

POSTAL REGULATORY COMMISSION**39 CFR Parts 3001 and 3005**

[Docket No. RM2009-12; Order No. 441]

Obtaining Information From the Postal Service**AGENCY:** Postal Regulatory Commission.**ACTION:** Final rule.

SUMMARY: The Commission is adopting a final rule on procedures for obtaining information from the Postal Service. Their adoption is consistent with Commission obligations under a recent change in law.

DATES: Effective April 27, 2010.**FOR FURTHER INFORMATION CONTACT:**

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SUPPLEMENTARY INFORMATION: *Regulatory History*, 74 FR 51815 (October 8, 2009).

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I. Introduction

In this order, the Postal Regulatory Commission (Commission) adopts rules governing (1) the issuance of subpoenas requiring officers, employees, agents, or contractors of the United States Postal Service (Covered Persons) to appear and present testimony or to produce documentary or other evidence; (2) the enforcement of Commission subpoenas by district courts of the United States; and (3) the issuance of orders requiring depositions and responses to written interrogatories by any of those same Covered Persons. These rules implement section 602 of the Postal Accountability and Enhancement Act (PAEA), Public Law 109-435, 120 Stat. 3198, December 20, 2006, which amended section 504 of title 39 of the United States Code by adding a new subsection 504(f) authorizing the issuance of subpoenas and the taking of depositions and responses to written interrogatories by certain persons.¹

Comments were solicited by Order No. 293.² After careful consideration of

¹ Section 601(a)(3) of the PAEA created section 504 by re-designating then-existing section 3604 of title 39 as section 504.

² Notice and Order of Proposed Rulemaking Concerning Obtaining Information From the Postal Service, September 2, 2009 (Order No. 293).

the comments submitted, the Commission is adopting the proposed rules with several minor modifications, clarifications, and corrections.

II. Comments

The Commission received a total of five comments and reply comments on the proposed rules.³ In its comments, the Postal Service raises essentially five issues. First, it requests that the Commission revise proposed rule 12(c), which authorizes the summary issuance of subpoenas without a prior opportunity to provide information voluntarily.⁴ The suggested revision would require the Commission to make a good faith attempt to reach the Postal Service's General Counsel (or other authorized person) prior to invoking rule 12(c). Postal Service Comments at 1-2.

Second, the Postal Service suggests two changes to the procedures set forth in proposed rule 13 that apply to third-party requests for subpoenas. The first change would prohibit a third party from requesting a subpoena to enforce a Commission (as opposed to a third-party) information request. *Id.* at 2-3. The second proposed change would require third-party applicants for subpoenas to include in their application three certifications in addition to the certification that the Postal Service (or other subpoena target) had failed to comply with a Commission order directing the production of information. *Id.* at 3-4.

Third, the Postal Service objects to the requirement in proposed rule 14(a) that places responsibility on the Postal Service for serving a subpoena on a third-party contractor. *Id.* at 4-9.

Fourth, the Postal Service challenges the requirement in proposed rule 15(e) that the failure or refusal to produce electronically stored information on

³ Comments of the Public Representative in Response to Notice and Order Concerning Information from the Postal Service (Public Representative Comments); United States Postal Service Comments in Response to Order No. 293 (Postal Service Comments); Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. Initial Comments on Proposed Rulemaking Concerning Obtaining Information from the Postal Service (Valpak Comments), all filed on November 9, 2009; Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. Reply Comments on Proposed Rulemaking Concerning Obtaining Information from the Postal Service, November 23, 2009 (Valpak Reply Comments); and Reply Comments of American Postal Workers Union, AFL-CIO, November 24, 2009 (APWU Reply Comments). On November 25, 2009, APWU filed American Postal Workers' Union, AFL-CIO, Motion for Late Acceptance of Reply Comments. The motion is granted.

⁴ The Postal Service has referred to discrete sections of proposed 39 CFR part 3005 as "rules." To avoid confusion, that convention will be followed in this order.

grounds of undue burden or cost must demonstrate that undue burden or cost by clear and convincing evidence. *Id.* at 9-12.

Finally, the Postal Service suggests that the Commission clarify that proposed rule 31 will not apply to Commission proceedings.⁵ The purpose of this clarification would be to prevent the use of "rule 31" as a means of circumventing the requirements contained in rule 33 of the Commission's existing rules of practice. *Id.* at 13-14. Alternatively, the Postal Service requests that proposed rule 31 be modified to include the same requirements contained in rule 33 of the rules of practice. *Id.* at 14.

In its initial comments, Valpak states that the proposed regulations appear to conform to the Commission's statutory authorization, but urges a clarification to the subpoena form that was attached to Order No. 293. Valpak Comments at 2-3. Specifically, Valpak urges the Commission to revise the subpoena form by adding a field to identify the name of the report, if any, to which a subpoena applies.⁶ *Id.* at 3. The purpose of this change would be to "ensure that the jurisdictional basis for each subpoena would be clarified at the outset." *Id.* In reply comments, Valpak opposes the Postal Service's attempt to preclude third parties from seeking subpoenas to enforce Commission information requests. Valpak Reply Comments at 1-3. Valpak also opposes the Postal Service's attempt to require additional certifications in third-party subpoena requests. *Id.* at 3-4.

APWU objects to the changes proposed by the Postal Service to rule 15 that relate to the showing of undue burden or cost required to justify a failure or refusal to disclose or provide electronically stored information. APWU Comments at 1-2. APWU also opposes the Postal Service's requested clarification regarding the application of proposed rule 31 to Commission proceedings, as well as the Postal Service's proposed alternative to modify proposed rule 31 to conform to rule 33 of the rules of practice. *Id.* at 2-3.

⁵ As the Postal Service correctly points out, the correct number of the proposed rule in subpart C of the proposed regulations is "§ 3005.21," not "§ 3005.31" as set forth in the text of the rule. *Id.* at 12, n.21. The Postal Service nevertheless refers to this rule as "rule 31" in its comments. *Id.* at 12-14. APWU also refers to this rule as "rule 31." See APWU Comments at 2. For consistency and to avoid confusion, the Commission refers to this rule as "rule 31." The Commission is, however, correcting the erroneous number in the final version of the rules adopted by this order.

⁶ The proposed subpoena form attached to Order No. 293 included an analogous field for specifying the Commission proceeding to which a subpoena relates.

