working day) before the scheduled appearance of the witness. They may be

filed online or delivered in hardcopy form to counsel for the witness, at the discretion of the participant. If a participant has obtained permission to receive service of documents in hardcopy form, hardcopy notices of intent to conduct oral cross-examination of witnesses for that participant shall be delivered to counsel for that participant and served 3 or more working days before the announced appearance of the witness. Cross-examination exhibits shall be delivered to counsel for the witness at least 2 days (including 1 working day) before the scheduled appearance of the witness.

(f) *Limitations on presentation of the evidence.* The taking of evidence shall proceed with all reasonable diligence and dispatch, and to that end, the Commission or the presiding officer may limit appropriately:

(1) The number of witnesses to be heard upon any issue;

(2) The examination by any participant to specific issues; and

(3) The cross-examination of a witness to that required for a full and true disclosure of the facts necessary for exploration of the Postal Service's proposal, disposition of the proceeding, and the avoidance of irrelevant, immaterial, or unduly repetitious testimony.

(g) *Motions during hearing.* After a hearing has commenced in a proceeding, a request may be made by motion to the presiding officer for any procedural ruling or relief desired. Such motions shall set forth the ruling or relief sought, and state the grounds therefor and statutory or other supporting authority. Motions made during hearings may be stated orally upon the record, except that the presiding officer may require that such motions be reduced to writing and filed separately. Any participant shall have the opportunity to answer or object to such motions at the time and in the manner directed by the presiding officer.

(h) *Rulings on motions.* The presiding officer is authorized to rule upon any motion not reserved for decision by the Commission. No ruling on motions to dismiss, motions that involve or constitute a final determination of the proceeding, motions under § 3001.91, or motions that seek to extend the deadline for issuance of an advisory opinion may be made by the presiding officer. This section shall not preclude a presiding officer from referring any motion made in hearing to the Commission for ultimate determination.

(i) *Transcript corrections.* Corrections to the transcript of a hearing shall not be requested except to correct a material

substantive error in the transcription made at the hearing.

**§ 3001.93 Initial and reply briefs.**

(a) *When filed.* At the close of the taking of testimony in any proceeding, participants may file initial and reply briefs. The dates for filing initial and reply briefs shall be established in the procedural schedule issued pursuant to § 3001.80. Such dates may be modified by subsequent order issued by the Commission or the presiding officer.

(b) *Contents.* Each brief filed with the Commission shall be as concise as possible and shall include the following in the order indicated:

(1) A subject index with page references, and a list of all cases and authorities relied upon, arranged

alphabetically, with references to the pages where the citation appears;

(2) A concise statement of the case from the viewpoint of the filing participant;

(3) A clear, concise, and definitive statement of the position of the filing participant as to the Postal Service request;

(4) A discussion of the evidence, reasons, and authorities relied upon with precise references to the record and the authorities; and

(5) Proposed findings and conclusions with appropriate references to the record or the prior discussion of the evidence and authorities relied upon.

(c) *Length.* Initial briefs shall not exceed 14,000 words. Reply briefs shall not exceed 7,000 words. Participants

shall attest to the number of words contained in their brief.

(d) *Incorporation by reference.* Briefs before the Commission or a presiding officer shall be completely self-contained and shall not incorporate by reference any portion of any other brief, pleading, or document.

(e) *Excerpts from the record.* Testimony and exhibits shall not be quoted or included in briefs except for short excerpts pertinent to the argument presented.

(f) *Filing and service.* Briefs shall be filed in the form and manner and served as required by §§ 3001.9 to 3001.12 of this part.

**Appendix A to Subpart D of Part 3001—Pro Forma N-Case Procedural Schedule**

Line	Action	Day number
1	Pre-Filing Consultations <sup>1</sup>	n/a.
2	Commission Order <sup>2</sup>	n/a.
3	Filing of Postal Service Request	0.
4	Commission Notice and Order <sup>3</sup>	1–3.
5	Technical Conference	10.
6	Participant Discovery on Postal Service Case Ends	28.
7	Responses to Participant Discovery on Postal Service Case..	35.
8	Participants Confirm Intent to File a Rebuttal Case	37 <sup>4</sup> .
9	Filing of Rebuttal Cases (if submitted)	42.
10	Deadline for Motions for Leave to File Surrebuttal	44 <sup>5</sup> .
11	Deadline for Answers to Motions for Surrebuttal	46.
12	Filing of Surrebuttal Cases (if authorized)	49 <sup>6</sup> .
13	Hearings	
	Hearings (with no Rebuttal Cases)	42–44.
	Hearings (with Rebuttal Cases, but no requests for leave to file Surrebuttal Cases)	49–51.
	Hearings (with Rebuttal Cases and requests for leave to file Surrebuttal Cases)	54–56.
14	Initial Briefs	(7 days after conclusion of hearings).
15	Reply Briefs	(7 days after filing of Initial Briefs).
16	Target Issuance Date of Advisory Opinion	90.

<sup>1</sup> The Postal Service would initiate pre-filing consultations and would file a notice with the Commission of such consultations prior to their commencement.

<sup>2</sup> This order would appoint a Public Representative.

<sup>3</sup> This notice and order would announce the Postal Service request, set a deadline for interventions, set a date for a technical conference, and establish a procedural schedule.

<sup>4</sup> If no participant elects to file a rebuttal case, hearings begin on Day 42.

<sup>5</sup> If no surrebuttal cases are requested, hearings begin on Day 49.

<sup>6</sup> If one or more surrebuttal cases are requested (whether or not authorized by the Commission), hearings begin on Day 54.

By the Commission.

**Ruth Ann Abrams,**  
*Acting Secretary.*

[FR Doc. 2013–13502 Filed 6–13–13; 8:45 am]

**BILLING CODE P**

**POSTAL REGULATORY COMMISSION**

**39 CFR Parts 3030, 3032, and 3033**

[Docket No. RM2013–4; Order No. 1739]

**Unfair Competitive Advantages; Enhancement of the Formal Complaint Process**

**AGENCY:** Postal Regulatory Commission.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Commission is proposing rules to enhance the formal complaint process in cases involving alleged violations of a law that prohibits the Postal Service from taking certain actions that might provide it with unfair competitive advantages. The proposal provides an optional accelerated procedure that allows for adjudication of this type of complaint within 90 days. The Commission invites public comment on the proposal.

**DATES:** *Comments are due:* July 29, 2013. *Reply comments are due:* August 28, 2013.

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

Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

**FOR FURTHER INFORMATION CONTACT:** Stephen L. Sharfman, General Counsel, at 202–789–6820.

**SUPPLEMENTARY INFORMATION:**

- I. Introduction
- II. Substantive Provisions
- III. Procedural Provisions
- IV. Section-by-Section Analysis
- V. Public Representative
- VI. Ordering Paragraphs