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39 CFR Part 3001

Revisions to Procedural Rules; Final Rule

**POSTAL REGULATORY COMMISSION****39 CFR Part 3001****[Docket No. RM2012-4; Order No. 2080]****Revisions to Procedural Rules****AGENCY:** Postal Regulatory Commission.  
**ACTION:** Final rule.

**SUMMARY:** The Commission is issuing a set of final rules concerning the procedures related to Postal Service requests for an advisory opinion from the Commission on a change in the nature of service. Adoption of the rules follows a review of comments on proposed rules. After consideration of comments received, some proposed rules were modified, clarified, or corrected. Adoption of these rules will expedite the issuance of advisory opinions.

**DATES:** *Effective* July 10, 2014.**FOR FURTHER INFORMATION CONTACT:** David A. Trissell, General Counsel, at 202-789-6820.**SUPPLEMENTARY INFORMATION:** Regulatory History:

77 FR 23176 (April 18, 2012)

78 FR 35812 (June 14, 2013)

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**I. Introduction**

In this Order, the Commission adopts new procedures for nature of service proceedings (N-cases). These new procedures replace the rules set forth in 39 CFR part 3001, subpart D, and are intended to address the need for more timely completion of N-cases. Under the new procedures, the Commission would provide an advisory opinion within 90 days of the date on which the Postal Service files its request under 39 U.S.C. 3661.

The Commission first solicited comments on this issue in an advance

notice of proposed rulemaking.<sup>1</sup> Eight parties filed comments on matters such as whether changes to existing rules and procedures were warranted and if so, what the changes should be.<sup>2</sup>

In response to those comments, the Commission issued a notice of proposed rulemaking setting forth proposed regulations for modifying the N-case procedures.<sup>3</sup> Order No. 1738 solicited comments on the proposed rules. After careful consideration of the comments submitted, the Commission is adopting the proposed rules with several minor modifications, clarifications, and corrections.

**II. Comments**

In response to Order No. 1738, the following parties submitted comments: David B. Popkin (Popkin),<sup>4</sup> the Greeting Card Association (GCA),<sup>5</sup> the National Newspaper Association, Inc. (NNA),<sup>6</sup> the Public Representative,<sup>7</sup> Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. (collectively, Valpak),<sup>8</sup> and the Postal Service.<sup>9</sup>

Reply comments were submitted by GCA,<sup>10</sup> Valpak,<sup>11</sup> the Public Representative,<sup>12</sup> and the Postal Service.<sup>13</sup>

**III. Changes to Proposed Rules**

The following proposed regulations have been modified from Order No. 1738:

- 39 CFR 3001.20—Formal intervention

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

<sup>2</sup> The Appendix to Order No. 1738 identifies initial and reply comments to Order No. 1309.

<sup>3</sup> Notice of Proposed Rulemaking Regarding Modern Rules of Procedure for Nature of Service Cases Under 39 U.S.C. 3661, May 31, 2013 (Order No. 1738).

<sup>4</sup> Comments of David B. Popkin, July 29, 2013 (Popkin Comments).

<sup>5</sup> Initial Comments of the Greeting Card Association, July 29, 2013 (GCA Comments).

<sup>6</sup> Comments of National Newspaper Association, July 29, 2013 (NNA Comments).

<sup>7</sup> Public Representative's Comments, July 29, 2013 (PR Comments).

<sup>8</sup> Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. Initial Comments on Notice of Proposed Rulemaking, July 29, 2013 (Valpak Comments).

<sup>9</sup> United States Postal Service Initial Comments, July 29, 2013 (Postal Service Comments).

<sup>10</sup> Reply Comments of the Greeting Card Association, August 28, 2013 (GCA Reply Comments).

<sup>11</sup> Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. Reply Comments on Notice of Proposed Rulemaking, August 28, 2013 (Valpak Reply Comments).

<sup>12</sup> Public Representative's Reply Comments, August 28, 2013 (PR Reply Comments).

<sup>13</sup> United States Postal Service Reply Comments, August 28, 2013 (Postal Service Reply Comments).

- 39 CFR 3001.81—Pre-filing requirements
- 39 CFR 3001.83—Contents of formal requests
- 39 CFR 3001.87—Interrogatories
- 39 CFR 3001.88—Production of documents or things
- 39 CFR 3001.89—Admissions
- 39 CFR 3001.92—Hearings
- 39 CFR 3001.93—Initial and reply briefs.

The following proposed regulations are being enacted with the language proposed in Order No. 1738, except, in some instances, for minor editorial changes not intended to change the content of the rule:

- 39 CFR 3001.71—Applicability
- 39 CFR 3001.72—Advisory opinion and special studies
- 39 CFR 3001.73—Computation of time
- 39 CFR 3001.74—Service by the Postal Service
- 39 CFR 3001.75—Motions
- 39 CFR 3001.80—Procedural schedule
- 39 CFR 3001.82—Filing of formal requests
- 39 CFR 3001.84—Filing of prepared direct evidence
- 39 CFR 3001.85—Mandatory technical conference
- 39 CFR 3001.86—Discovery—in general
- 39 CFR 3001.90—Rebuttal testimony
- 39 CFR 3001.91—Surrebuttal testimony.

**IV. Discussion****A. Background**

The statutory basis for N-cases was enacted as part of the Postal Reorganization Act of 1970, Public Law 91-375, 84 Stat. 719, 39 U.S.C. 101 *et seq.* (PRA) and is codified at 39 U.S.C. 3661. Section 3661 requires the Postal Service to seek an advisory opinion from the Commission whenever it determines that there should be a change in the nature of postal services which will generally affect service on a nationwide basis. The Commission cannot issue an opinion on any proposal until it first provides the Postal Service, users of the mail, and the Commission's Public Representative an opportunity for hearing on the record under sections 556 and 557 of the Administrative Procedure Act (APA).

Procedural rules governing N-cases are contained in 39 CFR part 3001, subpart D. N-cases are also subject to procedural rules of general applicability set forth in 39 CFR part 3001, subpart A. 39 CFR 3001.71. Under these rules, the Commission has historically conducted N-case hearings as formal, trial-type proceedings.

Since the enactment of the Postal Accountability and Enhancement Act (PAEA) in 2006, the frequency of Postal Service requests for advisory opinions under section 3661 has increased significantly. Order No. 1738 at 2. Between 1970 and 2006, the Postal Service initiated five N-cases. *Id.* at 1–2. In the last seven years, the Postal Service has filed six additional N-cases.<sup>14</sup> As the frequency of N-cases has increased, so has their complexity and duration. Of the last six N-cases, three have required eight months or more to complete.<sup>15</sup> The longest of those cases (Docket No. N2010–1) took almost a full year to complete. *Id.*

As its financial situation has worsened, the Postal Service has called for more expeditious resolution of its N-case proposals. Congress has taken notice of the Postal Service's calls for expedition and is considering the imposition of a 90-day deadline for the issuance of all N-case advisory opinions.<sup>16</sup> Mailers and others oppose a fixed deadline for the completion of N-cases. See, e.g., Valpak Comments at 3. They base their opposition on existing legal requirements and on practical considerations, such as the need to conduct discovery of Postal Service information which, they assert, is needed to analyze and evaluate N-case proposals. *Id.* at 9–11.

The Commission has attempted to respond to Postal Service calls for expedition and N-case participant demands for an opportunity to explore and contest Postal Service proposals by balancing the interests of both in the procedural schedules it adopts in individual N-cases. While it understands the Postal Service's desire for more prompt issuance of advisory opinions, the Commission has not always been able to accommodate Postal Service requests for expedition. The tension between the rights of participants and the rights of the Postal Service in N-cases was discussed in a 2012 Commission order denying a Postal Service request for reconsideration of a procedural schedule:

<sup>14</sup> In addition to the five N-cases identified on page 2 of Order No. 1738, one additional N-case has been filed and concluded. See Docket No. N2014–1, Advisory Opinion on Service Changes Associated with Standard Mail Load Leveling, March 26, 2014.

<sup>15</sup> See “Survey of N-cases” attached to 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 17, 2012.

<sup>16</sup> Postal Reform Act of 2014, S. 1486, 113th Cong., 2d. Sess. section 206 (as reported by S. Comm. on Homeland Security and Governmental Affairs on February 6, 2014) (S. 1486).

Before the Commission is permitted to issue an advisory opinion, it is required to provide an opportunity for hearing on the record. . . . Participants [in the proceeding have] justified requests for hearings on the record. The Commission has procedures in place, both by precedent and rule, to implement these [statutory] requirements, which provide due process to all participants. The procedures are flexible enough to accommodate various complexities of cases, and levels of controversy, but also include procedural steps that once triggered require somewhat rigid increments of time. . . . A reasonable amount of time, consistent with the complexity of the case, must be provided for each step to ensure due process.<sup>17</sup>

Given the increasing frequency and the varied complexity of N-cases and the Postal Service's continuing expressions of the need for expediting these cases, among other reasons, on April 10, 2012, the Commission issued an advance notice of proposed rulemaking in which it solicited comments on: (1) Whether changes to the current N-case procedures and regulations are warranted; (2) if so, what those changes would be; and (3) such other relevant subjects commenters might wish to address.<sup>18</sup> Comments were filed by the Postal Service and seven other persons.<sup>19</sup>

After reviewing these comments, on May 31, 2013, the Commission issued Order No. 1738 in this docket, in which it presented a comprehensive proposal for restructuring and streamlining N-case procedures. The objective of the Commission's proposal was to establish a procedural framework in which advisory opinions could be issued within 90 days of the filing of a Postal Service request.

The issuance of an advisory opinion within 90 days requires a number of inter-related changes to the Commission's existing N-case procedures. The principal changes include:

- The establishment of a pre-filing phase intended to inform interested persons of the Postal Service's proposal and to provide the Postal Service with feedback useful in preparing a final proposal less likely to require substantial revisions after commencement of formal Commission proceedings;
- The adoption of a pro forma procedural schedule that provides for issuance of an advisory opinion within 90 days;

<sup>17</sup> Docket No. N2012–1, Order Denying Motion for Reconsideration of Ruling Establishing Procedural Schedule, January 31, 2012, at 2–3 (Order No. 1183).

<sup>18</sup> See Order No. 1309.

<sup>19</sup> Order No. 1738, Appendix.

- A limitation on the scope of the proceeding to the Postal Service's proposal with an opportunity for participants to explore related subjects by means of special Commission studies or public inquiry proceedings;
  - The adoption of expedited deadlines for filing and responding to motions;
  - The adoption of new discovery procedures that provide for a mandatory technical conference and a limitation on the number of written interrogatories;
  - Expedited filing of rebuttal and surrebuttal testimony, if any;
  - Revised hearing procedures that provide for back-to-back hearings on the Postal Service's direct case; rebuttal testimony, if any; and surrebuttal testimony, if any;
  - An expedited briefing schedule and limitations on the length of initial and reply briefs; and
  - Adoption of a policy of issuing advisory opinions targeted to the Postal Service's proposal and, when appropriate, the institution of special studies or a public inquiry proceeding to explore related subjects.
- Order No. 1738 at 9–10.

No single procedural change, by itself, is capable of significantly reducing the duration of N-cases. It is only in combination that these changes have the potential for achieving the objective of issuing an advisory opinion within 90 days of the date of the Postal Service's filing.

#### B. Legal Basis for Changes

39 U.S.C. 3661(c) sets forth the Commission's legal authority to issue advisory opinions. Subsection 3661(c) requires the Commission to provide the Postal Service, users of the mail, and the Commission's Public Representative an opportunity for a hearing on the record.

The Commission has historically interpreted section 3661's 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” to require formal, trial-type proceedings. See Order No. 1183. 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.

Additionally, the Commission's evaluation of N-cases is conducted

according to procedures set forth in 39 CFR part 3001, subpart D. Procedural rules of general applicability in 39 CFR part 3001, subpart A also apply.

### C. The 90-Day Schedule/Pro Forma Scheduling Order

In Order No. 1738, the Commission proposed a “deadline for issuance of an advisory opinion, which is 90 days from the date of filing [of the Postal Service’s request].” Order No. 1738 at 13. See also *id.* at 29 (proposed § 3001.72(a)); *id.* at 33 (proposed § 3001.80 (a)(12)). The 90-day deadline was part of a pro forma N-case procedural schedule that the Commission proposed to add to its part 3001, subpart D procedural regulations in CFR title 39. *Id.* at 50. That pro forma procedural schedule was based upon, and incorporated, the other changes in N-case procedures proposed by the Commission to expedite the issuance of advisory opinions. See *id.* at 13. The pro forma procedural schedule was, in turn, to provide the basis for scheduling orders in individual N-cases. See *id.* at 13–14. Accompanying the 90-day deadline was a provision that permitted changes in the procedural schedule for “good cause.” *Id.* at 33 (proposed § 3001.80(b)).