The Public Representative states that the proposed rules appear to conform to the statutory requirements of 39 U.S.C. 504, but suggests several modifications and clarifications. Public Representative Comments at 8–9. First, the Public Representative suggests a modification to the provisions of proposed rule 11 that allow for the attachment to a subpoena of conditions deemed “necessary and appropriate under the circumstances presented.” *Id.* at 4–5. Second, the Public Representative suggests that the Commission revise proposed rule 12 to clarify the procedures or standards used to demonstrate that the Postal Service has been given an opportunity to provide information voluntarily (or that the Postal Service has failed to respond) before a subpoena is issued. *Id.* at 5–6.

Third, the Public Representative suggests that the Commission consider changes in the procedures under proposed rule 13 by which the Postal Service would confirm that a Covered Person does not object to a subpoena. The Public Representative also suggests that the Commission consider modifications that ensure a Covered Person’s right to state his objections to a subpoena request directly to the Commission, not through the Postal Service. *Id.* at 6–7.

Fourth, the Public Representative suggests that comparisons to the Federal Rules of Civil Procedure or the adoption of analogous provisions may, in limited instances, be of benefit to the Commission and parties to Commission proceedings. *Id.* at 7.

Finally, the Public Representative states its support for the use in an adjudicatory proceeding of proposed rule 31 as an alternative to the procedures in part 3001 of the rules of practice for compelling discovery. *Id.* at 7–8.

III. Summary of Changes to Proposed Rules

As discussed below, the Commission is making the following changes to its proposed rules:

Rule 13 is modified to require Postal Service confirmation that requests for subpoenas have been transmitted to third-party agents or contractors.

Rule 14 is modified to revise the Postal Service’s responsibilities for transmitting subpoenas to Covered Persons. As modified, the Postal Service will be responsible for transmitting subpoenas to persons currently holding positions with the Postal Service (such as officers and employees), to persons or entities currently acting as agents for the Postal Service, or to persons serving as a Postal Service contractor under an

existing contract. In addition, the proposed rule will be modified to eliminate any Postal Service responsibility for transmitting subpoenas to former officers, employees, agents, and contractors. Instead, the person who requested the subpoena and, in some cases, the Commission, will be responsible for serving subpoenas on former officers, employees, agents, and contractors.

Rule 14(b) is modified to state expressly the Commission’s authority to extend the time for filing a return of service of a subpoena.

Rule 15(e) is revised by removing the requirement that a refusal to produce electronically stored information must be justified by “clear and convincing evidence.” Rule 15(e) is replaced by additions to rules 12 (governing summarily issued subpoenas) and 13 (governing subpoenas requested by third parties) that require opponents of subpoenas to state “with particularity” the reasons why a subpoena would be unduly burdensome or costly.

The subpoena form is modified by adding a placeholder for “Report Name-If Applicable.” The proposed form already has a placeholder for “Case Name-If Applicable.”

Finally, the Commission redesignates rule 31 as rule 21 and clarifies the relationship between rule 21 and existing rule 33 of the rules of practice.

In all other respects, the Commission adopts the rules as proposed in Order No. 293.

IV. Discussion

The final rules adopted by this order establish a new part 3005 organized in three subparts. Subpart A integrates part 3005 into the Commission’s existing rules and regulations by making various existing rules applicable to part 3005. Subpart B establishes regulations governing the issuance and enforcement of subpoenas under the authority of sections 504(f)(2)(A) and 504(f)(3). Finally, subpart C implements section 504(f)(2)(B) of title 39, which authorizes the Commission to order depositions and responses to written interrogatories. The regulations in both subpart B and subpart C apply to Covered Persons. The term “covered persons” is defined in subsection 504(f)(4) of title 39.

The comments filed in this proceeding address six of the proposed rules and the subpoena form proposed as Appendix A to part 3005. Those six proposed rules are rule 11, rule 12, rule 13, rule 14, rule 15, and rule 31.

Rule 11(d) Conditions placed on subpoenas. The Public Representative proposes a modification to rule 11(d) to clarify that conditions imposed on a

subpoena by the Commission are in conformity with statutory and other applicable authorities under which the Commission functions. Public Representative Comments at 4–5. The Public Representative makes this proposal because she finds ambiguity in phraseology of rule 11 as proposed. As proposed, rule 11(d) would permit the attachment of conditions to a subpoena that are “necessary and appropriate under the circumstances presented.”

The Commission recognizes that any conditions attached to a subpoena must be authorized by law and consistent with statutory authorities under which the Commission operates. Subpoena conditions must also reflect the specific need for information and the circumstances in which the subpoena is issued. The Commission believes that the requirement in rule 11(d) that subpoena conditions be “necessary and appropriate” implicitly includes an obligation to attach conditions that are in conformance with the legal authorities under which the Commission functions. The change proposed by the Public Representative could be interpreted as a limitation on the Commission’s discretion and thereby undermine, rather than foster, the attachment of lawful conditions. The Commission therefore finds the formulation of rule 11(d), as proposed, to be appropriate and rejects the Public Representative’s suggested modification.

Rule 12(c) Subpoenas issued summarily by the Commission. The Postal Service requests that rule 12 be modified to require the Commission to make a good faith attempt to reach its General Counsel or other appropriate person before invoking the provisions of rule 12(c) under which a subpoena may be issued summarily without a prior opportunity to provide information voluntarily.

The Commission does not believe that such a change is necessary or desirable. Rule 12 addresses situations in which a subpoena can be issued without the prior receipt of a third-party request. In other words, the Chairman, a designated Commissioner, or an administrative law judge appointed under 5 U.S.C. 3105 could seek authorization from the full Commission for the issuance of a subpoena. Rule 12(b) provides that, with a limited exception provided in rule 12(c), the Postal Service would be given the opportunity to provide the information voluntarily before the subpoena is issued. The exception provided in rule 12(c) is expressly limited to situations in which “a delay in the issuance of the subpoena could unreasonably limit or prevent

production of the information being sought.”

Given the limited applicability of rule 12(c), the Commission does not believe the modification proposed by the Postal Service is necessary. In addition to the express limitations that rule 12 places on its own operation, the Commission noted its expectation in the analysis section to Order No. 293 that “the summary issuance of a subpoena [would] rarely, if ever, be necessary....” Order No. 293 at 18.

Moreover, the Commission does not believe that the proposed modification would necessarily be desirable since neither the Commission, nor the Postal Service, can contemplate all of the possible situations in which the summary issuance of a subpoena might be deemed necessary. Notwithstanding its decision to reject the proposed change to rule 12, the Commission will certainly, as a matter of comity, consider informal notification to the Postal Service’s General Counsel or other appropriate person prior to the summary issuance of a subpoena if such prior notification appears feasible.

