

Dated: October 20, 1995.

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Troubled Housing Recovery.

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POSTAL RATE COMMISSION

[Docket No. RM95-4, Order No. 1084]

39 CFR Part 3001

Rules of Practice and Procedure

AGENCY: Postal Rate Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commission is proposing amendments to its rules of practice and procedure that would facilitate expedited consideration of requests of the United States Postal Service to: Conduct market tests of new postal services in order to develop information necessary to support a permanent mail classification change; adopt, on a provisional basis, mail classification and associated rate changes that supplement, but do not alter, existing rates and mail classifications; and adopt permanent but narrowly focused mail classification changes that supplement, but do not alter, existing rates and mail classifications. In addition to these amendments, the Commission is proposing a rule that would allow the Postal Service to use a multi-year test period for the purpose of demonstrating the financial viability of potential new services that are the subject of a concurrent Postal Service request.

DATES: Comments must be submitted on or before December 26, 1995.

ADDRESSES: Comments and correspondence should be sent to Margaret P. Crenshaw, Secretary of the Commission, 1333 H Street NW, Suite 300, Washington, DC 20268-0001 (telephone: 202/789-6840).

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, Legal Advisor, Postal Rate Commission, 1333 H Street NW, Suite 300, Washington, DC 20268-0001 (telephone: 202/789-6820).

SUPPLEMENTARY INFORMATION: On April 24, 1995, the Commission issued an Advance Notice of Proposed Rulemaking in response to a petition submitted by the United States Postal Service. The Postal Service's petition, filed April 13, 1995, asked the Commission to initiate a rulemaking with a view to adopting new procedural rules applicable to seven ratemaking and mail classification topics, for the purpose of facilitating expedited consideration and review of Postal

Service requests in those areas. For the most part, the rules proposed in the Postal Service's petition pursue specific recommendations of the Joint Task Force on Postal Ratemaking.¹ The Commission summarized the Postal Service's seven proposed rules and solicited the views of interested parties on the draft rules and six other topics in the Advance Notice. 60 FR 22017-19 (May 4, 1995).

The Commission received 21 sets of comments in response to the Advance Notice.² In addition to their views on the merits of the Postal Service's proposed rules, several parties submitted that it would be inappropriate to go forward with the requested rulemaking in light of the current focus on mail classification reform and the parties significant commitment of resources in Docket No. MC95-1. In contrast, the Postal Service commented that it sees no utility in deferring consideration of any of its proposed rules, and that simultaneous consideration of all of them is warranted.

The Commission concurs in the Postal Service's initiative "to reopen the dialogue over administrative reform to a new chapter, and to focus on procedural changes designed to provide more expedition and flexibility." Petition of United States Postal Service to Initiate Rulemaking, April 13, 1995, at 5. However, the Commission is also mindful of the current workload imposed on all those involved in Docket No. MC95-1 and mail classification reform generally, and is disinclined to occasion additional efforts now without a realistic prospect of procedural enhancements in the near term. An additional consideration, which the Postal Service acknowledges in its petition, is the existence of potential legal impediments to implementing at least some of the concepts recommended by the Joint Task Force.

In view of these competing considerations, the Commission has

¹ See Postal Ratemaking in a Time of Change: A Report by the Joint Task Force on Postal Ratemaking (June 1, 1992).

² The Association of American Publishers, American Bankers Association, American Business Press, Air Courier Conference of America, Advo, Inc., Advertising Mail Marketing Association, Direct Marketing Association, Inc., Dow Jones & Company, Inc., Federal Express Corporation, Florida Gift Fruit Shippers Association, McGraw-Hill Companies, Inc., Major Mailers Association, Mail Order Association of America, Magazine Publishers of America, National Newspaper Association, Newspaper Association of America, the Commission's Office of the Consumer Advocate, Quality Letter Service, Inc., Time Warner Inc., United Parcel Service, and the United States Postal Service submitted comments in response to the Advance Notice.

determined to promulgate draft rules which would implement a majority, but not all, of the Postal Service's seven procedural initiatives. Specifically, the Commission has drafted proposed rules for application in the areas of market tests, provisional new services, minor changes in permanent mail classifications, and multi-year financial test periods for new services. At this point, these initiatives appear to hold the greatest promise for procedural improvement in the near term. The Commission will endeavor to pursue the remaining initiatives, which appear to present somewhat greater challenges under the Postal Reorganization Act as currently interpreted, in subsequent proceedings.