Responses to the 90-day deadline range from apparent acquiescence by GCA to clear opposition by Valpak.<sup>20</sup> Comments by NNA, the Postal Service, and the Public Representative either accept or support the proposed 90-day deadline, subject to potential exceptions or clarifications that could impact whether the deadline is extended.<sup>21</sup>

In its comments, GCA states that it “does not disagree with the general thrust of the proposed rules,” although it believes that the completion of complex or highly controversial cases in 90 days “will be a challenging task.” GCA Comments at 9.

Although NNA does not express *per se* opposition to the 90-day deadline, it does express concern over “the effect a shortened review period would have upon the time available for field hearings.” NNA Comments at 1. It therefore proposes that the N-case procedural schedule “adopt a 120- to 180-day expectation” if “participants persuasively argue or the Commission’s own analysis determines that citizens across the country should have the opportunity to be heard at [field] hearings. . . .” *Id.* at 5. The issue of field hearings was raised by various participants and will be discussed in

more detail in section IV.J., *infra*. Until a decision is made to hold field hearings, there is no way to estimate what impact such hearings would have on the deadline for issuing an advisory opinion. Accordingly, it would, at best, be premature for the Commission to adopt NNA’s proposal.

Valpak challenges the 90-day deadline as an “effort to cut short intervenor participation.” Valpak Comments at 2. It also asserts that “[a] fixed, 90-day timeline for Advisory Opinions is unreasonable (and thus unlawful). . . .” Valpak Reply Comments at 7. The Commission disagrees with both propositions.

The Commission’s objective is not to “cut short” participation by interested parties. Rather, its objective is to focus intervenor participation on the Postal Service’s proposal, as opposed to potential alternatives, and thereby accelerate the issuance of the requested advisory opinion.

The history of N-cases demonstrates that participants frequently seek to challenge the Postal Service’s case by establishing the feasibility of one or more alternatives that they argue would be preferable.<sup>22</sup> In furtherance of such efforts, participants have engaged in discovery in an effort to establish a factual basis to support their alternative(s). The exploration of alternatives can add significantly to the time required to issue an advisory opinion.

In some cases, the Commission has found the alternatives, or aspects of the alternatives, proposed by participants to be preferable to the Postal Service’s proposals.<sup>23</sup> In other cases, the presentations by participants appear to have caused the Postal Service to have modified its proposal during the course of the N-case. See, e.g., Evolutionary Network Development Proposal at 88, ¶ 7019. Given the potential value of participant-identified alternatives, the Commission does not intend to preclude participants from endorsing such alternatives. Rather, the Commission seeks to redirect such efforts into either the pre-filing conferences that will be required under the new regulations or into special studies or public inquiry proceedings.

In adopting this approach, the Commission emphasizes that participants may identify or advocate

alternatives to the Postal Service’s proposal during the course of an N-case. However, the manner and the degree to which an alternative can be pursued in the N-case proper will be restricted. This issue is discussed further in later sections of this Order.

The Commission also disagrees with Valpak’s assertion that the 90-day deadline is unlawful. Notwithstanding the Commission’s use of the term “deadline,” the 90-day period is not immutable as Valpak seems to suggest. Valpak Comments at 3. The Commission has expressly reserved the right in §§ 3001.71 and 3001.80(b) to extend the deadline for “good cause.” Indeed, the Postal Service has cited the possibility of a “good cause” extension as the basis for concern that the 90-day deadline may prove to be merely aspirational. Postal Service Comments at 25–27. The “good cause” basis for an extension of the 90-day deadline is discussed below.

In its comments, the Postal Service presents an affirmative case for the 90-day deadline. For the reasons that follow, the Commission does not rely upon the reasons offered by the Postal Service in support of a 90-day deadline. The Commission does, however, conclude that a 90-day deadline is appropriate as part of the comprehensive package of procedural changes adopted by this Order. The reasons for that conclusion are also set forth below.

The Postal Service argues that the Commission already operates under a 90-day deadline in both the Annual Compliance Determination (ACD) proceedings conducted under 39 U.S.C. 3653(b) and exigent rate cases conducted under 39 U.S.C. 3622(d)(1)(E). In both types of proceedings, the result is a binding Commission directive or order. By contrast, N-cases result in the issuance of a non-binding advisory opinion. *Id.* at 4.

While the Postal Service is correct in distinguishing between the legal effect of these types of proceedings, what the Postal Service fails to note is that statutorily required procedures for ACD proceedings and exigent rate cases are less demanding than the statutorily required procedures for N-cases. Thus, 39 U.S.C. 3653(a) requires only that the Commission “provide an opportunity for comment” on the Postal Service’s Annual Compliance Report that will be the subject of the Commission’s ACD. The opportunity that the Commission provides for filing written comments satisfies this requirement.

Similarly, the provisions of 39 U.S.C. 3622(d)(1)(E) governing exigent rate cases require only that the Commission

<sup>20</sup> See GCA Comments at 6–8; Valpak Comments at 2; Valpak Reply Comments at 6–9.

<sup>21</sup> NNA Comments at 5; Postal Service Comments at 2–4; Postal Service Reply Comments at 1–2; PR Comments at 13–14.

<sup>22</sup> See, e.g., Docket No. N2006–1, Advisory Opinion Concerning a Proposed Change in the Nature of Postal Services, December 19, 2006, at 84–85 (Evolutionary Network Development Proposal).

<sup>23</sup> Docket No. N2011–1, Advisory Opinion on Retail Access Optimization Initiative, December 23, 2011, at 64–81.

provide an “opportunity for a public hearing and comment. . . .” The Commission satisfies this requirement by affording participants the opportunity to file written comments and to propose questions that Commissioners can consider posing to Postal Service witnesses at public hearings. By contrast, the provisions of 39 U.S.C. 3661 governing N-cases prohibit the Commission from issuing its advisory opinion “until an opportunity for hearing on the record under sections 556 and 557 of title 5 [*i.e.*, the APA]. . . .” The requirement to provide an opportunity for a “hearing on the record” obligates the Commission to afford interested persons procedural rights that go beyond those afforded in ACD proceedings and exigent rate cases. This obligation to provide an opportunity for a “hearing on the record” places practical limitations on the Commission’s ability to expedite N-case proceedings. The objective of this rulemaking proceeding is to minimize unnecessary delays that can flow from practical limitations produced by the existing legal standards the Commission must observe.

Second, the Postal Service cites the abbreviated 20- to 90-day timeframes observed by other federal agencies in issuing binding advisory opinions to suggest that Commission N-case proceedings that produce non-binding advisory opinions are “unnecessarily drawn out.”<sup>24</sup> However, none of the six agencies identified by the Postal Service is required to provide an “opportunity for hearing on the record under sections 556 and 557 [of the APA]” as is the Commission. Indeed, it appears from the regulations cited by the Postal Service that five of the six agencies are authorized to issue advisory opinions on an *ex parte* basis without any input whatsoever from third parties.<sup>25</sup> The remaining agency limits interested persons to the submission of written comments only.<sup>26</sup> The Commission is not authorized to issue *ex parte* advisory opinions, nor is it categorically authorized to limit participation by interested persons to the submission of written comments. The Commission

concludes that the comparisons offered by the Postal Service are misplaced.

Third, the Postal Service cites Senate passage of S. 1486 and comments filed in response to Order No. 1309 by Senator Carper for the proposition that “the Commission’s advisory opinion process can and should be subject to a 90-day time limit.” Postal Service Comments at 4. While it appreciates the sentiments cited by the Postal Service, the Commission must conduct N-cases under section 3661 as it exists. The provisions of S. 1486 cited by the Postal Service omit any requirement for a “hearing on the record” and limits participants to the filing of written comments.<sup>27</sup> Pending enactment of provisions like those contained in S. 1486, the Commission’s attempts to expedite N-cases must satisfy the existing legal requirements of section 3661.

The Commission nevertheless concludes that it is appropriate to prescribe a 90-day deadline for N-cases. It bases that conclusion on the consideration of several factors, including: (1) The increased importance of issuing advisory opinions more promptly given the Postal Service’s financial difficulties; (2) the incentive that a 90-day deadline will provide to expedite N-case proceedings; (3) the potential that other structural and procedural changes adopted by this Order have for enabling the Commission to meet the 90-day deadline; and (4) the right retained by the Commission to extend the 90-day deadline if necessary and appropriate.

The Postal Service’s precarious financial situation is widely known and has in recent years led to an increase in the frequency of N-case proposals. The Postal Service states that its “unsustainable financial position has even impelled it to initiate service changes about which it has sought the Commission’s advice before the conclusion of the [N-case] review process that will generate that advice.” Postal Service Comments at 3. It states further that “timelier proceedings can offer greater relevance for the Postal Service’s ultimate decisions.” *Id.* The Commission agrees that the situation confronting the Postal Service militates in favor of expediting N-cases under existing statutory authority.

The Postal Service also supports the Commission’s proposal to complete N-cases within 90 days of the submission of an advisory opinion request. *Id.* at 2.

<sup>27</sup> See S. 1486, section 206(b)(2)(A) (“Advisory Opinion.—Upon receipt of a proposal [to make a change in the nature of postal services], the Postal Regulatory Commission shall . . . provide notice and an opportunity for public comment. . . .”).

The Commission agrees with the Postal Service’s assertion that “[a] commitment to a 90-day process will make N-case procedures more effective. . . .” *Id.* at 2–3.

In two of the most recent N-cases, the Commission has issued advisory opinions within 90 days of the filing of the Postal Service’s request.<sup>28</sup> Opponents of a 90-day deadline argue that such cases were atypical and cannot be considered representative of all N-cases, many of which are far more complex. Valpak Comments at 2. The Commission recognizes the potential for differences in N-case complexity and does not mean to suggest that all N-cases will present the same (or even nearly the same) level of complexity. In these more recent instances, the Postal Service’s pre-filing outreach to affected stakeholders gave it an early understanding of the proposals and facilitated issuance of the advisory opinion within 90 days.<sup>29</sup> This experience demonstrates that a 90-day deadline can be an attainable goal, particularly when stakeholders cooperate in the formulation and presentation of a proposal, as anticipated by the pre-filing requirements adopted herein. To be sure, while the circumstances surrounding each request for advisory opinion may vary, the safeguards incorporated into the procedures are designed to accommodate those variations.

The Commission also believes that the adoption of a 90-day deadline will provide an appropriate incentive for timely issuance of advisory opinions. The Postal Service, interested participants, and the Commission will each have responsibilities for meeting the 90-day deadline. For example, at the pre-filing stage discussed in section IV.E., *infra*, it will be necessary for the Postal Service to engage interested persons in a discussion of its proposal. Participants must, among other things, meet expedited procedural deadlines in pursuing discovery, submitting testimony, and making other filings. The Commission will be required to issue prompt rulings, to place appropriate limitations on the scope of the proceedings, and otherwise to facilitate

<sup>28</sup> Docket No. N2012–2, Advisory Opinion on Post Office Structure Plan, August 23, 2012 (POSTPlan Opinion); and Docket No. N2014–1, Advisory Opinion on Service Changes Associated with Standard Mail Load Leveling, March 26, 2014 (Standard Mail Load Leveling Opinion).

<sup>29</sup> See POSTPlan Opinion at 5 (“The POSTPlan represents a more fully realized Postal Service effort to optimize its retail network . . . The POSTPlan incorporates many of the recommendations the Commission made in its RAOI Advisory Opinion.”).

<sup>24</sup> Postal Service Comments at 4, n.6 (citing United States Postal Service Comments, June 18, 2012, at 7, n.13 in response to Order No. 1309 (Postal Service Response to Order No. 1309)).

<sup>25</sup> See Postal Service Response to Order No. 1309 at 7, n.13 (regulations of the Federal Reserve Board of Governors; Department of Commerce, Bureau of Industry and Security; Office of the Special Master for TARP Executive Compensation; Centers for Medicare and Medicaid Services; and Office of the Inspector General for Health and Human Services).

<sup>26</sup> *Id.* (regulations of the Federal Election Commission).

the timely completion of the proceeding.

Adoption of a 90-day deadline is also facilitated by the restructuring of N-case proceedings and by the procedural changes being adopted by this Order. These changes, each of which is discussed below, include limitation of the scope of a proceeding; adoption of a pre-filing conference requirement; revisions to filing requirements; adoption of a mandatory technical conference requirement; shortened procedural deadlines; revised discovery procedures; revised procedures for the filing of testimony; revised hearing procedures; revised briefing requirements; and the adoption of procedures for conducting special studies of issues beyond the scope of the Postal Service's specific N-case proposal.