The Public Representative proposes a further and slightly different modification to rule 12 that would apply to situations in which the Postal Service has been given an opportunity to provide information voluntarily. Specifically, the Public Representative suggests that clarification is needed to “provide some standard for evidence of the Postal Service’s receipt of an opportunity to respond voluntarily as well as evidence showing that it has failed to respond.” Public Representative Comments at 5–6.

The Commission is not persuaded that this clarification is necessary. Any proposal by the Chairman, a designated Commissioner, or an administrative law judge for the issuance of a subpoena must in all cases be affirmatively approved by a majority of the Commissioners. See proposed rule 11(b). Except for subpoenas issued under the authority of rule 12(c), the Commissioners must decide that the Postal Service has had an opportunity to provide the information voluntarily. Whether or not such an opportunity has been provided will depend upon the specific facts and circumstances surrounding the attempt to obtain the information. Not all such facts and circumstances are readily predictable. This makes the formulation of an evidentiary standard or evidentiary requirements suggested by the Public Representative problematic and therefore undesirable. If further experience demonstrates the need for, and feasibility of, such clarifications,

the Commission will consider the adoption of a specific proposal.

Rule 13 Eligibility to make third-party requests for subpoenas and contents of the request. The Postal Service seeks two changes to rule 13. First, it seeks to eliminate the right of third parties to request subpoenas to enforce a Commission information request. Postal Service Comments at 2–3. In support of this proposed modification, the Postal Service argues that, as proposed, rule 13 “allows participants to prod the Commission as to its own information requests. Whether and how to enforce a Commission information request is a matter between the Commission and the Postal Service.” *Id.* In the view of the Postal Service, this “would produce little clear benefit” and would threaten “to embroil participants in the Commission’s exercise of discretion....” *Id.* at 3. Valpak opposes the Postal Service’s suggestion. Valpak Reply Comments at 1–3.

The Commission does not view the possibility that third parties might seek enforcement of a Commission information request as a threat to the exercise of its discretion. Moreover, if the Commission were to preclude third parties from seeking subpoenas to enforce a Commission information request, this could prompt third-party attempts to preserve their right to request subpoenas by making duplicative requests for information that merely track outstanding Commission information requests. Finally, if the concerns articulated by the Postal Service materialize, the Commission can always amend its rules to restrict the right of third parties to seek enforcement of Commission information requests.

As an alternative to its first proposed change, the Postal Service proposes an amendment to rules 13(c)(4) and 13(c)(5) that would require third-party applicants for subpoenas to provide more than a certification that the Postal Service has failed to comply with a Commission order. Postal Service Comments at 3–4. Specifically, the Postal Service requests that persons requesting subpoenas be required to include in their requests a description of the efforts of the Postal Service (or other subpoena target) to respond; to await passage of a specified period of time following issuance of an order or reply deadline before requesting a subpoena; and to provide the subpoena target’s response to an inquiry from the applicant as to whether a response would be forthcoming. *Id.* at 3–4. Once again, Valpak opposes the Postal Service’s suggestion. Valpak Reply Comments at 3–4.

The Commission is not persuaded that this second change should be made. The person in the best position to describe the efforts of the subpoena target to respond to a discovery order or information request is the subpoena target, not the person requesting the subpoena. Moreover, if additional time is needed to respond to a discovery order or information request, the target of the subpoena is free to request additional time.

Finally, the obligation to state that a response will be forthcoming after a response deadline is an obligation of the responding party whether or not the requesting party inquires as to the status of the response effort. In those situations in which a formal response deadline has not been established or in which efforts to respond are not “visible externally,”⁷ any person who requests a subpoena without first checking the status of the response effort will do so at his own peril, since subpoenas cannot be issued automatically upon request. They require formal approval by the Commission. If the Postal Service (or other responding party) is still engaged in a good faith process of responding, that fact will undoubtedly be communicated to the Commission in the responder’s answer to the subpoena request pursuant to rule 13(a)(3), and the requesting party risks that its request will be summarily denied.

Rule 13 Responses to third-party requests for subpoenas. Proposed rule 13 governs requests by third parties for the issuance of subpoenas. Rule 13(a) covers situations in which hearings have been ordered. Rule 13(b) governs situations in which hearings have not been ordered. As proposed, both rule 13(a) and 13(b) make the Postal Service responsible for notifying the Covered Person of the request and for transmitting any objections it might have.

The Public Representative makes two suggestions. First, she suggests that the Postal Service be required to provide proof that it has notified the Covered Person of the subpoena request. Second, the Public Representative suggests that some Covered Persons, such as Postal Service contractors, should be given the opportunity to respond directly to the subpoena request. Public Representative Comments at 6. The Commission agrees with both suggestions.

With regard to the first suggestion, the Commission concludes that it would be useful to require the Postal Service to identify the persons to whom it has given notification of the subpoena request. While the Commission has no

⁷ See Postal Service Comments at 3, n.3.

doubt that the Postal Service will provide such third-party notifications, it would be useful for the Commission, the requesting party, and other interested persons to have information regarding the recipients of such notifications. While the requesting party may be aware of at least one Covered Person who possesses or controls relevant information, identification of additional persons who the Postal Service knows or believes possess or control the information being requested will foster the efficient operation of the proposed regulations. To ensure that such additional sources are identified, the Commission is revising rule 13(a)(2) to require the Postal Service to identify such sources and provide relevant contact information. Similar changes are being made to rule 13(b)(1).

With regard to the Public Representative's second suggestion regarding the right of Covered Persons to respond to a subpoena request, the Commission never intended to preclude a Covered Person from submitting its own answer without the assistance of the Postal Service. To eliminate any misunderstanding and to reduce administrative burdens on the Postal Service, the Commission is modifying and clarifying rule 13(a)(3) and rule 13(b)(2) in two ways. First, the Commission is eliminating any Postal Service responsibility for transmitting a Covered Person's objections to the request for subpoena. Second, both proposed subsections of rule 13 are revised to include Covered Persons among those who are eligible to answer a request for subpoena. Together, these two changes will make it clear that Covered Persons are permitted to submit their own answers to subpoena requests. In making these changes, the Commission recognizes that the Postal Service remains an interested party and therefore will be eligible to file its own answer to a request for a subpoena directed to a third party.