Market tests of potential new services. While one commenter, United Parcel Service, disputes the necessity of adopting a market test rule, the Joint Task Force Report correctly observes that there is no "well-worn path" in Commission procedure for obtaining information that could shed light on the prospects of potential service innovations through limited testing in the marketplace. Sections 67 through 67d of the current rules of practice (39 CFR 3001.67 through .67d) establish procedures for considering mail classification requests that the Postal Service denominates as "experimental" in character. However, this pre-existing mechanism may not be the most efficient and effective way to facilitate market testing, as the Postal Service has commented. The Commission agrees with the Postal Service and the Governors that it would be useful to explore new procedures explicitly designed for limited market tests that would enable the Service to gain "real world" experience with innovative services, and that would at the same time generate information needed to support recommendation of such services as permanent mail classifications. Employing these procedures within the larger context of an ongoing proceeding to consider a Postal Service request for a permanent classification change would also assist in establishing the objectives of market tests and defining their reasonable limits.

The Postal Service's proposed market test rules would apply to requests which seek "changes in rates or mail classification preceded by testing in the market in order to develop information necessary to support a permanent change." Proposed 39 CFR 3001.121. Insofar as the Postal Service has proposed rules that would apply to requests for expedited market tests of changes in existing rates only,

unaccompanied by a proposed service innovation, the Service's proposal exceeds the scope of the Joint Task Force's recommendations. Those recommendations were directed toward "potential service innovations[.]" and contemplated implementation through "rules for the consideration of *mail classification proposals* to allow market data to be obtained from limited tests * * *." Joint Task Force Report at 47, 48. (Emphasis added.) In the Commission's view, market testing of pure rate changes for existing services could raise difficult issues of consistency with the fairness and equity factor in 39 U.S.C. 3622(b)(1) and the prohibition of undue discrimination or preferences among mail users in 39 U.S.C. 403(c). Accordingly, to foreclose these potential issues and thereby simplify the market testing initiative, the Commission's draft rules are limited to market tests of proposed changes in mail classification, together with the rates proposed for the proposed new mail classification.

One commenter, the Newspaper Association of America, has suggested that the Commission must reject the Service's proposed market test rules because they are unlawful in several respects: They limit the Commission's review to a "yes or no" determination, thereby limiting analysis and potentially precluding consideration of some applicable statutory factors; they incorporate too short a deadline for Commission action; and they set no outside parameters for the duration of a market test. Other commenters—the American Bankers Association, Air Courier Conference of America, Federal Express Corporation, and United Parcel Service—presented similar criticisms of the Service's proposed rules regarding the limited scope of the Commission's review, attenuated data requirements, and the indefinite scope and duration of market tests permissible under the rules.

At the outset, the Commission believes that it is possible to craft rules for the expedited consideration and recommendation of market tests that are consistent with both the substantive and procedural requirements of the Postal Reorganization Act. Substantively, the Act requires that the Commission's recommendations be in accordance with the policies of Title 39 and the factors specified in sections 3622 and 3623. Under ordinary circumstances, if a Postal Service request appears to be incompatible with established postal policy or applicable statutory factors, the Commission endeavors to cure those deficiencies by recommending modifications in the Service's proposal, if that is feasible and appropriate. This

would certainly be the case with respect to a permanent mail classification change requested by the Postal Service. However, in the case of a market test, the Postal Service's evident intention would be to implement a plan both expeditiously and in the form in which it was designed by management. A recommendation to modify the proposed plan in any significant respect—even if the Commission considered modification to be compelled by applicable factors—could jeopardize the timeliness of the test and seriously impair its usefulness. This being the case, a relatively inflexible "yes or no" determination by the Commission might be viewed as the necessary price of expedition, but it seems to be a reasonable one under the terms of the Reorganization Act. The risk of proposing a market test that the Commission would find itself unable to recommend under the policies and factors of the Act would be borne entirely by the Postal Service.³