Finally, the Commission concludes that the adoption of a 90-day deadline must include provisions for an extension of that deadline in appropriate cases. In adopting the new N-case rules, the Commission seeks to balance the interest of the Postal Service in obtaining more timely advisory opinions and the interest of all participants in being accorded due process. This balance must be achieved under the statute as it exists. Although the exercise is challenging, the Commission is committed to providing both more timely opinions and due process. Nevertheless, cases may be presented in which it is not possible to issue an opinion within 90 days. For that reason, a safety valve must be available to permit extension of the deadline. That being said, however, the Commission does not intend to invoke its right to extend a 90-day deadline without good cause first being established.

The Postal Service and the Public Representative both request the Commission to clarify what situations or circumstances might constitute "good cause" under proposed § 3001.80(b) for extending the 90-day deadline. Postal Service Comments at 25–27; PR Comments at 14. In a related request, Valpak asks the Commission to amend proposed § 3001.80(c) to provide for the automatic reset of the 90-day clock to zero in any cases in which the Postal Service changes its proposal as the case progresses. Valpak Comments at 5.

The Commission does not believe that it is either necessary or advisable at this stage to specify what situations or circumstances would justify a "good cause" extension. That standard is intended to be flexible and dependent upon specific factual circumstances. It is for the proponent of an extension to

articulate a "good cause" basis for an extension.

#### *D. Limited Scope of Proceeding*

Section 3001.72, as proposed, would require the Commission to issue an advisory opinion no later than 90 days following the filing of the Postal Service's request for an advisory opinion, absent a determination of good cause for extension. Proposed § 3001.72(a). It would also be limited in scope to the specific changes proposed by the Postal Service in its request. Proposed § 3001.72(b). Any alternatives or issues tangentially related to the proposed changes may be evaluated by the Commission in a separate special study or public inquiry proceeding within the discretion of the Commission. Order No. 1738 at 23.

GCA opines that the limitation of scope may be the most significant change to the N-case proceedings. GCA Comments at 6. It observes that "since the Postal Service must have the same procedural rights and opportunities as other parties, the presentation of alternatives could extend the case well past the Commission's 90-day limit." *Id.* However, it contends proposed § 3001.72 does not exploit the possibilities of a special study or public inquiry as fully as it should. Because briefs, hearings, rebuttal, and surrebuttal cases are limited to the Postal Service's proposal by §§ 3001.93(b)(3), 92(e)(1) and (f)(3), and 90(a) and (b) respectively, it states that it is unclear how the discussion of alternatives could arise in N-cases. *Id.* at 6–7. It proposes the Commission reinforce its regulations by providing for a special procedure whereby a participant could petition for institution of a special study public inquiry. *Id.* at 7.

The Public Representative supports the proposed rule, so long as participants may request exploration of alternatives in special studies or public inquiry proceedings. PR Comments at 31.

The Postal Service agrees with the principle that participants be allowed to file a petition for public inquiry for alternative proposals. Postal Service Reply Comments at 4. However, it states that specific language creating procedures for them to do so is unnecessary, as any participant may request the Commission open a public inquiry at any time, even without an explicit provision in the Commission's rules. *Id.*

Valpak opposes the limitation of scope and maintains that the consideration of alternatives is integral to the development of a quality and informed advisory opinion. Valpak

Comments at 10. It contends that any after-the-fact studies of alternative proposals after an advisory opinion has been issued would be "well nigh impossible." Valpak Reply Comments at 3.

The Commission does not believe that its proposed restructuring of N-cases will preclude the issuance of informed advisory opinions or the careful review of worthy alternatives. Rather, it believes that its approach preserves a balance between the efficacy and meaningfulness of a 90-day review of a specific Postal Service proposal and the Commission's ability to give thorough consideration to the range and complexity of alternatives proposed by participants. The Commission notes that participants may, if they wish, raise alternative proposals in their briefs and even list reasons why those alternatives would be superior to the Postal Service's proposal. The Commission would view such discussion as critique of the Postal Service's current proposal. It would not, however, evaluate or opine on the merits of the alternative proposal in the advisory opinion.

The Postal Service correctly notes that any party may petition the Commission to open a rulemaking or public inquiry at any time. As such, modification of the proposed rule to create a special procedure for such requests is unnecessary. The Commission will not set forth specific requirements in this section for such requests. It does so with the intent of giving participants who wish to file alternative proposals the ability to do so in the form that they deem most appropriate.

#### *E. Pre-Filing Conference/Revised Filing Requirements*

*Pre-filing conference.* As a condition for issuance of an advisory opinion within 90 days of filing, proposed § 3001.81 would require the Postal Service to conduct a pre-filing conference with interested persons prior to filing a request for an advisory opinion. It sets forth certain parameters regarding the purpose of the pre-filing conference, the notice to be given for the benefit of interested parties, and specifies the informal and off the record nature of pre-filing conferences. See proposed § 3001.81. The Commission believes that a formal pre-filing process will both aid the Postal Service in developing its proposal before formally requesting an advisory opinion and expedite the Commission's review of the proposal once it is filed. Order No. 1738 at 12.

Certain commenters question the value of a pre-filing phase. Popkin expresses concern that an intelligent

discussion may not be possible when participants have not seen or fully evaluated the pending proposal. Popkin Comments at 2. Valpak doubts that the pre-filing phase will do anything to shorten the time required to issue an advisory opinion. Valpak Comments at 7. It states that some Postal Service filings are based on incomplete and developing information and the Postal Service often takes the position that nothing is final until approved by the Governors. As such, it asserts “there is little reason to believe that the Postal Service will be in a position to disclose material information about the nature of a proposal before it is finalized and filed.” *Id.*

Many commenters suggest refinements and improvements to the pre-filing phase. NNA recommends the Commission require the Postal Service to make a policy or “road-map” witness available in the pre-filing conference. NNA Comments at 7. The Public Representative proposes that the Commission modify the notice requirements to require the Postal Service to notify all participants in the past five N-cases and all participants in a certain number of rate and complaint cases in order to ensure that all potentially affected persons may be reached. PR Comments at 8. She also opines that it would be useful for the rules to state explicitly that the prohibition on *ex parte* communications in § 3001.735–501 in the Commission’s Standard of Conduct for employees also applies in the pre-filing stage. *Id.* at 8–9. Finally, she proposes to re-cast the filing phase as a “conditional acceptance” phase to allow for active Commission involvement during this stage of the proceedings. *Id.* at 10.

The Postal Service does not oppose creating a formal pre-filing process so long as it “is not significantly more burdensome than the pre-filing activities that the Postal Service undertakes under current practice.” Postal Service Comments at 7. It suggests that in order to ensure participants do not use the pre-filing phase to delay N-case proceedings, the Commission should indicate that alleged nonconformity with pre-filing rules does not provide a basis for extending the 90-day procedural schedule. *Id.*

The Commission emphasizes that the pre-filing stage is not intended to be overly burdensome to either the parties or the Postal Service. However, it does envision the pre-filing conference as a step above and beyond the current discussions conducted by the Postal Service with key customer segments before it files a request for an advisory

opinion. In the most recent advisory opinion, the Commission recommended that the Postal Service conduct more meaningful customer outreach prior to submitting an N-case proposal to the Commission.<sup>30</sup> The Commission views the formal pre-filing conference as one of several potential means to ameliorate the current gaps in customer outreach prior to implementation of a service change. To that end, the Commission is adopting several changes suggested by commenters as clarification in its final rule.

As NNA suggests, the final rules include a requirement that the Postal Service make a representative available at the pre-filing conference who can explain the policy rationale behind the proposal to participants in the pre-filing conference.

The language in the final rule has also been modified to make clear that the Commission may, in its discretion, consider an extension to the procedural schedule if the Postal Service’s failure to satisfy the requirements of the pre-filing conference is established by any participant. The intent of this modification is not to be punitive, but rather to provide an incentive for the Postal Service to be prepared to engage in productive and meaningful dialogue with its customers during the pre-filing conference. The Commission will allow the Postal Service ample discretion to conduct the pre-filing conference in the manner it deems most appropriate. The Commission views the formal pre-filing process as a prerequisite for adoption of an expedited procedural schedule. It is intended to aid the Postal Service in developing its proposal and to afford interested stakeholders an opportunity to learn about and possibly shape the Postal Service’s plans prior to the Postal Service filing a request for an advisory opinion.

*Revised filing requirements.* Section 3001.83 sets forth the information that must be included in the Postal Service’s request for an advisory opinion. Order No. 1738 at 13.

The Public Representative expresses concern that the requirement for the Postal Service to provide a summary of pre-filing discussions in its request for an advisory opinion will have a chilling effect on these discussions. PR Comments at 12–13. She suggests elimination of this requirement as well as the requirement that the Postal Service explain how it made a good faith effort to address criticisms and suggestions made by interested persons.

She asserts that both of these requirements defeat the purpose of “off the record” discussions—namely, that the matters discussed will not be disclosed in a manner that affects participants. She also maintains that the likelihood of the pre-filing phase becoming a case unto itself would increase if a summary and certification were required. *Id.*

The Commission seeks to foster an open and productive exchange of information at the pre-filing conference. It is persuaded by the Public Representative’s assertion that such an exchange may be chilled if the Postal Service is required to provide the Commission with a summary of the conference. However, it does not believe that the certification of good faith by the Postal Service will create a similarly chilling effect on pre-filing discussions. The final rule will eliminate the requirement for the Postal Service to provide a summary of the pre-filing conference but maintain and clarify the Postal Service’s obligation to certify that it made a good faith effort to address critiques of the proposal by participants to the pre-filing conference.

#### F. Mandatory Technical Conference

Section 3001.85 requires the Postal Service to make witnesses available for a mandatory technical conference with Commission staff and interested participants. The purpose of the conference is to clarify various technical aspects of the Postal Service’s proposal and to allow attendees to identify and request relevant information. The technical conference will be conducted off the record, but information obtained from the conference may be used to seek additional information through formal discovery procedures. Order No. 1738 at 18.

NNA, the Public Representative, and the Postal Service all support inclusion of a mandatory technical conference in the final rules. NNA Comments at 7; PR Comments at 18; Postal Service Comments at 6–7. Valpak opposes the technical conference because it doubts the utility to participants. Valpak Comments at 8.

Despite its support for the concept of a mandatory technical conference, the Postal Service maintains that the requirement obligating all witnesses who submit direct testimony to attend is unnecessarily burdensome and does not advance the objective of open information exchange. Postal Service Comments at 28. It proposes several alternatives to the proposed rule. The first alternative would require only witnesses whose testimony contains technical information to attend the

<sup>30</sup>Docket No. N2014–1, Advisory Opinion on Service Changes Associated with Standard Mail Load Leveling, March 26, 2014, at 50–52.

technical conference. The second alternative would allow the Public Representative to determine which, if any, witnesses' testimony contains technical information. Only those witnesses would be required to attend. *Id.* at 28–29.

GCA contends that neither of these alternatives improves the proposed rule. It states that not all participants will agree with either the Postal Service or the Public Representative's definition of what constitutes technical information. Lack of an objective definition may lead to more motions practice as participants request the Postal Service provide witnesses not initially determined to be technical witnesses. It proposes the proposed rule remain unchanged or that the Commission allow the Postal Service to move that certain witnesses be excused from attendance upon a demonstration that the witnesses' testimony neither presents nor uses technical information. GCA Reply Comments at 10–11.

The Commission regards the technical conference as an important procedural safeguard to ensure that participants and Commission staff are able to obtain necessary information about the Postal Service's proposal. Although the Commission's intent is not to create an undue burden on the Postal Service, GCA underscores the difficulty with achieving a consensus definition on technical or technically-based testimony. The Commission notes that this conference is the first opportunity within the formal procedural schedule for participants or Commission staff to clarify important and potentially complex aspects of the Postal Service's proposal. The utility of a mandatory technical conference may be significantly impaired if all necessary witnesses were not present. To that end, the Commission has determined to maintain the language of the proposed rules as-is, keeping in mind that the conference is an opportunity to ask witnesses questions of a technical nature. If the Postal Service seeks for one of its witnesses to be excused from the conference, it may file a motion with its proposal along with supporting justification for why the witness is not testifying or relying on any technical information.