Rule 14 Service of subpoenas on third-party contractors. The Postal Service objects to the proposed requirement in rule 14(a) that it transmit and deliver Commission subpoenas to contractors or agents outside the Postal Service.⁸ *Id.* at 4–9. It argues that the

⁸ The Postal Service also seems to interpret the proposed rules as imposing an obligation on the Postal Service regarding the Covered Person's "responsiveness" to the subpoena. Postal Service Comments at 5. However, the proposed rules already make clear that compliance with a subpoena is the responsibility of the Covered Person. See proposed rule 15. Accordingly, the Commission need not address the Postal Service's request that the Commission provide in its rules that the Postal Service has no liability for responses

proposed procedure appears to be unnecessary, is without precedent, and raises potentially serious constitutional issues. *Id.* The Postal Service also explains that because of the complexities involved in serving foreign entities, it may not be possible to file a return of service within 2 days of a subpoena's issuance. *Id.* at 8.

Section 504(f)(2)(A) grants the authority "to issue subpoenas requiring the attendance and presentation of testimony by, or the production of documentary or other evidence in the possession of, any covered person...." [emphasis added]. A "covered person" is "an officer, employee, agent, or contractor of the Postal Service." Section 504(f)(4).

As formulated, section 504(f) does not authorize the issuance of subpoenas to the Postal Service itself, but to officers, employees, agents, and contractors of the Postal Service. Information sought from a Covered Person must be related to a proceeding or request related to the Postal Service.⁹ Given the Postal Service's obvious interest in attempts to subpoena information from its officers, employees, agents, and contractors, the Commission has provided in rule 14 that subpoenas be served upon the Postal Service and its General Counsel and other representatives authorized to receive legal process regardless of which officer, employee, agent, or contractor is the ultimate target of the subpoena.¹⁰

The Postal Service objects to its obligation to transmit a subpoena on five grounds. First, the Postal Service argues that the Commission is equally capable of knowing which of the Covered Persons is likely to have possession of the information being sought. Second, it argues that it "cannot be accountable for independent third parties' behavior or responsiveness with respect to their own proprietary information." Postal Service Comments at 5. Third, it argues that service on an entity through an independent third party (in this case, the Postal Service) can implicate an entity's due process rights. *Id.* at 6. Fourth, the Postal Service asserts that it is unaware of any Federal or administrative procedures that permit substituted service of subpoenas. *Id.* Finally, it argues that

to a subpoena by an entity having only a contractual relationship with the Postal Service. See *id.* at 9.

⁹ Section 504(f)(2) authorizes the issuance of subpoenas "with respect to any proceeding conducted by the Commission under this title [i.e., title 39] or to obtain information to be used to prepare a report under this title [i.e., title 39]...."

¹⁰ For that same reason, the Commission has authorized the Postal Service to address subpoenas and subpoena requests regardless of which Covered Person is the target of the subpoena. See rules 12 and 13.

Congress has not indicated its intent to have the Postal Service play a role in the service of Commission subpoenas. *Id.* 6–7.

Contrary to the Postal Service's first contention, the Commission may not necessarily be able to ascertain the identity of Covered Persons in possession of relevant information at the time a subpoena is issued. For example, when the Postal Service is provided an opportunity under rule 12 to produce information voluntarily, a subpoena could be issued without the identity of the appropriate Covered Person or Covered Persons being known to the Commission.¹¹ The Commission's inability to identify appropriate Covered Persons could also occur because of a Postal Service refusal voluntarily to provide both the requested information and the identities of the Covered Persons in possession of the information. Rule 14 would address such a situation by requiring the Postal Service to transmit the subpoena to each Covered Person needed to obtain the information. Without rule 14's provisions for transmitting subpoenas to the relevant Covered Persons, the Commission might first have to issue one or more subpoenas just to ascertain the identity of the relevant Covered Persons.¹²

The Postal Service's second argument is that it should not be held accountable for the response of a third party, such as a Postal Service agent or contractor, to a Commission subpoena that might seek information that is arguably proprietary. This concern is misplaced. The proposed rules already make clear that compliance with a subpoena is the responsibility of the Covered Person. See rule 15. In that connection, the Commission would point out that claims for confidential treatment can be made by any Covered Person. See proposed rule 15(f). Accordingly, it is unnecessary for the Commission to address the Postal Service's request that the Commission provide in its rules that the Postal Service has no liability for responses to a subpoena by an entity having only a contractual relationship with the Postal Service. See Postal Service Comments at 9.

¹¹ Such a situation could also arise in cases under rule 12(c) in which it is not possible to provide the Postal Service with an opportunity to produce information voluntarily before resorting to the issuance of a subpoena.

¹² The problem of identifying Covered Persons would not be presented in Federal district courts. Fed. R. Civ. P. rule 26(a) requires, *inter alia*, that parties must, without awaiting a discovery request, provide the names, addresses, and phone numbers of individuals likely to have discoverable information. The Commission's current rules of practice contain no such requirement.

As its third argument, the Postal Service asserts that transmission of a subpoena by the Postal Service to a Covered Person could violate the Covered Person's due process rights.¹³ *Id.* at 6. The Commission is not persuaded by this argument. In the first place, the cases cited by the Postal Service all involve some type of substituted, alternative, or constructive service which either did not, or might not, result in notice actually being given to the intended recipient of process.¹⁴ Without notice of process, the intended recipient of process would be denied the opportunity to be heard, which, as the Postal Service recognizes, is "the essential element of due process of law...." Postal Service Comments at 6 citing *Jacob*, 223 U.S. at 265–66. By contrast, under the provisions of rule 14, the Postal Service would actually transmit the Commission subpoena to the Covered Person and the Covered Person would be able to respond directly to the Commission.

Historically, judicial subpoenas required personal service by an officer of the court, such as a marshal or deputy marshal.¹⁵ Over time, these service requirements have been relaxed by a number of courts. *Id.* at 399–400. In the view of these courts, it is the delivery of the subpoena and actual notice of what is being demanded of the person being subpoenaed that is the touchstone of due process and the obligation to respond. From the standpoint of due process, there appears to be nothing unusual about personal service by an officer of the court.¹⁶

The fourth ground for opposing rule 14's service mechanism is that the

¹³ The Postal Service's argument addresses situations in which the Covered Person to whom the subpoena is directed is a Postal Service agent or contractor. The Postal Service makes no due process objection to the Commission's proposal that subpoenas be transmitted by the Postal Service to its officers and employees. It therefore appears that the Postal Service sees no due process problem with transmission of a subpoena by the Postal Service to one of its officers or employees. The basis for this distinction is not provided.

¹⁴ *E.g.*, *Jacob v. Roberts* 223 U.S. 261 (1912) (service by publication); *Mulhane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (service by publication); and *Calabro v. Leiner*, 464 F.Supp.2d 470 (E.D. Pa. 2006) (alternative service). It should be noted that some of the very cases cited by the Postal Service upheld the constitutionality of substituted or alternative service. See *Jacob*, 223 U.S. at 267; and *Mulhane*, 339 U.S. at 318.