For these reasons, the Commission believes that it would be feasible to implement an expedited, "yes or no" review of proposed market tests, provided the objectives and criteria applicable to such tests are clearly specified. Accordingly, the first section of the new Subpart I proposed for addition to the Commission's rules begins by stating that the procedures apply in cases in which the Postal Service has requested a recommended decision pursuant to section 3623 "preceded by testing in the market in order to develop information necessary to support a permanent change." Proposed § 3001.161. The section also declares a Commission policy in favor of recommending "market tests that are reasonably calculated to produce information needed to support a permanent change in mail classification, and that are reasonably limited in scope, scale, duration and potential adverse impact." In order to clarify the issue of maximum duration, upon which some parties commented, the proposed rule would declare a limit of one year, except in extraordinary circumstances and for good cause shown.

With regard to procedural requirements, the Commission believes that it is possible to fashion expedited procedures that would accommodate the due process rights of participants and enable it to review all issues presented, but agrees with various comments that claimed the Postal

Service's proposed market test rule would provide for unduly attenuated proceedings. First, the artificial limitation of issues to be considered by the Commission under the Service's proposed rule cannot be justified, as the comments of American Bankers Association and Newspaper Association of America observe. It is altogether likely that a proposed market test, conducted within the larger context of a Postal Service request for a permanent change in mail classification, will involve the determination of relatively few issues. However, in order to be able to recommend to the Governors that a proposed market test be conducted, the Commission is obliged by the Reorganization Act to assure itself that all applicable statutory factors have been duly considered. Consequently, the Commission's proposed rules do not contain any issue-limiting provision, but instead adopt a procedural mechanism for narrowing the issues that might require a hearing. See proposed § 3001.163(e).

The Commission also believes that the 60-day schedule dictated by the Postal Service's rules may be insufficient to provide interested parties an adequate opportunity to exercise their due process rights under section 3624. For this reason, the Commission's proposed market test rules incorporate a 90-day decisional schedule. The proposed rules also are designed to maximize the opportunity of potential participants to examine and respond to the Postal Service's request through inclusion of expedited public notice provisions similar to those in the Commission's rules applicable to Express Mail Market Response requests. These provisions allow interested persons to register for expedited receipt of Postal Service requests to conduct market tests, and direct the Service to serve copies of such requests on the registrants either by hand delivery or Express Mail service. They also direct the Postal Service to serve copies of its request on all participants in the most recent omnibus rate proceeding. See proposed § 3001.163 (b) through (d).

The Commission's proposed rules would require the Postal Service to describe the features of its requested market test in some detail, identifying the services to be provided, the rates to be charged, the number and extent of the areas to be served, the test's duration, and the anticipated number of customers who will participate. Proposed § 3001.162 would also require the Service to describe the means by which it plans to provide equal access to all potential users in the test market service areas, and its plan for gathering

³ Of course, in any such case the Commission would express its specific concerns in its Opinion and Recommended Decision, and would provide guidance on how the identified deficiencies could be remedied.

and reporting the data needed to support a permanent mail classification change.

However, the rules would also afford the Postal Service considerable flexibility in conducting market tests, and in acting upon their results. If the Service anticipates that periodic reporting of test data would be harmful to the purposes of the test—for example, by revealing information that might lead mailers or competitors to take actions that would influence the test results—its plan could provide for presenting the test data as part of the information to be filed subsequently in support of a permanent mail classification change. Additionally, if the experience gained from the market test leads the Postal Service to change its plans regarding the new service, proposed § 3001.166(b) would allow the Service to move for revision or withdrawal of its request for a permanent mail classification change. A motion to withdraw its request would relieve the Postal Service of any obligation to produce the test data that would otherwise be submitted. Finally, while market tests to be recommended by the Commission ordinarily would be limited to one year in duration, proposed § 3001.161 states that this limitation would not necessarily bar the Postal Service from conducting more than one market test in support of a potential classification change, under appropriate circumstances.

Requests for provisional service changes of limited duration. The Joint Task Force Report recommended that the Commission adopt rules providing fast-track, “yes or no” review of proposed service innovations that would supplement existing rates and classifications without altering any of them. The purpose of the rules would be to enable the Postal Service to introduce a new service offering quickly, while allowing postal customers to “either try the new service or stick with the existing service menu, or both.” Report at 52. The Report also recommended that the Service’s request for the new service denominate it as provisional, and specify an ending date in its filing.