#### *G. Shortened Procedural Deadlines/ Procedures Generally*

In order to issue an advisory opinion by the 90-day target deadline and meet the intermediate procedural deadlines of the pro forma schedule, the Commission shortened the procedural deadlines for: Oppositions to notices of intervention (proposed § 3001.20(d));

the Commission's motions practice (proposed § 3001.75); discovery procedures (*e.g.*, proposed §§ 3001.87, 3001.88, and 3001.89); and procedures for designating evidence from other Commission dockets (proposed §§ 3001.31(e) and 3001.31(k)(4)). The Commission included Saturdays, Sundays, and holidays in calculating deadlines (proposed §§ 3001.73 and 3001.15). Finally, the Commission proposed elimination of the "limited participator" status in N-cases (see proposed § 3001.20a).

Commenters express a number of concerns regarding these changes. Mr. Popkin and NNA expressed general concern that smaller participants may be disadvantaged because of a lack of internet access and because of an undue burden that smaller participants will experience in attempting to comply with shorter deadlines. Popkin Comments at 2–3; NNA Comments at 6. Mr. Popkin also objects to the possibility that proposed § 3001.73 will make filings due before 4:30 p.m. on days when the Commission is only open for part of the day. Popkin Comments at 3. NNA argues that 2-day deadlines (*e.g.*, proposed § 3001.75's deadline for answers to motions) could toll over a long weekend. NNA Comments at 6.

The Commission acknowledges that shortened procedural deadlines may require more intensive participation by participants in N-cases. However, small participants will not be the only ones who confront challenges under the new procedures. Everyone involved in the process, including the Commission, which will be responsible for issuing prompt rulings on motions and other filings made during the course of the proceeding and for issuing an advisory opinion within 90 days, will be required to increase their efforts to meet the expedited procedural deadlines. While different participants may encounter various challenges, all participants and the Commission will have increased responsibilities. Nor is the Commission convinced that a lack of access to the internet is so pervasive that it will adversely impact a significant number of potential smaller participants. Problems that may arise because of a lack of internet access will be dealt with in specific cases.

Nor do the alleged problems identified by Mr. Popkin and NNA with respect to specific regulations preclude the establishment of shortened deadlines. Mr. Popkin objects to the possibility that proposed § 3001.73 could make filings due before 4:30 p.m. on days, such as snow days, when the Commission closes early. Popkin Comments at 3. However, this

possibility already exists under the Commission's current regulations. See 39 CFR 3001.15. NNA's concern that a 2-day deadline could toll over a weekend is obviated by the fact that the Commission does not propose changing the second sentence in the current version of § 3001.15 which extends the deadline to the next business day. See proposed change in § 3001.15 (replacing the third sentence and leaving the first two sentences unchanged).

In addition to assertions that the shortened deadlines will be more burdensome, both the Postal Service and the Public Representative argue that compliance with these deadlines will not be feasible and that motions for extensions of time will become routine. Postal Service Comments at 48–49; PR Comments at 17–18; Postal Service Reply Comments at 2–3; PR Reply Comments at 9. The Postal Service asserts that the preferable alternative is to abandon "Participant Discovery" and adopt "Commission-Led Discovery." Postal Service Comments at 8–12.

The single biggest challenge to the expedition of N-cases is the discovery of information needed to provide "an opportunity for hearing on the record" as required by section 3661(c). While the Postal Service prefers the adoption of Commission-Led Discovery to the continuation of Participant Discovery, the Commission concludes that, under the existing statutory scheme and in light of its experience in conducting N-cases, Participant Discovery should be retained. See section IV.H.1.a., *infra*. To meet the challenge presented by discovery in N-cases, the Commission has proposed an array of changes. It has restructured the N-case process by, for example, creating a pre-filing conference process, narrowing the scope of the proceeding to the Postal Service's proposal, and deferring consideration of alternatives to public inquiry proceedings or special Commission studies. Within the framework thus created, a number of non-structural procedural changes are essential if the Commission is to issue advisory opinions within 90 days. The adoption of shortened procedural deadlines is such an essential procedural change.

The Commission appreciates that practice under the shortened procedural deadlines it has proposed will require an adjustment on the part of participants. It remains to be seen whether the Postal Service and the Public Representative are correct in suggesting that the shortened procedural deadlines proposed by the Commission will be beyond the ability of participants to comply. In the meantime, the Commission believes that



the approach it is adopting is needed, and can be managed successfully.

Finally, the Commission concludes that the status of “limited participator” should no longer be available to participants in N-cases. A number of participants agree with that conclusion. NNA Comments at 6; Valpak Comments at 7. The Public Representative urges the Commission to defer decision on the continued availability of the limited participator status in N-cases. PR Comments at 16–17. Aside from the Public Representative’s assertions that the continued availability of the limited participator status is unlikely to have an adverse impact on N-cases, the Commission sees no affirmative value in, or need for, that special status in N-cases. Accordingly, the Commission is adopting the proposed changes in its regulations that will eliminate the limited participator status in N-cases.

#### H. Discovery

Historically, a significant portion of N-cases has been devoted to discovery. In the discovery rules adopted by this Order, the Commission seeks to reduce the time and effort that will be spent on formal discovery by the Postal Service, other N-case participants, and by the Commission. The objective is to facilitate the more timely issuance of advisory opinions while, at the same time, providing for the development of an adequate record for decision.

By instituting a pre-filing conference procedure, the Commission seeks to encourage the voluntary exchange of information that would be directly related to the proposal filed by the Postal Service. By requiring a mandatory technical conference, the Commission seeks to afford participants an opportunity to inform themselves further regarding information relevant to the proposal after its filing. By requiring the Postal Service to make policy and institutional information available at the pre-filing and technical conference and to provide testimony, the Commission seeks to reduce the need for formal discovery to elicit such information. By limiting the scope of N-cases to a review of the Postal Service’s proposal, the Commission seeks to eliminate the need for discovery by participants of information for use in supporting alternatives to the Postal Service’s proposal, as well as the need for discovery by the Postal Service and participants of information regarding alternatives proposed by others. By eliminating the need to litigate the feasibility and appropriateness of

alternatives in the N-case itself,<sup>31</sup> the Commission seeks to eliminate or to reduce the possible need for Postal Service discovery of other participants.

Supplementing its attempt to reduce the need for formal discovery, the Commission is placing limits on the number of interrogatories that can be served on the Postal Service without express authorization. Participants will continue to be able to request the production of documents and to request the admission by the Postal Service of relevant facts.

The Commission also seeks to expedite formal discovery by adopting stricter discovery deadlines, such as deadlines for serving and answering discovery requests.

Finally, the Commission is establishing a new procedure by which the Postal Service can seek to avoid answering particular discovery requests through the filing of a motion to be excused from answering. This procedure replaces the filing of discovery objections followed by motions to compel and answers to motions to compel.

##### 1. Discovery—Generally

###### a. “Participant Discovery” vs. “Commission-Led Discovery”

Under the Commission’s existing N-case rules, parties seek discovery of relevant facts from each other without prior Commission authorization by means of interrogatories, requests for production of documents or things, and requests for admission. See 39 CFR 3001.26, 3001.27, and 3001.28. The Commission’s role in discovery is to resolve discovery disputes presented to it by the parties. This discovery method has been referred to by commenters in this proceeding as “Participant Discovery” to distinguish it from an alternate method referred to as “Commission-Led Discovery.” This latter method is employed by the Commission in other regulatory contexts, such as ACD proceedings and rate cases, including, most notably, exigent rate cases.

Participant Discovery is not available to participants in these types of proceedings. Instead, by motion, participants request the Commission to issue specific information requests (interrogatories). After review, the Commission or presiding officer will issue an information request containing participants’ questions found to be appropriate. The Commission is neither

obligated to present a proposed discovery request to another participant, nor is it required to present a request as formulated by the proponent of the request.

The Postal Service urges the Commission to adopt Commission-Led Discovery in lieu of Participant Discovery. Postal Service Comments at 8–18.<sup>32</sup> The Public Representative suggests that Commission-Led Discovery can be consistent with the public interest, provided participants have a realistic opportunity to pursue legitimate avenues of inquiry. PR Reply Comments at 8. GCA and Valpak both oppose the Postal Service’s proposal. GCA Reply Comments at 1–9; Valpak Reply Comments at 10–11.

In support of its proposal, the Postal Service argues that the Commission’s practice in ACD proceedings, exigent rate cases, and other rate proceedings demonstrates that Commission-Led Discovery is the most efficient form of fact-finding. Postal Service Comments at 12–14. In a related argument, it asserts that sections 556 and 557 of the APA, although applicable to N-cases by virtue of section 3661, do not give participants discovery rights. *Id.* at 14.

Valpak responds by arguing that N-cases are more complex than ACD proceedings, which involve after-the-fact review and are more suitable for Commission-Led Discovery. Valpak Reply Comments at 7–8. GCA adds that Commission-Led Discovery would not further the goal of expediting N-cases because it transfers the burden of performing discovery to the Commission. GCA Reply Comments at 2–5. Both GCA and Valpak argue that the adoption of Commission-Led Discovery would, in effect, unlawfully deprive participants of the opportunity for a hearing on the record as provided in section 3661(c). They base their argument on the fact that responses to interrogatories are used as written cross-examination in N-Case hearings and that a denial of Participant Discovery would effectively deny them the right “to conduct such cross-examination as may be required for a full and true disclosure of the facts” as guaranteed by APA section 556(d). GCA Reply Comments at 5–9; Valpak Reply Comments at 10–11. The Commission concludes that the successful use of Commission-Led Discovery in other proceedings, such as ACD proceedings and exigent rate cases, does not justify its use in N-cases. As discussed previously in this Order, the

<sup>31</sup> As discussed elsewhere in this Order, alternatives worthy of consideration could be evaluated in public inquiry proceedings or in special Commission studies.

<sup>32</sup> Attached to the Postal Service’s comments is an appendix that contains a copy of the Commission’s pro forma procedural schedule revised to reflect the effect of Commission-Led Discovery.

statutory authorization in section 3661 is significantly different from the statutory authorizations for these other types of proceedings. The opportunity for hearing accorded in N-cases is an opportunity for hearing “on the record” as that term has been used in the APA.

Although courts have recognized, as the Postal Service correctly points out, that APA hearings on the record do not grant an express right of discovery, they have acknowledged that, in some cases, discovery may be necessary to afford participants a meaningful opportunity for hearing. *Citizens Awareness*, 391 F.3d 338, 350 (1st Cir. 2004), citing *U.S. Lines, Inc. v. Fed. Maritime Comm’n*, 584 F.2d 519, 540 (D.C. Cir. 1978) (“ . . . the requirement of a hearing to determine the public interest means, at a very minimum, that an opportunity must be afforded for meaningful public participation.”).

Based upon its N-case experiences, the Commission finds that discovery in N-cases is necessary to permit meaningful public participation. Despite what the Commission assumes are the Postal Service’s best good faith efforts, proposals sometimes come before the Commission without enough information to assess the merits of the proposal. Valpak Comments at 7 (noting “some Postal Service filings have been made based on incomplete and developing information. . . .”); Docket No. N2012–1, Advisory Opinion on Mail Processing Network Rationalization Service Changes, September 28, 2012, at 13 (“When the Postal Service provided its proposal to the Commission, it had not fully completed its analysis of the plan.”). In such cases, discovery has been necessary for participants to assess and comment on the Postal Service’s proposal. Discovery by participants has also been an important aid to the Commission in developing an adequate record for decision.

Moreover, as GCA and Valpak have argued, discovery responses are used as written cross-examination in N-case hearings. Written cross-examination has proved to be a relatively efficient means whereby participants develop evidence to support their positions. The use of discovery responses as written cross-examination also aids in the “full and true disclosure of the facts” consistent with the requirements of APA section 556.

Nor is the Commission persuaded by the Postal Service’s arguments that Commission-Led Discovery would be more efficient and would more effectively expedite the issuance of advisory opinions than would Participant Discovery.

The Postal Service begins by questioning the Commission’s proposals to shorten discovery and other procedural deadlines: “The mere establishment of tighter response deadlines, without substantial reduction in the scope of discovery, simply means that deadlines will be harder to meet and that more deadlines will be missed.” Postal Service Comments at 8–9 (footnote omitted).

What the Postal Service overlooks is that other elements of the Commission’s proposed rules do, indeed, seek to achieve a “substantial reduction in the scope of discovery”:

The pre-filing conference seeks to engage the Postal Service in a constructive dialogue which, among other things, will improve understanding of its proposal, identify areas of agreement and disagreement, and narrow the need for discovery by enabling the Postal Service to file a well-supported proposal that reduces the scope of needed discovery.