¹⁵ 9A *Charles Alan Wright and Arthur R. Miller, Federal Practice and Procedure*, § 2454 at 397 (Civil 3d. 2002 and Supp. 2008) (*Wright and Miller*).

¹⁶ Indeed, at least one Federal court has noted that even under Fed. R. Civ. P. rule 45, there is no specific requirement for personal service of a subpoena. All that the rule requires is "delivery" to the person being served. *Ultradent Prods., Inc. v. Hayman*, D.C.N.Y. 2002, 2002 WL 31119425, *3 (Patterson, J.), as cited in *Wright and Miller*, § 2454, n.10.

Commission has failed to identify any other Federal or administrative precedent that supports substituted service of a subpoena. The short answer to this contention is, as noted above, that the Commission's proposed mechanism for service does not constitute substituted service. Whereas substituted service typically involves delivery to a person's place of work when the person is not present, delivery to an address by certified or registered mail, or posting of a notice in a public place, and publication in a newspaper,¹⁷ the Commission's proposed rule 14 provides for transmission of a subpoena by the Postal Service to the particular person responsible for responding. This is actual service, not substituted service. Adoption of the proposed mechanism in rule 14 does not depend upon a justification for substituted service.

Finally, the Postal Service argues that Congress has not expressed an intent that the Postal Service play a role in the service of Commission subpoenas. The Commission agrees. But neither does section 504(f) prohibit the Commission's proposed method of service. In light of the more recent judicial developments identified above and in further view of the absence of specific congressional direction regarding the manner in which Commission subpoenas must be served, the Commission continues to believe that its proposed method for serving subpoenas on outside Postal Service contractors and agents implements section 504(b) reasonably and effectively. This is particularly true when the Postal Service has an agency or contractual relationship with the Covered Person at the time the subpoena is issued. In such cases, the requirement that the Postal Service transmit the subpoena to its agent or contractor is similar to transmission by the Postal Service of a subpoena to one of its own officers or employees. Because of its existing relationships with agents and contractors, the Postal Service is in the best position to accomplish transmission of the subpoena to an agent or contractor.

Without the requirement that the Postal Service transmit the subpoena to its agent or contractor, more formal and potentially time consuming methods would be required.¹⁸ If, for some

¹⁷ See 62B Am. Jur.2d Process § 143.

¹⁸ In some cases, this could require the Commission to involve the assistance of a United States Attorney or the Justice Department in serving the subpoena. There appears to be no need for such additional complexity given that the agency or contractor relationship will be an existing relationship and the fact that the agent or contractor will be able to assert any objections or claims of privilege or confidentiality directly to the Commission. See rules 12 and 13.

unexpected reason, the Postal Service is unable to locate or transmit the subpoena to the appropriate recipient, it can so advise the Commission and an alternate and more traditional means of service can be employed.

By contrast, if, at the time a subpoena is issued, the Postal Service no longer has an agency or contractual relationship with the third-party agent or contractor, it may no longer be in any better position to transmit the subpoena than the third party who requested the subpoena or the Commission itself. Accordingly, the Commission is revising proposed rule 14 to eliminate the requirement that the Postal Service transmit a subpoena to a former agent or contractor. Service on such Covered Persons will be the responsibility of either the third party who requested the subpoena or the Commission.

While the service requirements for outside Covered Persons, such as former Postal Service agents or contractors, will be modified, the Commission expects the Postal Service to provide subpoenaed information to which the Postal Service has contractual or other proprietary rights whether or not such information is in the physical possession of the Postal Service at the time a subpoena is issued. It is the Commission's understanding that the Postal Service does not oppose that position. See Postal Service Comments at 7, n.13. Similarly, the Commission expects the Postal Service to provide all relevant subpoenaed information that is under its physical control at the time a subpoena is issued, even if that information is information of an outside Covered Person, such as a Postal Service contractor.¹⁹

Rule 15(e) Standard for opposing production of electronically stored information. The Postal Service expresses concern that the formulation of proposed rule 15(e) establishes a "high bar to cost-based objections...[that] would lead to severe imbalances between the probative value of requested information and the cost inflicted on the Postal Service." *Id.* at 9. As an alternative, the Postal Service requests the Commission to adopt a standard akin to Fed. R. Civ. P. rule 26(b)(2)(C). *Id.* at 12. Fed. R. Civ. P. rule 26 provides general provisions for discovery in Federal district courts and is expressly referred to in Fed. R. Civ. P. rule 45(d), the rule that sets forth duties in responding to judicial

¹⁹ The third-party contractor would, of course, have the opportunity to oppose production of such information, either by opposing a third-party request for a subpoena made under rule 13 or by filing a motion to quash a subpoena that is issued summarily under rule 12.

subpoenas. APWU opposes the Postal Service's request and urges the Commission to adopt rule 15(e) as proposed. APWU Comments at 1–2.

The concern expressed by the Postal Service focuses primarily on the requirement in proposed rule 15(e) that to justify the failure or refusal to provide discovery of electronically stored information, the Postal Service (or other Covered Person) must show “by clear and convincing evidence” that the burden or cost of production is undue. See Postal Service Comments at 10–11. The Postal Service argues that a more appropriate standard would be a “preponderance of the evidence.” *Id.* Implicit in the Postal Service's argument is also an assumption that a determination of whether a burden or cost was “undue” would not involve a balancing of competing considerations (such as the cost of producing the requested information, the importance of the issues, and the importance of the requested discovery in resolving the issues), as would occur in Federal district court under Fed. R. Civ. P. rule 26(b)(2)(C).²⁰ APWU responds by pointing out that proposed rule 11, which makes provision for attaching conditions to a subpoena, should provide adequate protection to the Postal Service. APWU Comments at 2.

In proposing rule 15(e), the Commission was not attempting to require the production of information without regard to cost, burden, or consideration of other relevant factors of the type discussed by the Postal Service. What the Commission was attempting to make clear was that it would not accept vague and unsubstantiated claims of burden or cost as justification for failing or refusing to provide necessary information. Indeed, cost and other relevant factors should be given due consideration in the process of considering the attachment of conditions to a subpoena, as APWU suggests.

Upon consideration of the points presented by the Postal Service and APWU, the Commission concludes that the appropriate context for resolving claims of burden, cost, and protective conditions is before the Covered Person responds to a subpoena. Accordingly, the Commission is removing subsection

²⁰ The Commission would note that its rules of practice, which are applicable to the subpoena process by rule 1(b), do not currently contain a rule analogous to Fed. R. Civ. P. rule 26. The Commission has, however, from time to time relied on the principles embodied in Fed. R. Civ. P. rule 26. See, e.g., Order No. 381, Docket No. C2009–1, Order Affirming Presiding Officer's Ruling C2009–1/12, January 7, 2010, at 11–12. In the current context, the Postal Service's reference to Fed. R. Civ. P. rule 26(b)(2)(C) is appropriate.