The Postal Service has proposed provisional service change rules that nominally would apply to “requests that the Commission recommend changes in rates or mail classification which supplement, but do not alter, existing classification and rates. * * *” USPS proposed § 3001.131. (Emphasis added.) While it is unclear how a rate change unaccompanied by a change in mail classification could supplement, yet not alter, existing classification and rates, the Service’s proposed rule could be read to extend to provisional changes in

rates alone. Such changes would be beyond the scope of the Joint Task Force’s recommendations, and the Commission’s proposed § 3001.171 includes alternative language.

Several commenters—including American Bankers Association, Federal Express Corporation, and United Parcel Service—questioned the potential application of the Postal Service’s proposed rules, or whether rules for provisional services would accomplish any purposes different from those addressed by the market test rules. At this point, the Commission believes that separate provisional service rules could be employed to accomplish objectives similar to those for market tests, but in somewhat different ways. For example, in appropriate instances provisional services might be introduced simultaneously throughout the postal system, rather than in just a few market testing areas. In any event, these issues merit further consideration, and the Commission invites both the Postal Service and other interested parties to submit further comments.

In light of the similarities in purpose and overall structure between the Service’s proposed market test rules and the rules for provisional services, the Commission’s proposed Subpart J parallels the provisions in proposed Subpart I. Proposed § 3001.171 would define applicability of the rules, and declare as Commission policy the recommendation of provisional services that enhance the range of postal services available to the public, without producing a material adverse effect overall on postal revenues or costs, and without causing unnecessary or unreasonable harm to competitors of the Postal Service. The latter criteria follow both the Joint Task Force Report’s recommendations and the language of the Postal Service’s proposed rules. The proposed section would also limit recommended provisional services to two years’ duration ordinarily, but provide for extension to an additional year if the Postal Service has filed a request to establish the provisional service as a permanent mail classification.

Proposed § 3001.172 establishes the filing requirements applicable to requests for provisional services. Each formal request would be required to include descriptive and proposed Domestic Mail Classification Schedule language and rate schedules, documentation to support the rates proposed for the provisional service, a termination date on which the proposed service would be discontinued, and an estimate of the effect of implementing the proposal on overall Postal Service

costs and revenues. The section would also establish compliance with subpart C of the current rules applicable to mail classification requests as a general standard applicable to the contents of formal requests, but would allow the Postal Service to seek waiver of particular requirements by explaining why responsive information is unavailable.

The Postal Service’s proposed rules would allow requests for provisional services to include proposed rates “which may encompass a range of rates.” USPS proposed § 3001.132(a). As noted above, the Commission is not proposing rules at this time that would establish the concept of rate bands in Commission proceedings, and the Postal Service’s proposed language is not included in the Commission’s rules for provisional services. However, in light of the “yes or no” feature of the Service’s proposal in this area, which has been retained, the Commission is reluctant to adopt rules that would compel rejection of a requested provisional service solely because of deficiencies in a single proposed rate. Interested parties are invited to comment on how this potential problem should be addressed, and to suggest specific language for inclusion in the rules.

Proposed § 3001.173 would establish expedited procedures for public notice of the Postal Service’s request and for conducting the proceeding. The section closely tracks the procedures specified for market test requests in proposed § 3001.163 in order to give interested parties the earliest feasible notice of the requested provisional service and to establish whether a hearing will be necessary.

As with the Commission’s proposed market test rules, proposed Subpart J does not include the issue-limiting provisions contained in the Postal Service’s proposed rules, but substitutes a procedural mechanism for narrowing the issues that might require a hearing. This accommodates the concerns of commenters Air Courier Conference of America and Newspaper Association of America that the Service’s proposed rules would fail to provide the thorough review provided by current procedures. The rule for decision in proposed § 3001.164 provides for issuance of a “yes or no” Commission decision in accordance with all applicable policies of the Postal Reorganization Act, and declares the objective of completing consideration of proposed provisional services within 90 days, consistent with the procedural due process rights of interested persons.