The Commission is limiting the scope of the N-case to a consideration of the Postal Service’s proposal and by referring potentially viable alternatives to public inquiry proceedings or by conducting special studies of such proposals. This limitation is also intended to contribute to a “substantial reduction in the scope of discovery.”

The Commission is limiting the number of interrogatories that participants may serve on the Postal Service and, elsewhere in this Order, is taking steps to eliminate opportunities to circumvent the limitation on interrogatories. See sections IV.H.2.a. and IV.H.2.b.(1)(c), *infra*.

Although the Commission declines to place limits on requests for production and requests for admission, it is providing the Postal Service with a streamlined procedural mechanism (the motion to be excused from answering) that will allow it to oppose requests that are not well-grounded. See section IV.H.1.d., *infra*.

For these reasons, the Commission believes that its proposals have the potential for producing the “substantial reduction in discovery” that the Postal Service asserts is a necessary condition for expediting discovery and the issuance of advisory opinions.

The Postal Service’s suggestion that Commission-Led Discovery would be a preferable alternative to the revised Participant Discovery adopted by this Order is not persuasive. First, as GCA points out, Commission-Led Discovery will not reduce the number of discovery requests made by participants. It will only transfer responsibility for the initial review of those requests from the Postal Service to the Commission. GCA Reply Comments at 2–5.

Second, between the Commission and the Postal Service, it is the Postal Service that is in the best position

initially to assess the nature of the request, the likelihood that the requested information exists, the potential relevance or irrelevance of the requested information to the Postal Service’s proposal, and the potential of the request for being unduly burdensome.

Third, the Postal Service does not appear to relinquish the right to oppose a proposed discovery request submitted to the Commission by a participant for adoption as a Commission information request. See Postal Service Comments at 13, n.16. An objection by the Postal Service would, of course, require an opportunity to respond be given to the proponent of the request, as well as an opportunity for the Commission to decide whether to issue an information request.<sup>33</sup> The failure of the Postal Service to account for these additional steps results in a significant understatement of the potential amount of time needed to obtain information by means of Commission-Led Discovery.<sup>34</sup>

For these reasons, the Commission is not adopting the Postal Service’s proposal to substitute Commission-Led Discovery for Participant Discovery.

#### b. Discovery by the Postal Service

The pro forma procedural schedule proposed in Order No. 1738 omits dates for discovery by the Postal Service or any supporters of participant rebuttal cases. See Order No. 1738 at 50 (Proposed Appendix A to Part 3001, subpart D, Pro Forma N-case Procedural Schedule). In its comments, the Postal

<sup>33</sup> In addition to possible objections to the issuance of Commission information requests, the Postal Service raises the further possibility that the failure to make such an objection “should not waive or otherwise prejudice any rights that a responding party has with respect to how it answers (or declines to answer) any resulting Commission information request.” *Id*.

<sup>34</sup> Under the Postal Service’s proposal, one round of Commission-Led Discovery would require 10 days to complete. See Postal Service Comments, Appendix I at 23 (Pro-Forma N-Case Procedural Schedule). Deadlines for applications for issuance of Commission Information Requests would be due by Day 14; information requests would be issued by Day 17; and responses to information requests would be due by Day 24. If a motion for leave to object were filed within a day of the application for issuance of an information request (as would be permitted under the Postal Service’s proposal), followed by an answer to the motion within 5 days (proposed § 3001.75(a)(2)), an additional 6 days or more would be added to the 10 days required for a single round of Commission-Led Discovery. Moreover, additional time would be needed to complete the process if the respondent did not answer fully or unambiguously, as the Postal Service suggests might occur. See note 33, *supra*. By contrast, a single round of Commission-proposed Participant Discovery would take 11 days, including resolution of a respondent’s motion to be excused from answering, assuming the Commission were to act on the motion within 3 days of receipt of the answer to the motion. See proposed § 3001.75.

Service states that it or other participants “may have need to propound discovery upon a party offering the rebuttal testimony.” Postal Service Comments at 35–36. It therefore requests the Commission to revise the proposed discovery regulations to make those rules “party neutral” and to revise the proposed pro forma schedule to include dates for discovery on rebuttal cases. *Id.* at 18–22; 35–37. The Public Representative supports giving the Postal Service the right to conduct discovery. PR Comments at 24.

The Commission does not intend categorically to deny the Postal Service or other participants the opportunity to conduct discovery of participant rebuttal cases. However, it is not persuaded that such discovery will necessarily be required in N-cases as restructured. Under the new N-case procedures, the scope of the proceeding is being limited to the Postal Service’s proposal. Participants will no longer be permitted to present and attempt to support alternatives. Moreover, with the increased opportunity for dialogue between the Postal Service and interested persons, beginning with the pre-filing consultations required under the revised procedures, the Postal Service should be better able to anticipate and address possible objections to its proposal when it files its direct case. These changes reduce the likelihood of the need for discovery of rebuttal cases by the Postal Service and others.

Should the need for such discovery nevertheless arise, the Postal Service and others may request an opportunity to propound discovery. Appropriate requests will be granted. Accordingly, although the Commission is not revising the pro forma schedule, it is revising the text of its proposed N-case discovery rules to make those rules “party neutral” for use in the event discovery by the Postal Service or others becomes necessary.

#### c. Stricter Discovery Deadlines

Stricter discovery deadlines include shortened deadlines for conducting discovery, expedited deadlines for contesting and resolving discovery disputes, and stricter deadlines for providing responses to discovery requests. The stricter deadlines applicable to discovery are consistent with the shortening of all deadlines in N-cases in order to facilitate the issuance of an advisory opinion within 90 days of filing. As noted in section IV.G., *supra*, shortened procedural deadlines within the new N-case framework are essential if the Commission is to meet the 90-day target

for advisory opinions. Stricter discovery deadlines are no exception.

#### d. New Procedures for Contesting Discovery Requests

In Order No. 1738, the Commission proposed to replace the method traditionally used by recipients of discovery requests to contest specific requests. That method typically involved four steps: (1) Service of an objection on the proponent of the request by the recipient of the request; (2) filing and service of a motion to compel by the proponent of the request; (3) filing and service of an answer by the recipient of the request; and (4) issuance by the Commission or a presiding officer of an order granting or denying (in whole or in part) the motion to compel.

Under the new procedure, set forth in proposed § 3001.75, the process would be reduced to three steps: (1) Filing by the recipient of a discovery request of a motion to be excused from answering; (2) filing by the proponent of the request of an answer in support of its request; and (3) issuance by the Commission or a presiding officer of an order granting or denying (in whole or in part) the motion to be excused from answering. See proposed § 3001.75(b). In addition to eliminating objections to discovery requests as an antecedent condition to the filing of a motion, the new section would set a short deadline for the filing of the motion to be excused from answering (*i.e.*, within 3 days of the filing of the discovery request. *Id.* at 3001.75(b)(1). Answers to the motion would be due within 2 days. *Id.* at 3001.75(b)(2). Answers to the discovery request would be due within 3 days of the denial of a motion to be excused from answering. *Id.* at 3001.75(b)(3).

The Postal Service opposes these changes on essentially two grounds. Postal Service Comments at 29–31. First, it restates its preference for Commission-Led Discovery. *Id.* at 31. Second, the Postal Service argues that the new process “could paradoxically increase the burden on party and Commission resources and the time spent in discovery.” *Id.* at 29 (emphasis in the original).

The Commission is not persuaded by either of the grounds offered for rejecting the new procedure. For the reasons previously given, the Commission is not adopting the Postal Service’s proposal for Commission-Led Discovery. See section IV.H.1.a., *supra*. Nor does the Commission accept the Postal Service’s assertion that the new procedure can be expected to increase the burdens of, or time required for, discovery.

The Postal Service predicates the alleged increased discovery burdens and time requirements on the assumption that “the Commission proposes to do away with the role of party discretion and to subject every objectionable discovery request—even those that a proponent would not otherwise have contested—to an adversarial dispute resolution process as a matter of course.” *Id.* at 30. That is not the case. Although the Postal Service is correct that under the current procedural rules discovery disputes can be resolved informally and summarily when a proponent of a request acquiesces in an objection, the Postal Service errs in assuming that such an informal and summary resolution would not be possible under the new procedure. Thus, for example, upon receipt of a discovery request to which it objects, the recipient of the request can informally contest the request and seek to have it withdrawn before it files a motion to be excused from answering. The participant proposing the discovery request can agree to withdraw the request as it can currently do in response to a formal objection. Alternatively, if a motion to be excused from answering has already been filed, the proponent of the request can acquiesce in the motion formally by answer or informally by not answering. In either event, the most that would be required of the Commission or presiding officer would be a one-page order granting the motion to be excused.

#### 2. Discovery–Interrogatories

All six commenters address the Commission’s proposed N-case interrogatory rule contained in § 3001.87. The centerpiece of that rule is a limit on the number of interrogatories that a participant may serve on the Postal Service. Commenters raise essentially three questions:

(1) Should there be a limit on the number of interrogatories that a participant may serve?

(2) If limited, is the proposed 25-interrogatory limit appropriate?

(3) Can the limit on interrogatories be expected to be effective in expediting the proceeding and permit the development of an adequate record for decision?

Each of these questions, and the issues they raise, is discussed below.

a. Should there be a limit on the number of interrogatories?

Barring the adoption of its Commission-Led Discovery proposal, the Postal Service supports the imposition of a limit on the number of interrogatories that participants may

serve. Postal Service Comments at 32–35, 39–40. The Public Representative also acknowledges the need for numerical limits on interrogatories. PR Comments at 19 (“[i]f expedition of N-cases is to be achieved, it seems that numerical limits on interrogatories directed to the Postal Service are inevitable, notwithstanding legitimate concerns about the difficulty of capturing the qualitative aspects of a case in such a finite fashion.”). Other participants acquiesce in the Commission’s proposed limit on the number of interrogatories, subject to certain additions and modifications to the proposed interrogatory rule. GCA Comments at 1; NNA Comments at 6.

The only commenter that expressly opposes limits on the number of interrogatories is Valpak. Valpak Comments at 5–9. Valpak takes the position that unless limits are placed on the scope of any one N-case and the length of the Postal Service’s filing, there “should be no limitation on the number of written interrogatories. . . .” *Id.* at 8. Valpak bases its position on its right to “a hearing on the record under sections 556 and 557” of title 5 of the United States Code and upon general claims of its right to due process. See *id.* at 5–6. Valpak challenges as “utopian” any expectation that the Postal Service will be forthcoming about its proposal during a pre-filing period and a pre-filing technical conference. *Id.* at 8. Valpak therefore dismisses such expectation as a rationale for limiting discovery. *Id.*

Unlike Valpak, most participants recognize that some numerical limits must be imposed as part of an attempt to issue advisory opinions more promptly. Neither the statutory requirements of a “hearing on the record” under sections 556 and 557, nor constitutional requirements of due process preclude the imposition of such limits. Indeed, the imposition of such limits is commonplace, as evidenced by the numerical limits imposed by the Federal Rules of Civil Procedure (FRCP) on interrogatories in civil actions. See Fed. R. Civ. P. 33. Like the limits imposed by FRCP Rule 33, the limits proposed by the Commission in § 3001.87 can, upon an adequate showing, be increased. See *id.*

The proposed numerical limit on interrogatories, like the 90-day limit on the duration of N-cases, is predicated, in part, upon good faith efforts by the Postal Service to make relevant information available to participants outside the context of formal discovery. The expectation of good faith voluntary production of information is not, as Valpak suggests, “utopian,” since it is in

the Postal Service’s self-interest to produce relevant information voluntarily in order to obtain an advisory opinion by the 90-day target deadline. Furthermore, as discussed below, formal interrogatories will not be the only means whereby participants can obtain relevant information for use in an N-case.

The alternative suggested by Valpak that a limitation on the number of interrogatories should require “a corresponding limit on the scope of any one N-docket and the length of the filing of the Postal Service” is not explained. It remains unclear exactly what “corresponding limit” Valpak has in mind.

Valpak’s skepticism regarding the efficacy of pre-filing disclosures does not persuade the Commission that it should refrain from imposing a limit on the number of interrogatories that participants may serve on the Postal Service. The Commission concludes that a limit on interrogatories subject to an opportunity to seek Commission permission to serve additional interrogatories is the preferable procedure.

b. If limited, is the proposed 25-interrogatory limit an appropriate limit?

In Order No. 1738, the Commission proposed to limit each N-case participant to the service of 25 interrogatories on the Postal Service. Proposed § 3001.87(a). Included within that limit would be the combined total of each participant’s initial and follow-up interrogatories for all witnesses, as well as institutional interrogatories directed to the Postal Service. Although the Commission did not state the basis for its selection of 25 as the appropriate limit, several commenters correctly infer that the Commission used as the model for its proposal the limit in FRCP Rule 33 that applies to federal courts in civil litigation. See Postal Service Comments at 32; PR Comments at 19.