(e) from proposed rule 15 and is modifying proposed rules 12 and 13 as described below.

Proposed rule 12 covers situations in which subpoenas are issued without a third-party request. Subsection (d) of that rule will be modified by requiring that motions to quash, limit, or condition a subpoena that allege undue burden or cost must state with particularity the basis for such a claim.²¹ Similar requirements will be added to proposed rules 13(a)(3) and 13(b)(2). Those latter subsections provide for answers to third-party requests for subpoenas. By requiring the issues of undue burden and cost be addressed prior to the compliance stage, participants (including the Postal Service and Covered Persons) will be able to address all relevant factors that relate to alleged costs and burdens in a more timely manner that will hopefully foster compliance. As APWU suggests, applicable conditions, if any, can be attached prior to issuance of the subpoena.

*Rule 31*²² *Deposition orders.* As enacted, 39 U.S.C. 504(f)(2)(B) authorizes the Chairman of the Commission, any Commissioner designated by the Chairman, and any administrative law judge appointed by the Commission under 5 U.S.C. 3105 to order the taking of depositions and responses to written interrogatories by a Covered Person. Proposed rule 31 closely follows the text of section 504(f)(2)(B).

The Postal Service acknowledges that, as proposed, rule 31 directly tracks the provisions of section 504(f)(2)(B). Postal Service Comments at 12. However, it is concerned that, without clarification, rule 31 could be used to circumvent certain restrictions contained in rule 33 of the Commission's existing rules of practice. That latter rule is limited in its application to Commission proceedings. *Id.* at 13.

The Postal Service proposes that the Commission clarify that parties who seek information or testimony that they believe would be useful in Commission proceedings should pursue discovery under the rules of practice (which would include rule 33 of the rules of practice), not proposed rule 31 that is being adopted pursuant to section 504(f)(2)(B). *Id.* at 13–14. Alternatively, the Postal Service requests that the

²¹ The requirement that the showing of undue burden or cost be made “with particularity” avoids unintended implications of the “clear and convincing evidence” standard. The requirement of a showing “with particularity” is also consistent with the Commission's existing rules of practice. See 39 CFR 3001.26, 3001.27, and 3001.28.

²² See n.5, supra.

Commission clarify that proposed rule 31 is subject to the same conditions applicable to discovery under rule 33 of the rules of practice.

APWU opposes the Postal Service's suggested clarifications. APWU Comments at 2–3. The Public Representative agrees with the Commission's statement in Order No. 293 that the authority embodied by proposed rule 31 “can be used within the scope of an adjudicatory hearing as an alternative to the procedures in part 3001 [the Commission's rules of practice] for compelling discovery.” Public Representative Comments at 8.

In light of these divergent views, clarification is in order. It is useful, first, to summarize the background against which the rule is being proposed. The Commission's rules of practice apply to proceedings before the Commission. See 39 CFR 3001.3. In those proceedings, participants have the opportunity to propound written interrogatories to other participants or to request the Commission for authorization to take the deposition of a witness. See 39 CFR 3001.26 and 3001.33. Historically, a refusal to respond to a written interrogatory or to appear at a deposition presented a serious problem for the Commission. Although rule 26(g) provided for the issuance of orders compelling responses to written interrogatories, there were, on occasion, situations in which the Postal Service refused to comply with such an order. See Order No. 293 at 4, n.3. Rule 33 governing depositions presented a similar problem in that the rule did not include provision for compelling appearance for a deposition.

Against this background, Congress enacted section 504(f)(2)(B). This new section provides the authority for ordering the taking of depositions and responses to written interrogatories by a Covered Person. Thus, in a proceeding in which the Commission has authorized a deposition in response to an application made pursuant to rule 33 of the rules of practice, the Commission can, by virtue of section 504(f)(2)(B) and proposed rule 31, compel a Covered Person to appear for the deposition. Similarly, in a Commission proceeding, the Commission can compel a Covered Person to respond to written interrogatories propounded under rule 26 of the rules of practice.

In addition, the authority provided by section 504(f)(2)(B) and proposed rule 31 empowers the Chairman, a Commissioner designated by the Chairman, or an administrative law judge appointed under 5 U.S.C. 3105, sua sponte, to order depositions and responses to written interrogatories,

even if no participant in a Commission proceeding has requested such a deposition or propounded such a written interrogatory.

Such depositions and responses can also be ordered *sua sponte* when no proceeding is pending. Section 504(f)(2)(B) authorizes the Chairman, a Designated Commissioner, or an administrative law judge to order depositions and responses to written interrogatories in order to obtain information to be used to prepare reports under title 39. This authority also goes beyond the scope of a Commission proceeding.

From the Commission's perspective, proposed rule 31 is a mechanism for enforcing discovery in Commission proceedings and for pursuing, *sua sponte*, discovery and information needed to prepare reports by means of either depositions or written interrogatories.

It was with the foregoing situations in mind that the Commission stated in Order No. 293 that "the authority to issue orders under section 504(f)(2)(B) can...be exercised in the context of an adjudicatory hearing as an alternative to the procedures in part 3001 for compelling discovery...[and that an] order can also be issued under section 504(f)(2)(B) outside the context of a Commission proceeding." *Id.* at 16.

Appendix A to part 3005—Subpoena form. Valpak proposes that the subpoena form attached as Appendix A to Order No. 293 be revised to add a field to specify a report for which information is sought. Valpak Comments at 2–3. Valpak makes this suggestion to "ensure that the jurisdictional basis for each subpoena would be clarified at the outset" and, presumably, to guard against the unauthorized use of the Commission's subpoena power. *Id.* at 3.

The Commission accepts Valpak's suggested modification to the subpoena form. Whether or not the Commission has the authority to issue specific subpoenas will depend upon the facts and circumstances surrounding the issuance of those subpoenas and upon their formulations and purposes. Additional relevant information on the subpoena form may eliminate confusion and reduce controversy.

V. Section-By-Section Analysis of the Rule

Section 3001.3 Scope of rules. The amendment to rule 3 of the rules of practice clarifies that the rules of practice apply both to proceedings before the Commission and to the procedures in part 3005 for compelling the production of information by the

Postal Service. This change is consistent with the inclusion in part 3005 of references to specific rules of practice.