Proposed § 3001.175 would direct the Postal Service to collect and report data pertaining to provisional services that have been recommended by the Commission and implemented by the Board of Governors. The Service's data collection and reporting requirements would generally correspond to the periodic reporting requirements specified in § 3001.102 of the current rules. However, if the Service does not revise its regular data reporting systems to include the provisional service while it is in effect, the section would direct the Service to perform and file the results of special studies on a corresponding schedule to provide equivalent information to the extent reasonably practicable.

Finally, proposed § 3001.176 would provide for formal Postal Service requests that provisional services currently in effect be terminated, or established as permanent mail classifications either as originally recommended or in modified form. Following the provisional service's termination date, the section would allow the Postal Service to submit a request for its re-establishment under any subpart of the Commission's rules which would otherwise apply.

Expedited consideration of requests for minor mail classification changes. Noting that requests for permanent mail classification changes have been held to a uniform set of requirements regardless of whether the proposed change is complex or relatively simple, the Joint Task Force recommended that the Commission establish a streamlined version of its rules to consider "appropriately limited proposals" within the framework of a 90- to 150-day procedural schedule. Report at 55.

The Postal Service proposes rules that would provide expedited review of requested classification changes that are "minor," which would be defined as changes that do not involve changes in current rates or fees, and which: (a) Involve only changes in current mailing requirement or eligibility standards; (b) pertain to existing or proposed mail types or services estimated to provide less than 10 percent of total Postal Service revenues; or (c) are otherwise found by the Commission to be appropriately limited. USPS proposed § 3001.69. As commenters Federal Express Corporation and United Parcel Service have noted, the 10 percent standard is problematical because of its potential scope: A threshold as high as \$ 5.5 billion could be expected to encompass quite a few classification changes of more than "minor" consequence. For this reason, the Commission's proposed § 3001.69

adopts a different standard that includes classification changes which "would only affect categories of service with low aggregate costs and revenues."

The Commission's proposed § 3001.69a would impose somewhat more stringent requirements on the contents of formal requests for minor classifications than the Postal Service's proposed provision. The section would require: Descriptive and proposed Domestic Mail Classification Schedule language, as well as any pertinent rate schedules; a thorough explanation of the grounds on which the Service submits that the requested change is minor in character; and an estimate, in the greatest level of detail practicable, of the overall impact of the requested change on postal costs and revenues, mail users, and competitors of the Postal Service. As with the proposed rules for provisional service requests, the section would establish compliance with subpart C as the general standard applicable to the contents of formal requests, but would allow the Postal Service to seek waiver of particular requirements by explaining why responsive information is unavailable, or should not be required in light of the minor character of the requested classification change. These provisions are intended to assure the availability of all information genuinely necessary for evaluation of the proposed classification change.

Proposed § 3001.69b specifies expedited procedures for noticing the Postal Service's request, allowing interventions and responses to the Service's request for consideration under the expedited rules, and the Commission's determination whether the request is appropriate for consideration as a minor classification change. If the Commission determines that the request is not appropriate for consideration as a minor change, the expedited rules will not apply, and the request will be considered under other appropriate provisions. If the Commission determines that the expedited rules should apply, respondents who requested a hearing will be directed to identify the material issues of fact that require a hearing, and identify the facts presented in the Postal Service's filing that it disputes. The section states that hearings will be held if the Commission determines that there are genuine issues of material fact to be resolved, and that a hearing is needed to resolve them. Unlike the Postal Service's proposed provision, this section would not exclude any category of factual issue from consideration.

The Postal Service's proposed rules would require the Commission to issue

a recommended decision within 60 days after filing of the request if no party challenges it, and within 90 days if an on-the-record inquiry is conducted. The Commission is concerned that these deadlines would not allow adequate opportunities for interested persons to participate meaningfully in every phase of the proceeding, particularly in ascertaining if a hearing may be necessary. Consequently, proposed § 3001.69c provides for issuance of a recommended decision within 90 days after filing if no hearing is held, and 120 days if a hearing is held. The intervals between procedural milestones specified in proposed § 3001.69b are designed to accommodate these time limits.

Multi-year test periods for proposed new services. The Joint Task Force Report concluded that the single-year test period prescribed in the Commission's rules tends to restrict opportunities for new service innovation by the Postal Service. Such services can entail substantial initial expenditures for equipment, marketing, or other introductory investments that will not be recovered in their early, low-volume startup periods. In order to allow new services an opportunity to mature and achieve financial breakeven, the Report recommended that the Commission adopt rules providing for a multi-year test period of at least four or five years for proceedings involving new service offerings. Report at 50-52.