GCA and NNA either implicitly accept the Commission’s proposed limit or conditionally accept that limit, subject to additions or modifications to the interrogatory rule.<sup>35</sup> Valpak agrees with GCA’s and NNA’s assertions regarding alleged problems with a limit

<sup>35</sup> GCA does not expressly challenge the limit of 25 interrogatories, but questions whether that number of interrogatories will be adequate in suggesting that, upon motion, participants be given an opportunity to serve follow-up interrogatories for supplementation or clarification. GCA Comments at 2. NNA takes a similar position by accepting a limit of 25 on initial interrogatories, but urging the Commission to authorize “at least one set of follow up interrogatories without limitation by a discovery cap.” NNA Comments at 6. These comments are addressed in section IV.H.2.b.(1)(a), *infra*.

of 25 on the number of interrogatories that each participant could serve on the Postal Service. Valpak Reply Comments at 1–4. It does not, however, agree with their proposed solutions. *Id.* Mr. Popkin suggests that by limiting the number of interrogatories to 25, the Commission will precipitate an increase in the number of discovery motions. Popkin Comments at 3. The Public Representative notes the commenters’ concerns and urges the Commission “to revisit its proposed across-the-board numerical limit on interrogatories, especially as this limit affects followup interrogatories and applies case wide, rather than by witness.” PR Reply Comments at 9.

The Postal Service takes the position that 25 interrogatories per participant is far too large. See Postal Service Comments at 10–11 (discussing hypothetical discovery scenario in which five participants serve a total of 1,250 interrogatory questions (including subparts), 150 requests for production, and 250 requests for admission, thereby placing an “insurmountable strain” on Postal Service resources).

Several factors influence the selection of an appropriate limit on the number of interrogatories. These include: (1) The availability to participants of relevant information through means other than the service of formal interrogatories; (2) the narrowed scope of the proceeding; (3) the manner in which the limit is to be applied; and (4) the availability of opportunities to exceed the limit.

*The availability of relevant information by means other than interrogatories.* Participants will have access to relevant information by means other than formal interrogatories, including: information submitted by the Postal Service in other proceedings or in reports filed with the Commission; information made available in pre-filing conferences; information contained in the Postal Service’s request for an advisory opinion; policy and institutional information provided by Postal Service representatives at pre- and post-filing conferences; information contained in documents produced under § 3001.88; and responses to requests for admission made under § 3001.89. The availability of relevant information from these other sources should reduce the relative need for discovery by interrogatories.

These same alternative sources should reduce the potential discovery burdens hypothesized by the Postal Service. See Postal Service Comments at 10–11. If the Postal Service provides relevant information voluntarily during the various stages of an N-case (including

the pre-filing stage) the need for formal discovery requests should be reduced.

*The narrowed scope of the proceeding.* An equally important factor bearing upon the appropriate limit on the number of interrogatories is the narrowed scope of the N-case proceeding. To date, N-case proceedings have encompassed consideration of both the Postal Service's proposal and participant alternatives. To develop and support their alternatives, participants have asserted a need to engage in sometimes extensive discovery of the Postal Service. This participant discovery adds to the length of the N-case proceeding.

As discussed earlier, the Commission has decided to restructure N-cases by narrowing their scope to consideration of the Postal Service's proposal and by deferring consideration of potential alternatives to other contexts, such as special Commission studies or public inquiry proceedings. This reduction in the scope of N-case proceedings should reduce the need for discovery generally and for interrogatories, in particular. This limitation on the scope of the N-case will not only limit participants' needs for discovery, including discovery by means of interrogatories, it will also limit the potential discovery burdens on the Postal Service.

*(1) The manner in which the 25-interrogatory limit will operate.*

Commenters address several issues regarding the scope and application of the 25-interrogatory limit. Those issues concern: (1) The intended scope of the limit; (2) the criteria for determining whether subparts of interrogatories are to be counted toward the limit; (3) potential circumvention of the limit; and (4) the effect of the limit on the opportunity to serve institutional interrogatories on the Postal Service.

*(a) Scope of the limit.* Both GCA and NNA suggest that the 25-interrogatory limit should be applied only to initial interrogatories. GCA Comments at 2; NNA Comments at 6. GCA would make all follow-up interrogatories subject to presiding officer approval upon motion by the participant establishing that the answers to the initial interrogatory were incomplete, non-responsive, or ambiguous and that the follow-up interrogatories did not exceed the scope of the initial interrogatories. GCA Comments at 2. NNA would permit "one set" of follow-up interrogatories without any numerical limit. NNA Comments at 6. These proposed changes are allegedly needed to ensure that participants get responsive answers to the 25 interrogatories they would be entitled to serve on the Postal Service. See GCA Comments at 2; NNA

Comments at 6. In its reply comments, Valpak agrees with GCA's and NNA's assertions that Postal Service responses to interrogatories are not always complete or responsive. Valpak Reply Comments at 2. Valpak also warns that the proposed 25-interrogatory limit could create an incentive for the Postal Service "to divide presentation of its case among more witnesses" thereby limiting the number of interrogatories that could be directed to each witness. *Id.*<sup>36</sup>

In its reply comments, the Postal Service warns that the proposals by both GCA and NNA would seriously undermine the potential effectiveness of the 25-interrogatory limit and "move N-cases even farther from the goal of a predictable 90-day framework." Postal Service Reply Comments at 10–11. The Postal Service finds NNA's suggestion least acceptable because it would permit an unlimited number of follow-up interrogatories without any need for justification or Commission approval. *Id.* at 11, n.10. The Postal Service objects to GCA's proposal because the proposed process for approval of additional interrogatories would consume additional time in an already tight procedural schedule and thereby enhance the risk that the 90-day target deadline could not be met. *Id.* at 11–12.

As proposed, the 25-interrogatory limit would apply to both initial and follow-up interrogatories. The participant would decide how many of its 25 interrogatories should be served as initial interrogatories, with the remainder available to be served as follow-up interrogatories. If the participant felt additional interrogatories were necessary, it would be required to obtain Commission approval for such interrogatories before serving them on the Postal Service. The Postal Service would have an opportunity to oppose any request for additional interrogatories.

The Commission is not persuaded that the proposals by GCA and NNA should be adopted. Their proposals address a potential problem—non-responsive, incomplete, or ambiguous Postal Service answers to interrogatories—that has a remedy other

than follow-up interrogatories. That remedy is to seek an order compelling responsive, complete, and clear answers. Such remedy avoids an unnecessary use of follow-up interrogatories, thereby permitting the participant to take full advantage of the 25 interrogatories that it can serve as a matter of right. In seeking such a remedy, the participant could, if appropriate in the circumstances presented, request that any follow-up requests that it reserved would not have to be served until the Postal Service complies with the initial request. Assuming a motion to compel is filed in good faith, an order denying a motion to compel would also establish a deadline for service of any remaining follow-up requests that the participant was eligible to serve.

In no event will a participant be able to serve more than 25 interrogatories without prior Commission approval. That prohibition applies regardless of whether the interrogatory is an initial or a follow-up interrogatory. The Commission agrees with the Postal Service that NNA's proposal to permit one set of an unlimited number of follow-up interrogatories as a matter of right could frustrate the objective of completing N-cases within 90 days.

*(b) Criteria for counting subparts as separate requests.* The Commission's proposed interrogatory rule provides that an interrogatory with subparts that are logically and factually subsumed within and necessarily related to the primary question will be counted as one interrogatory. Proposed § 3001.87(a). The purpose of this provision is to prevent the 25-interrogatory limit from unfairly restricting the ability of participants to engage in discovery. Without this provision, all parts of a multi-part interrogatory would be counted as individual interrogatories. For example, without this provision, an interrogatory that asked for a witness's (a) name; (b) address; (c) telephone number; and (d) email address, would count as four interrogatories toward the 25-interrogatory limit. This result would be patently unfair and contrary to the result intended by the 25-interrogatory limit.

While GCA agrees with the salutary intent of this provision, it points to certain potential uncertainties and difficulties with the language used by the Commission. It notes that a literal application of the requirement that subparts be both logically "and" factually subsumed with an interrogatory would be unduly restrictive. GCA Comments at 3–4. It also argues that use of the word "necessarily" could cause similar

<sup>36</sup> In the example presented by Valpak, the 25-interrogatory limit could restrict a participant to one initial and one follow-up interrogatory per witness in N-cases like the Docket No. N2010–1 and Docket No. N2012–1 proceedings in which the Postal Service presented 11 and 13 witnesses, respectively. Although the Commission will not assume fragmentation by the Postal Service of witnesses' testimony, it will entertain requests to exceed the 25-interrogatory limit, if, for any reason, the large number of witnesses unfairly hampers the ability of participants to obtain discovery by means of interrogatories.

problems. *Id.* at 4. Finally, it asserts that the term “primary question” requires clarification. To remedy these alleged deficiencies, GCA proposes specific modifications to proposed § 3001.87(a). *Id.* at 4–5.

In its comments, the Postal Service suggests that the Commission explicitly state that Rule 33(a)(1) of the FRCP is the source of the standard for determining whether subparts of interrogatories are to be considered separate requests. Postal Service Comments at 40. The Postal Service asserts that such explicit recognition will provide “transparency about the standards and precedents that may be brought to bear on matters concerning the 25-interrogatory limit.” *Id.*

In her reply comments, the Public Representative encourages the Commission to consider GCA’s suggested alternative for “the proposed ‘logically and factually’ related premise for subparts to primary interrogatories.” PR Reply Comments at 10.

The Commission agrees with GCA and the Public Representative that the “logically and factually” related premise is too restrictive and should be changed to a “logically or factually” related premise. However, the Commission does not agree that the word “necessarily” or the term “primary question” requires modification or further clarification in the proposed rule. As revised, § 3001.87(a) will provide that an interrogatory with subparts that are logically or factually subsumed within and necessarily related to the primary question will be counted as one interrogatory. As urged by the Postal Service, this formulation will adopt the practice of federal courts which operate under Rule 33 of the FRCP. *Trevino v. ACB Am., Inc.*, 232 F.R.D. 612, 614 (N.D. Cal. 2006) (noting “courts generally agree that ‘interrogatory subparts are to be counted as one interrogatory . . . if they are logically or factually subsumed within and necessarily related to the primary question.’ [citations omitted].”).

(c) *Restrictions on circumvention of the limit.* The Postal Service seeks to prevent participants from circumventing the limit on the number of interrogatories by fragmenting their participation. Postal Service Comments at 32–35. An example of such a potential circumvention would be a national union which seeks to participate through multiple union locals, each of which would ostensibly be able to serve up to 25 interrogatories, thereby circumventing the intended limitation. Similar opportunities would appear to be available to trade

associations and other formal or informal groups of participants. The Postal Service’s proposed cure would be to amend rule 20(e) of the Commission’s generally applicable rules of practice (which are expressly made applicable to the N-case rules being adopted by this Order) to add discovery to the list of activities that the Commission or a presiding officer may require be undertaken jointly with another participant. GCA endorses this proposal. GCA Reply Comments at 10 n.16 and accompanying text. The Commission agrees with the Postal Service that such circumvention is to be prohibited and therefore grants the suggested modification to rule 20(e) of the rules of practice.

(d) *The opportunity to serve institutional interrogatories on the Postal Service.* In its comments, GCA expresses concern over the reference in § 3001.87(a) to “sequentially numbered interrogatories, by witness[.]” GCA Comments at 5. It cites the usefulness of institutional interrogatories in past proceedings and seeks clarification that the reference to interrogatories “by witness” will not preclude the future ability to serve institutional interrogatories. It also seeks advice regarding the form in which such interrogatories should be directed to the Postal Service. *Id.* The Postal Service does not believe GCA’s concerns are well-founded, but offers a proposed clarification to the language of § 3001.87(a) as a means of allaying those concerns. Postal Service Reply Comments at 27. The Commission interprets the clarification proposed by the Postal Service as responsive to GCA’s concerns and adopts that clarification to confirm the continued availability of institutional interrogatories as a formal discovery mechanism.