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

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

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

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

From a procedural standpoint, the request would be made directly to the full Commission by a Commissioner or presiding officer. To insure that the Postal Service and other interested persons, including Covered Persons potentially affected by the subpoena, have an opportunity to oppose the

subpoena, or to limit or condition its scope and operation, any duly authorized subpoena would be subject to a motion under rule 21(a) to quash, limit, or condition the subpoena. Replies to such a motion could be made by any interested person under rule 21(b).

In the vast majority of circumstances, Covered Persons would be given an opportunity to produce information voluntarily before a subpoena is issued under this section. However, provision is also made for the summary issuance of a subpoena without issuance of a prior information request. While the Commission would expect the summary issuance of a subpoena to rarely, if ever, be necessary, it is including provision for such summary issuance in order to insure the ability to act promptly if necessary. In such cases, the recipient of the subpoena and other interested persons, would have an opportunity following issuance of the subpoena to file a motion to quash the subpoena, limit its scope, or to place conditions on the subpoena. Motions alleging undue burden or cost would be required to state with particularity the basis for any such claim. Pending resolution of the motion, Covered Persons would be required to maintain the information being sought by the subpoena.

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

The rule has been revised to require the Postal Service to provide the name, business address and phone number of any persons to whom the Postal Service transmits the subpoena request.

Covered Persons expected to produce the requested information will have an opportunity to present any objections to the issuance of a subpoena. All objections, including allegations of undue burden or cost, must state with particularity the basis for such claims.

Section 3005.14 Service of subpoenas. This proposed rule specifies the manner in which subpoenas are to be served. The Commission originally proposed that subpoenas be served initially upon the Postal Service with the requirement that the Postal Service transmit and deliver the subpoena to the officer, employee, agent, or contractor ultimately responsible for testifying or for otherwise providing the information being sought. The Commission has retained that procedure when information is sought from existing Postal Service officers, employees, and from those agents and contractors having an agency or contractual relationship at the time the subpoena is issued. However, the Commission has revised the service requirements to provide for personal service by the Commission (or by third parties who requested the subpoena) upon former Postal Service officers, employees, agents, or contractors. Conforming changes have been made to the provisions governing proof of service upon the Postal Service and Covered Persons and proof of transmission by the Postal Service to Covered Persons.

Changes have also been made to provide for shorter or longer return periods as may be ordered by the Commission in specific cases. The provision for longer return of service periods has been made, in part, to accommodate longer periods that may be needed to accomplish service upon foreign persons or entities. Finally, revisions have been made to the provisions of notice to the public of service, proof of transmission, and the return date of the subpoena.

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

that claims of undue burden or cost made to support a failure or refusal to produce electronically stored information be supported by clear and convincing evidence. In place of that section, modifications have been made to §§ 3005.12(d), 3005.13(a)(3), and 3005.13(b)(2). Those latter modifications require that any claim of undue burden or cost made in motions to quash, limit, or condition a subpoena, or in answers in opposition to requests for subpoenas must be supported by a particularized showing of the basis for such claims.

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

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

VI. Effective Date

Generally, a rule becomes effective not less than 30 days after publication in the **Federal Register**. 5 U.S.C. 553(d). A rule may become effective sooner if it is an interpretative rule, a statement of policy, or if the agency finds good cause to make it effective sooner. *Id.* Since the rules promulgated by this order are being adopted after public notice and opportunity for comment, procedures that are not statutorily required for the adoption of procedural rules, the Commission finds that good cause exists to make the rules promulgated by this order effective upon their publication in the **Federal Register**.

VII. Ordering Paragraphs

It is ordered:

1. The Commission hereby adopts the final rules for obtaining information from the Postal Service that follow the Secretary's signature as part of 39 CFR part 3005.

2. The Commission hereby adopts conforming rule changes to 39 CFR part 3001 that follow the Secretary's signature.

3. These rules shall take effect upon publication of this order in the **Federal Register**.

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

List of Subjects

39 CFR Part 3001

Administrative practice and procedure, Postal Service.

39 CFR Part 3005

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

By the Commission.

Shoshana M. Grove,
Secretary.

For the reasons discussed in the preamble, the Postal Regulatory Commission amends 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 is revised to read as follows:

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

■ 2. Revise §3001.3 to read as follows:

§3001.3 Scope of rules.

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

■ 3. Add part 3005 to read as follows:

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

Subpart A—General

Sec.

3005.1 Scope and applicability of other parts of this title.

3005.2 Terms defined for purposes of this part.

Subpart B—Subpoenas

3005.11 General rule—subpoenas.

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

3005.13 Subpoenas issued in response to a third-party request.

3005.14 Service of subpoenas.

3005.15 Duties in responding to a subpoena.

3005.16 Enforcement of subpoenas.

Subpart C—Depositions and Written Interrogatories

3005.21 Authority to order depositions and responses to written interrogatories.

Appendix A to Part 3005—Subpoena Form

Authority: Authority: 39 U.S.C. 503; 504; 3651(c); 3652(d).

Subpart A—General**§ 3005.1 Scope and applicability of other parts of this title.**

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

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

§ 3005.2 Terms defined for purposes of this part.

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

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

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

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

Subpart B—Subpoenas**§ 3005.11 General rule—subpoenas.**

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

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

(c) Subpoenas issued pursuant to this subpart may require the attendance and presentation of testimony or the production of documentary or other evidence with respect to any proceeding conducted by the Commission under title 39 of the United States Code or to obtain information for preparation of a report under that title.

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

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

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

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

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

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

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

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

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

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

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

(d) Subpoenas issued under this section shall be issued subject to the right of the Postal Service and other interested persons to file a motion pursuant to § 3001.21(a) of this chapter to quash the subpoena, to limit the scope of the subpoena, or to condition the subpoena as provided in § 3005.11(d). Such motion shall include any objections to the subpoena that are personal to the covered person responsible for providing the information being sought. Motions alleging undue burden or cost must state with particularity the basis for such claims. Answers to the motion may be filed by any interested person pursuant to § 3001.21(b) of this chapter. Pending the resolution of any such motion, the covered person shall secure and maintain the requested information.

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

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

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

(2) Requests for subpoenas under this section shall be made by written motion filed with the presiding officer in the manner provided in § 3001.21 of this chapter. The Postal Service shall transmit a copy of the request to any covered person that it deems likely to be affected by the request and shall provide the person requesting the subpoena with the name, business address and business phone number of the persons to whom the request has been transmitted.

(3) Answers to the motion may be filed by the Postal Service, by any person to whom the Postal Service has transmitted the request, and by any other participant. Answers raising objections, including allegations of undue burden or cost, must state with particularity the basis for such claims. Answers shall be filed as required by § 3001.21(b) of this chapter.