The Commission concurs with this rationale for multi-year test periods, but believes that their use must be supported by convincing substantial evidence in each case. Commenters Air Courier Conference of America and Federal Express Corporation expressed concerns that a multi-year test period could become a vehicle for allowing rates for new services to be set below attributable costs, and argued that it would be impermissible for the Commission to delegate a decision on breakeven to the Postal Service. These are legitimate concerns, but in the Commission's view they can be addressed by crafting a rule that will provide for full disclosure of available information and exploration on the record. Also, as a general matter, it would appear that to merit recommendation a multi-year test period should be commensurate with the horizon of the Postal Service's financial planning and be fully supported by financial analysis.

In light of these considerations, the Commission's proposed Subpart K would adopt a policy of allowing the use of multi-year test periods of up to 5 fiscal years in support of requests to

establish new postal services "where the Postal Service has presented convincing substantial evidence in support of the test period proposed." Proposed § 3001.181. The new subpart would require that each such request be supported by the testimony of a witness on behalf of the Postal Service, who would be responsible for providing a complete description of the proposed multi-year test period, a detailed explanation of the Service's bases for requesting the period, and a complete description of the Service's plan for achieving an appropriate contribution to institutional costs from the new service. The rules would also require the provision of complete documentary support for, and detail underlying, the requested test period, including cost, revenue and volume estimates, Return on Investment projections, and any other pertinent analyses prepared by the Postal Service.

The remaining Postal Service initiatives. As noted in the introduction to the discussion of the proposed rules, the Commission has determined to defer consideration of the Postal Service's remaining three initiatives: rules for limited scope rate cases, rate bands for competitive services, and Negotiated Service Agreements. Each of these areas merits further study and deliberation before proposing implementation in procedural rules.

With regard to limited scope rate cases, the Commission agrees in principle that it should be possible to consider Postal Service requests for relatively minor rate adjustments on an expedited basis. However, at this juncture it is not evident that a prescriptive rule of the sort proposed by the Postal Service is either necessary or would be beneficial. As commenters American Bankers Association, Newspaper Association of America, and United Parcel Service noted, such rules present problems in defining what is a "relatively minor adjustment" in current rates, and the preclusion of certain potential issues from consideration may trench upon interested parties' rights to an adequate opportunity for a hearing. Additionally, it is unclear how the possible effects of the proposed rate change upon other classes and subclass of mail could be accommodated. In light of the Commission's generally favorable experience in expediting consideration of the Postal Service's omnibus rate request in Docket No. R94-1, the Commission believes it would be preferable at this point to devise measures for expediting consideration of rate requests on a case-by-case basis.

The Commission also believes it would be advisable to defer consideration of rules incorporating special procedures to establish rate bands for competitive services. The commenters generally agreed that defining what constitutes a "competitive service" is problematical, especially when the influence of the Private Express Statutes is taken into consideration. Additionally, as commenters Air Courier Conference of America, Florida Gift Fruit Shippers Association, Newspaper Association of America, and United Parcel Service noted, the proposed procedures raise significant statutory and public policy issues concerning the respective roles of the Postal Service and the Commission in the ratemaking process. When the Commission last addressed the rate band concept, in Docket No. RM91-1, it declined to adopt rules incorporating the concept in the absence of the four-year strategic ratemaking cycle it had proposed in furtherance of the Joint Task Force's recommended new model for the ratemaking process.⁴ The Commission stated:

(W)ithout the regular scrutiny of the institutional cost contributions made by competitive categories of service which the regular cycle of omnibus and midcycle rate cases provides, the implementation of band rates would revive concerns expressed by other commenters regarding the risk of predation, exploitation of monopoly customers, and evasion of statutory requirements.