*The availability of opportunities to exceed the limit.* The adoption of any limit on the number of interrogatories a participant may serve on the Postal Service creates the possibility, noted by Mr. Popkin, that there will be an increase in the number of discovery motions. Popkin Comments at 3. By itself, that possibility does not preclude adoption of a limit on the number of interrogatories, particularly when there appears to be a general recognition that such a limit is a reasonable tradeoff balancing the interests of the parties and taking into account the other safeguards built into the new rules. See section IV.H.2.b., *supra*. It remains to be seen in particular cases whether the 25-interrogatory limit will produce an unacceptably high increase in the number of discovery motions. Should

that be the case, the Commission will address the problem either by rulings in specific cases or by revisiting the 25-interrogatory limit as a general matter. In the meantime, the Commission is not persuaded that the possibility of an increase in the number of discovery motions precludes adoption of the 25-interrogatory limit.

c. Can the limit on interrogatories expedite N-cases and permit development of an adequate record?

Generally, the most time-consuming phase of N-cases has been the discovery phase. Any changes that reduce the amount of discovery can be expected to shorten the time needed to complete an N-case. Nevertheless, in the context of advocating the adoption of Commission-Led Discovery, the Postal Service argues that the proposed 25-interrogatory limit will be ineffective. Postal Service Comments at 10–12. To support its claim, the Postal Service hypothesizes a case in which five participants each propound 25 interrogatories, as well as document production requests and requests for admission. The resulting discovery burden, it asserts, will effectively undermine the goal of completing an N-case within 90 days. *Id.* at 8. Although GCA views the Postal Service’s hypothetical as “somewhat extreme,” it accepts the hypothetical on the grounds that “procedural rules should be robust enough to deal with extreme as well as routine cases.” GCA Reply Comments at 4. GCA nevertheless proceeds to assert that the alternative proposed by the Postal Service, *i.e.*, Commission-Led Discovery, has equally, if not more, serious practical and legal shortcomings. *Id.* at 4–9.

The Commission concludes that a 25-interrogatory limit can contribute to the expedition of N-cases. It reaches that conclusion notwithstanding the possibility that in at least in some cases, the 25-interrogatory limit will not preclude service of a substantial number of interrogatories on the Postal Service. With the limit, participants will have a clear incentive to limit the number of interrogatories they serve. Without the limit, there is little incentive, if any, to pare back the number of interrogatories they propound.

Of equal importance is the need to develop an adequate record for decision. While the 25-interrogatory limit will be challenging, it will not preclude the development of an adequate record. The scope of N-cases is being narrowed and the need for information to support alternative proposals eliminated. Moreover, interrogatories are not the only means for assembling relevant information for use as evidence.

Participants will have access to information by means of pre-filing conferences; the Postal Service's request; technical conferences; and other discovery mechanisms, such as requests for production and requests for admission. Finally, the utility of interrogatories is being preserved by permitting interrogatories to contain appropriate subparts that do not count against the 25-interrogatory limit and by permitting participants to request the opportunity to serve more than 25 interrogatories.

For the interrogatory limit to achieve the dual objectives of expediting the issuance of advisory opinions while, at the same time, permitting the development of an adequate record, it will be necessary for the Commission to participate even more actively in managing N-case discovery. The Commission is prepared to accept that burden in order to ensure that both objectives are achieved.

### 3. Discovery—Requests for Production

Proposed § 3001.88 authorizes participants to request the production of documents or things.<sup>37</sup> This section is patterned largely on sections (a) and (b) of existing § 3001.27. See 39 CFR 3001.27(a) and (b). The differences are that proposed § 3001.88: (1) Applies only to requests for production from the Postal Service; (2) the time period for answering is shortened; and (3) the mechanism authorizing objections, motions to compel, and compelled answers is replaced by the new procedure called a motion to be excused from answering. Compare § 3001.27(c), (d), and (e) with proposed § 3001.88(b)(2) and (c). Neither existing § 3001.27, nor proposed § 3001.88, places any numerical limits on requests for production.

As already noted, *supra*, the Commission is amending proposed § 3001.88 to apply to requests for production directed to any participant, not just the Postal Service. The proposed time period for answering and the new procedure for seeking to avoid production (the motion to be excused from answering) are being approved as proposed.

<sup>37</sup> The Public Representative notes that although the body of the proposed rule provides for the production of both "documents" and "things," the rule's heading refers only to "documents." To avoid future confusion over the intended scope of the rule, the heading will be revised to include a reference to "things." The Commission is also correcting section (b)(1) of § 3001.88 to provide for the filing of answers within 7 days of a request for production. This change is necessary for consistency with the discovery rules for interrogatories and requests for admissions. See proposed §§ 3001.87(b)(4) and 3001.89(b)(1).

In her comments, the Public Representative raises essentially two points. First, the Public Representative states that although procedures for requesting the production of documents or things are of long standing, they "have seen relatively little use at the Commission" (except, perhaps, in complaint proceedings) and should therefore not be used as justification for limiting the number of interrogatories. PR Comments at 21. Second, the Public Representative asserts that the Commission has confused requests for production of documents with interrogatories that request the production of data. *Id.* at 21–24. The Public Representative's proposed remedy would be to consider creation of a new "hybrid" discovery request outside the scope of this rulemaking proceeding. *Id.* at 23.

The Postal Service responds to the latter contention by arguing that participants have an obligation to designate their discovery requests properly as either interrogatories or requests for production. See Postal Service Reply Comments at 14. The Postal Service states further that the courts routinely deal with ambiguous or improperly designated discovery requests using established legal principles. *Id.* at 14–15.

Regardless of whether requests for production have been widely used at the Commission, that discovery mechanism is well-established and will remain available to participants in N-cases. It is therefore proper for the Commission to rely on the availability of that discovery mechanism, as well as other potential avenues of discovery, as justification for limiting the number of interrogatories.

With respect to the Public Representative's second point, the Commission agrees with the Postal Service that a new "hybrid" discovery device is unnecessary. Instead, the Commission will continue to observe the discovery principles embodied in the FRCP as interpreted and applied by the courts. This includes the principles for dealing with ambiguous or improperly designated discovery requests.

### 4. Discovery—Requests for Admission

Proposed § 3001.89 authorizes participants to request the admission of facts. This section, like proposed § 3001.88, is patterned largely on an existing Commission rule of practice. In this case, the model is found in sections (a) and (b) of existing § 3001.28. See 39 CFR 3001.28(a) and (b). The differences are that proposed § 3001.89: (1) Applies only to requests for production from the

Postal Service; (2) the time period for answering is shortened; and (3) the mechanism authorizing objections, motions to compel, and compelled answers is replaced by the new procedure called a motion to be excused from answering. Compare § 3001.28(c), (d), and (e) with proposed § 3001.89(b)(3) and (c). Neither existing § 3001.28, nor proposed § 3001.89, places any numerical limits on requests for production.

As already noted, *supra*, the Commission is amending proposed § 3001.89 to apply to requests for admission directed to any participant, not just the Postal Service. The proposed time period for answering and the new procedure for seeking to avoid production (the motion to be excused from answering) are being approved as proposed.

As she argued with respect to proposed § 3001.88 dealing with requests for production of documents or things, the Public Representative argues that the opportunity to request admissions has not been widely used and therefore should not be used as justification for limiting the number of interrogatories. PR Comments at 21.

Once again, the Commission concludes that the opportunity to request the admission of relevant facts is an appropriate justification, at least in part, for placing a limit on the number of interrogatories. It is a well-established discovery mechanism whether or not participants have used it extensively.

While requests for admission are an appropriate complement to written interrogatories, the Commission would caution participants that requests for admission and interrogatories "are not interchangeable procedures" and that "interrogatories disguised as requests for admissions in an attempt to circumvent a . . . rule limiting the number of interrogatories is an abuse of the discovery process." *In re Olympia Holding Corp. v. Belt Concepts of Am., Inc.*, 189 B.R. 846, 853 (Bankr. M.D. Fla. 1995) (citations omitted).

#### I. Testimony

*Rebuttal testimony.* The proposed rules limit the scope of participant rebuttal testimony to the Postal Service's proposal. Rebuttal cases proposing or seeking to address alternatives to the Postal Service's proposal would no longer be permitted. Order No. 1738 at 20.

Valpak asserts that the limitation in scope is a violation of the APA. It maintains that the Commission does not have the authority under the APA to tell mailers what information can be included in their rebuttal testimony.

According to Valpak, any effort to limit the scope of rebuttal testimony in previous N-cases would have impaired the Commission's work and led to a less meaningful advisory opinion. Valpak Comments at 9–10. Valpak also contends that expedited deadlines for rebuttal testimony will reduce the quality of such testimony because participants will not have sufficient time to analyze the Postal Service's case. It suggests that the Commission modify the rules to provide that if the Postal Service requests to file surrebuttal testimony, the Commission suspend the 90-day rule for as long as it takes to receive and evaluate that testimony. *Id.* at 10–11.

The Commission does not intend the proposed scope limitation to prevent participants from criticizing the merits of the Postal Service's proposal or from identifying alternatives to the change in the nature of services. The Commission does, however, draw a distinction between the identification of potential alternatives and the presentation of a full case as to why the alternative proposals are superior. The latter scenario is best evaluated by the Commission in a special study or public inquiry, as such proceedings will continue to have no time limits and permit more thorough analysis. The final rules will be clarified to reflect this distinction.

The shortened deadlines in the procedural schedule may be challenging for all participants, as well as for the Commission. Notwithstanding, the expedited deadlines in and of themselves are expected neither to deprive participants of their ability to analyze the Postal Service's proposal nor the Postal Service and its supporters of their ability to respond to rebuttal cases. The Commission is persuaded that other informal information exchanges built into the procedural schedule, such as the pre-filing conference and the mandatory technical conference, will allow participants to begin crafting their rebuttal cases earlier in the process.

The Public Representative suggests that participants who do not intend to file rebuttal or surrebuttal testimony be required to file notice with the Commission to that effect. PR Comments at 27. She also recommends that the following additional information be included in every notice of intent to file rebuttal testimony: (1) The number of pieces of testimony (clarifying that "testimony" may be more than one); (2) the subject matter of the testimony; (3) whether the testimony will be accompanied by supporting library references or exhibits, to the

extent known; (4) the name and position or title of the witness; and (5) confirmation of witness availability. *Id.* The need for additional information in participants' notice of intent to file rebuttal testimony has not been clearly established. The Commission will retain the language of the proposed rule and not include additional filing requirements.

*Surrebuttal testimony.* The filing of surrebuttal testimony would only be permitted if participants file a formal request, and if the Commission determines that exceptional circumstances warrant such a filing. Surrebuttal testimony will be limited in scope to the Postal Service's proposal and the relevant rebuttal testimony. Order No. 1738 at 20–21.

The Public Representative does not support the exceptional circumstances standard because she states that this may impose undue constraints on the Postal Service, as a participant offering surrebuttal testimony presumably deems it essential to his or her case. PR Comments at 28. The Postal Service agrees with the Public Representative. Postal Service Reply Comments at 5. It states that surrebuttal is its opportunity to correct inaccurate or misleading aspects of testimony by critics of its proposal, and limiting this information could deprive the Commission of important insight about its service change proposal as well as hinder the Postal Service's ability to shoulder its burden of proof. *Id.*

The Commission recognizes that the exceptional circumstances standard presents a higher standard for the Postal Service to overcome in order to present surrebuttal testimony than the good cause standard required of participants requesting to extend the procedural schedule. However, because the Postal Service also is the proponent for expediency in N-cases, it would be held to a higher standard than mere good cause for requesting to file surrebuttal testimony. The Commission notes that briefs and reply briefs may also be used to correct misleading or inaccurate information about the Postal Service's proposal. Similarly, if meaningful customer feedback is obtained from these informal information exchanges, the Postal Service should be able to anticipate whether it will need to file a surrebuttal case well in advance of the deadline set forth in the procedural schedule.

#### J. Hearings

*Back-to-back hearings.* In Order No. 1738, the Commission proposed a back-to-back hearing process for N-cases. Hearings would be scheduled

continuously in the following order: (1) Hearings on the Postal Service's direct case; (2) hearings on participant rebuttal testimony, if any; and (3) hearings on surrebuttal testimony, if any. Order No. 1738 at 21. The pro forma schedule presents several options for the commencement of hearings depending on whether rebuttal and surrebuttal cases are requested. *Id.*

Valpak believes that the back-to-back hearing model is unworkable because "it is highly likely a participant would not have a full understanding of the Postal Service case until the end of cross-examination, with no time to prepare and file a rebuttal case, if rules provide for back-to-back hearings." Valpak Comments at 11. The Postal Service suggests that the Commission scale back further and require an affirmative showing of need before allowing oral hearings. Postal Service Comments at 23. The Public Representative points out that serial hearings are likely to "tax the resources of the Postal Service, the Commission, and all other participants" but "defers to the Commission and the Postal Service on the advisability of this provision, as they stand to be most affected by its introduction, especially in terms of insuring [sic] availability." PR Comments at 29.