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

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

(b) *Procedure for requesting and issuing subpoenas when no hearings have been ordered.* Any person may request the issuance of a subpoena to a covered person pursuant to § 3005.11 to

enforce an information request issued by the Commission or a Commissioner even though no hearings have been ordered by the Commission.

(1) A request for the issuance of a subpoena shall be made by motion as provided by § 3001.21 of this chapter. A copy of the request shall be served upon the Postal Service as provided by § 3001.12 of this chapter and by forwarding a copy to the General Counsel of the Postal Service, or such other person authorized to receive process by personal service, by Express Mail or Priority Mail, or by First-Class Mail, Return Receipt requested. The Postal Service shall transmit a copy of the request to any covered person that it deems likely to be affected by the request and shall provide the person requesting the subpoena with the name, business address and business phone number of the persons to whom the request has been transmitted. Proof of service of the request shall be filed with the Secretary by the person requesting the subpoena. The Secretary shall issue a notice of the filing of proof of service and the deadline for filing answers to the request.

(2) Answers to the motion may be filed by the Postal Service, by any person to whom the Postal Service has transmitted the request, and by any other person. Answers raising objections, including allegations of undue burden or cost, must state with particularity the basis for such claims. Answers shall be filed as required by § 3001.21(b) of this chapter.

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

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

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

(2) A showing of the relevance and materiality of the testimony,

documentary or other evidence being sought;

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

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

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

§ 3005.14 Service of subpoenas.

(a) *Manner of service.* (1) *Existing Postal Service officers and employees.* In addition to electronic service as provided by § 3001.12(a) of this chapter, subpoenas directed to existing Postal Service officers and employees must be served by personal service upon the General Counsel of the Postal Service or upon such other representative of the Postal Service as is authorized to receive process. Upon receipt, the subpoena shall be transmitted and delivered by the Postal Service to the existing officers and employees responsible for providing the information being sought by the subpoena. Subpoenas served upon the Postal Service and transmitted to Postal Service officers and employees shall be accompanied by a written notice of the return date of the subpoena.

(2) *Existing Postal Service agents and contractors.* In addition to electronic service as provided by § 3001.12(a) of this chapter, subpoenas directed to existing Postal Service agents and contractors must be served by personal service upon the General Counsel of the Postal Service or upon such other representative of the Postal Service as is authorized to receive process. Upon receipt, the subpoena shall be transmitted and delivered by the Postal Service to existing agents and contractors responsible for providing

the information being sought by the subpoena. Service upon such agents and contractors shall be accompanied by a written notice of the return date of the subpoena.

(3) *Prior Postal Service officers, employees, agents, and contractors.* Subpoenas directed to Postal Service officers, employees, agents, and contractors who, at the time the subpoena is issued, are no longer officers or employees of the Postal Service or are no longer agents or contractors in an existing agency or contract relationship with the Postal Service, must be served by personal service. Service upon such officers, employees, agents, or contractors shall be accompanied by a written notice of the return date of the subpoena.

(4) *Service arrangements.* Arrangements for service upon the Postal Service under §§ 3001.14(a)(1) or 14(a)(2) of this chapter or upon former Postal Service officers, employees, agents, or contractors under § 3001.14(a)(3) of this chapter shall be arranged either by the Commission or by the third party who requested issuance of the subpoena.

(b) *Return of service and proof of transmission.* (1) *Return of service.* Proof of service under § 3001.14(a) of this chapter must be filed with the Secretary within 2 business days following service, unless a shorter or longer period is ordered by the Commission, and must be accompanied by certifications of:

(i) The manner, date, and time of delivery of the subpoena;

(ii) The name, business address, telephone number, and e-mail address of the person upon whom the subpoena was served; and

(iii) The return date of the subpoena.

(2) *Proof of transmission.* The Postal Service shall within 2 business days of transmission of a subpoena by the Postal Service to an existing Postal Service officer, employee, agent, or contractor pursuant to §§ 3001.14(a)(i) or (ii) of this chapter, or such shorter or longer period ordered by the Commission, file with the Secretary a certification of:

(i) The manner, date, and time of delivery of the subpoena;

(ii) The name, business address, telephone number, and e-mail address of the person to whom the subpoena was transmitted; and

(iii) The return date of the subpoena.

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

§ 3005.15 Duties in responding to a subpoena.

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

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

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

(d) A covered person commanded to produce and permit inspection or

copying of designated electronically stored information, books, papers, or documents need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing, or trial.

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

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

§ 3005.16 Enforcement of subpoenas.

In the case of contumacy or failure to obey a subpoena issued under this subpart, the Commission may apply for an order to enforce its subpoena as permitted by 39 U.S.C. 504(f)(3).

Subpart C—Depositions and Written Interrogatories**§ 3005.21 Authority to order depositions and responses to written interrogatories.**

The Chairman, any designated Commissioner, or any administrative law judge may order the taking of depositions and responses to written interrogatories by a covered person with respect to any proceeding conducted under title 39 of the United States Code or to obtain information to be used to prepare a report under that title.

BILLING CODE 7710-FW-S

Appendix A to Part 3005—Subpoena
FormUNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

In the Matter of:

[Case Name – If Applicable]

[Docket No. – If Applicable]

[Report Name – If Applicable]

SUBPOENA

TO:

-
- YOU ARE COMMANDED to appear at the place, date, and time specified below to provide testimony in the above matter.

PLACE OF TESTIMONY	DATE AND TIME
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- YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above matter.

PLACE OF DEPOSITION	DATE AND TIME
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- YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (attach additional sheet if necessary).

PLACE	DATE AND TIME
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ISSUING OFFICIAL'S SIGNATURE	DATE
ISSUING OFFICIAL'S NAME AND PHONE NUMBER	
ISSUING OFFICIAL IS (CHECK ONE):	
<input type="checkbox"/> CHAIRMAN	
<input type="checkbox"/> COMMISSIONER DESIGNATED BY THE CHAIRMAN	
<input type="checkbox"/> ADMINISTRATIVE LAW JUDGE APPOINTED UNDER 5 U.S.C. 3105	
I HEREBY CERTIFY THAT THE MAJORITY OF THE COMMISSIONERS CURRENTLY HOLDING OFFICE HAVE PREVIOUSLY CONCURRED IN WRITING WITH THE ISSUANCE OF THIS SUBPOENA.	
ISSUING OFFICIAL'S SIGNATURE	DATE

39 CFR § 3005.15:

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

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

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

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

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