As with other steps in the procedural schedule, the Commission recognizes and acknowledges the difficulties inherent in preparation for and attendance of back-to-back hearings. However, when taken in conjunction with the other procedural steps intended to provide participants with ample opportunity for obtaining information early in the process, the Commission believes that the sequential hearing process will be workable for all parties.

The Commission's current rule on oral argument—39 CFR 3001.37—remains unchanged. The Commission will clarify that oral argument has not historically been part of N-cases and, although parties may request oral argument under the procedures set forth in § 3001.37, the Commission would only grant such requests upon an appropriate showing of need by the presenting party.

*Field hearings.* The proposed rules call for the elimination of field hearings in most instances. Order No. 1738 at 10. Commenter reaction was mixed on this point.

NNA asserts that field hearings are essential in many cases to provide a better understanding of how communities are impacted by a nature of service change. It states that these hearings are more convenient, less



intimidating, and more approachable to participants outside the Washington, DC area and reflect a recognition by the Commission that policy deliberations not be confined to the DC area. NNA Comments at 3.

GCA does not disagree with the proposed rules because they leave open the possibility that field hearings may still be held when genuinely useful. It suggests that, in the event that field hearings are found to be useful in a particular case, the Commission not require the Commissioners to preside at them *en banc*. Because field hearings do not produce record evidence, GCA proposes the Commission delegate a Commission staff member to preside in order to satisfy the APA provision. GCA Comments at 9.

Valpak notes that it proposed abolition of field hearings in its comments in response to Order No. 1309. It asserts that in Docket No. N2011–1, field hearings prolonged the docket without creating useful record evidence for the Commission. Valpak Comments at 11.

The Postal Service reiterates its contention that field hearings are inappropriate for most N-cases, causing expense and delay that is not commensurate to the non-evidentiary information obtained from conducting them. It recommends the Commission formalize its intentions to eliminate the use of field hearings in most cases by including a rule that prescribes the conditions for their use in exceptional cases. It also suggests the Commission clarify in its rules that statements in field hearings possess the status of informal comments and not record evidence. Postal Service Comments at 41.

The Commission appreciates commenter input about the value of field hearings in past N-cases. However, it is persuaded that, in all but the most exceptional cases, their value does not outweigh the expense and delay inherent in conducting them. With the advent of recent technological advances, interested parties at some distance from Washington, DC now have the option of teleconferencing or videoconferencing into live hearings. It is amending proposed § 3001.92 to state that, upon showing of exceptional need or utility for a field hearing, the Commission may consider modifying the procedural schedule to provide for such hearings.

#### K. Briefs

In Order No. 1738, the Commission proposed a 14,000 word limit for initial briefs, to be filed 7 days following the conclusion of hearings. Reply briefs would be limited to 7,000 words and are

due no later than 7 days after the date initial briefs are filed. Order No. 1738 at 22.

Valpak asserts that the rule unfairly impacts mailers because the Postal Service has an unlimited amount of words to explain and describe its initial proposal. Valpak Comments at 12. The Postal Service argues that a uniform word limit is inherently unfair because the Postal Service is tasked with replying to all participants' critiques. It states that the Commission should expect that briefs from the Postal Service should require more words than briefs from other participants. Postal Service Comments at 44. The Public Representative does not oppose word limits on briefs but urges the Commission to excuse the Postal Service from adhering to those limits as the proponent of the proposed change. PR Comments at 30.

The Public Representative also proposes allowing any intervenor to file a Statement of Position to provide a means for interested parties to submit their comments to the Commission in a less formal and technical manner than is required by the proposed rules. The Postal Service disagrees with the Public Representative's proposal, contending that if the Commission were to provide for this alternative, "there would be little to stop all N-case participants from choosing the easier path, no matter how much more difficult it might make the Commission's task of evaluating the record." Postal Service Reply Comments at 24.

The Commission believes that the word limitations on briefs would not adversely impact participants' rights to present their arguments to the Commission. In specific cases, the Commission may adjust word limitations by request of a participant or on its own motion. It will also modify the final rule to increase the word limit on the Postal Service's briefs to 21,000 words and 10,500 words for the initial and reply briefs, respectively. The final rule will also clarify that tables of cases, tables of citations, and appendices are not considered part of the word count for purposes of the limitation.

Additionally, the Commission will incorporate the Public Representative's suggestion for including a less formal filing option for parties who may not be familiar or able to comply with the Commission's briefing rules. Such participants may file a Statement of Position, which will allow them to express their views about the Postal Service's proposal and point to those parts of the existing record that support their position. Only "participants" (*i.e.*, parties to the proceeding) will be

eligible to file Statements of Position. Statements of Position are intended to provide less experienced participants with an opportunity to file an "informal brief" that need not comply with the technical requirements of a formal legal brief. Statements of Position will not be exempt from the scope limitations of initial and reply briefs and should be limited to the issues raised on the record concerning the Postal Service's proposal. Statements of Position will not be a permissible avenue for a participant to attempt to introduce new evidentiary material into the record.

#### V. Section-by-Section Analysis of the Rules

Part 3001, subpart D, of title 39, Code of Federal Regulations is deleted and replaced in its entirety with 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 § 3001.71. New § 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 current § 3001.75. New § 3001.74 concerns service of the Postal Service's request for an advisory opinion.

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 § 3001.81 requires the Postal Service to

engage in discussions with potentially affected persons before filing a request for an advisory opinion on proposed changes in the nature of postal services.

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

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

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

Section 3001.85 establishes a mandatory technical conference and the requirements for such conference.

Sections 3001.86 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 § 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 § 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 subpart D of part 3001, 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.

Section 3001.3 is amended to reflect the exclusion by § 3001.71 of 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 participators 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(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 3001.20(e) is amended to include discovery among the activities that the Commission or presiding officer may require be conducted jointly by two or more intervenors. The last sentence of this rule is also modified to clarify the text from the previous version and improve readability.

Section 3001.20a is amended to preclude participation in N-cases as a limited participator.

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.

#### VI. Effective date

The revisions to 39 CFR part 3001 set out below the Secretary's signature shall take effect 30 days following publication in the **Federal Register**.

#### VII. Ordering Paragraphs

*It is ordered:*

1. The Commission hereby amends and adopts rules of procedure for nature of service cases under 39 U.S.C. 3661 that follow the Secretary's signature as 39 CFR part 3001, subpart D.

2. The Commission hereby adopts conforming amendments to 39 CFR part 3001, subpart A that follow the Secretary's signature.

3. These rules shall take effect 30 days after 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 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 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 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, 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. In § 3001.5, revise paragraph (h) to read as follows:

##### § 3001.5 Definitions.

\* \* \* \* \*

(h) *Participant* means any party to the proceeding, including formal intervenors as described in § 3001.20, and the Public Representative. 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, in which event the period runs until the end of the 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 are to be excluded.

■ 5. In § 3001.17, amend by:

■ a. Removing the word “and” at the end of paragraph (c)(4);

■ b. Redesignating existing paragraph (c)(5) as paragraph (c)(6); and

■ c. Adding 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 this section shall include the procedural schedule provided for under § 3001.80; and

\* \* \* \* \*

■ 6. In § 3001.20, revise paragraphs (d) and (e) 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, in all proceedings except those conducted under subpart D of this part, delay on a day-for-day basis the date for responses to discovery requests filed by that intervenor.

(e) *Effect of intervention.* A person filing a notice of intervention shall be a party to the proceeding subject, however, to a determination by the Commission, either in response to an opposition, or sua sponte, that party status is not appropriate under the Act. Intervenor status is also subject to the right of the Commission or the presiding officer as specified in § 3001.24 to require two or more intervenors having substantially like interests and positions to join together for purposes of service of documents, presenting evidence, making and arguing motions and objections, propounding discovery, cross-examining witnesses, filing briefs, and presenting oral arguments to the Commission or presiding officer. No intervention shall be deemed to constitute a decision by the Commission that the intervenor is aggrieved for purposes of perfecting an appeal of any final order of the Commission.

■ 7. In § 3001.20a, revise the undesignated introductory paragraph 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:

\* \* \* \* \*

■ 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 no later than 3 days after a request is made under paragraph (e)(2) of this section or no later than 14 days after a request is made under paragraph (e)(3) of this section.

■ 9. Revise subpart D of part 3001 to read as follows:

**Subpart D—Rules Applicable to 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 § 3001.21 (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, nor 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. A motion to dismiss proceedings or any other motion that involves a final determination of the proceeding, any motion under § 3001.91, and 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 through 3001.12. 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 within 3 days of the filing of the interrogatory, request for production, or request for admission 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 admission, 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. 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 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 within 3 days of the date on which a motion to be excused from answering is denied.

(4) The Commission or presiding officer may impose such terms and conditions as are just and may, for good cause, issue a protective order, including an order limiting or conditioning interrogatories, requests for production, and requests for admission 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 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 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 and shall make a good faith effort to address the concerns of such persons.

(b) *Purpose.* The purpose of a pre-filing conference 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) *Rationale for the proposal.* The Postal Service shall make available at the pre-filing conference a representative capable of discussing the policy rationale behind the Postal Service's proposal with interested persons.

(d) *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.

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

(f) *Noncompliance.* If the Postal Service's noncompliance with the requirements of the pre-filing conference under § 3001.83(b)(4) is established by a participant, the Commission may, in its discretion, consider an extension of, or modification to, the procedural schedule.

(g) *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 through 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 Office 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 certification that the Postal Service has made a good faith effort to address concerns of interested persons about the Postal Service's proposal raised 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.

#### § 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 to 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. If the Postal Service seeks for any witness to be excused on the basis that the witness's testimony neither presents nor is based upon technical information, it shall make such a motion concurrent with its request.

(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 the 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. The technical conference is not part of the formal record in the proceeding.

(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 §§ 3001.86 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).

**§ 3001.86 Discovery—in general.**

(a) *Purpose.* The rules in this subpart allow discovery 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 in § 3001.86 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, 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 a participant fails to obey an order of the Commission or ruling of presiding officer to provide or permit discovery pursuant to this section or §§ 3001.86 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 a participant from introducing certain designated matters in evidence;

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

(4) Such other relief as the Commission deems appropriate.

**§ 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 any other participant no more than a total of 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 or factually subsumed within and necessarily related to the primary question will be counted as one interrogatory. The respondent 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. 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 or surrebuttal 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.

(4) Answers filed by a respondent shall be filed in conformance with §§ 3001.9 through 3001.12 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.* A respondent may, in lieu of answering an interrogatory, file a motion pursuant to § 3001.75(b) to be excused from answering.

(d) *Supplemental answers.* A respondent 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. A respondent 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. A respondent 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 any other participant 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 respondent.

(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.

(b) *Answers.* (1) The respondent shall file an answer to a request under paragraph (a) of this section with the Commission in conformance with §§ 3001.9 through 3001.12 within 7 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 respondent objects to an item or category, it 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.* A respondent 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 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 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.

(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 respondent files a written answer or motion to be excused from answering pursuant to paragraph (c) of this section. Answers to requests for admission shall be filed with the Commission in conformance with §§ 3001.9 through 3001.12.

(2) If the answer filed by the respondent 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 respondent 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.* A respondent 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 on 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.* Each 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 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, "PR-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 (unfastened, single-spaced, not hole-punched) 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.* Except as provided in § 3001.75(a), 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 therefore 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 in § 3001.75(a). 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.

(j) *Field Hearings.* Field hearings will not be held except upon a showing by any participant and determination by the Commission that there is exceptional need or utility for such a hearing which cannot be accomplished by alternative means.

**§ 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 filed by all participants other than the Postal Service shall not exceed 14,000 words. Initial briefs filed by the Postal Service shall not exceed 21,000 words. Reply briefs filed by all participants other than the Postal Service shall not exceed 7,000 words. Reply briefs filed by the Postal Service shall not exceed 10,500 words. All participants shall attest to the number of words contained in their brief. Tables of cases, tables of citations, and appendices shall not be considered as part of the word count.

(d) *Include 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 through 3001.12.

(g) *Statements of Position.* As an alternative to filing a formal brief, a participant may file a Statement of Position. To the extent practicable, the contents of each Statement of Position should include a clear, concise, and definitive statement of the position of the filing participant as to the Postal Service request, as well as any points or factors in the existing record that support the participant's position. Statements of Position shall be limited to the existing record and shall not include any new evidentiary material.

**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>



Line	Action	Day number
9	Filing of Rebuttal Cases (if submitted)	42.
10	Deadline for Motions to 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.

**Shoshana M. Grove,**

*Secretary.*

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