58 FR 16393 (March 26, 1993). (Footnote omitted.) The same concerns remain pertinent today.

Finally, the concept of Negotiated Service Agreements presents its own singular set of difficulties. In responding to earlier initiatives, the Commission has expressed doubt about the utility of "contract rate" procedures under the Postal Reorganization Act as it has been construed by the courts.⁵ In this docket, commenters have cited the decision in *UPS Worldwide Forwarding, Inc. v. United States Postal Service*,⁶ in which an international mail service that featured prices negotiated between the Postal Service and large-volume-capable customers was found to violate several requirements of the Postal Reorganization Act. Since those comments were filed, the District Court's decision has been reversed. However, in doing so the Court of Appeals was careful to distinguish the

Reorganization Act's provisions governing international rate setting, which it characterized as a "model of simplicity," from the open and more technically rigorous process required for adopting domestic rates.⁷ It is by no means apparent that the reviewing court's approbation would extend to domestic Negotiated Service Agreements.⁸ An additional administrative consideration, which the petition of the Postal Service reflects, is the necessity of conducting a classification proceeding to recommend the adoption of Negotiated Service Agreements as a discrete type of mail classification before procedural rules can be published for notice and comment. In view of these potential impediments and uncertainties, the Commission will defer the consideration of Negotiated Service Agreements to subsequent proceedings.

Issued by the Commission on October 13, 1995.

Margaret P. Crenshaw,
Secretary.

List of Subjects in 39 CFR Part 3001

Administrative practice and procedure, Postal Service.

Accordingly, 39 CFR part 3001 is amended as follows:

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

Authority: 39 U.S.C. 404(b), 3603, 3622-3624, 3661, 3662.

2. Sections 3001.69 through 3001.69c are added to Subpart C to read as follows:

§ 3001.69 Expedited minor classification cases—applicability.

This section and §§ 3001.69a through 3001.69c apply in cases where the Postal Service requests a recommended decision pursuant to section 3623 and seeks expedited review on the ground that the requested change in mail classification is minor in character. The requirements and procedures specified in these sections apply exclusively to the Commission's consideration of requested mail classification changes which the Postal Service denominates as, and the Commission finds to be,

⁷No. 94-7423, *supra*, slip op. 20.

⁸"In challenging the Postal Service, its competitors characterize it as a 'public service' and 'essentially a public utility.' In the domestic area, we believe those descriptions are apt. In some ways, the skepticism surrounding the ICM service exists because the program seems antithetical to traditional notions of the Postal Service. We expect to pay the same price for a postage stamp as everyone else, not to have to bargain for the best rate. In this sense, the Postal Service is properly compared to a public utility that charges the same rate to all customers." Slip op. at 31.

⁴See Postal Ratemaking in a Time of Change, *supra*, at 10-38.

⁵See Docket No. RM89-5, Notice Inviting Further Comments, 54 FR 47223 (November 13, 1989).

⁶853 F. Supp. 800 (D. Del. 1994), *rev'd*, No. 94-7423 (3d Cir., September 15, 1995).

minor in character. A requested classification change may be considered to be minor in character if it would not involve a change in any existing rate or fee and:

(a) Involves only changes in eligibility standards or requirements applicable to mail classes or services; or

(b) Would only affect categories of service with low aggregate costs and revenues.

§ 3001.69a Expedited minor classification cases—filing of formal request and prepared direct evidence.

(a) Whenever the Postal Service determines to request that the Commission submit a decision recommending a mail classification change, and to seek expedited review on the ground that the requested change is minor in character, it shall file a request for a change in mail classification pursuant to section 3623 that comports with the requirements of subpart C, part 3001, of the rules of practice and of this section. Each such formal request shall include the following particular information:

(1) A description of the proposed classification change or changes, including proposed changes in the text of the Domestic Mail Classification Schedule and any pertinent rate schedules;

(2) A thorough explanation of the grounds on which the Postal Service submits that the requested change in mail classification is minor in character; and

(3) An estimate, prepared in the greatest level of detail practicable, of the overall impact of the requested change in mail classification on postal costs and revenues, mail users, and competitors of the Postal Service.

(b) If the Postal Service believes that data required to be filed under § 3001.64 are unavailable, it shall explain their unavailability, as required by § 3001.64(a)(2) (i), (ii), and (iv). If the Postal Service believes that any of the data or other information required to be filed under § 3001.64 should not be required in light of the minor character of the requested change in mail classification, it shall move for a waiver of that requirement, stating with particularity the reasons why the character of the request and its circumstances justify a waiver of the requirement. A satisfactory explanation of the unavailability of information required under § 3001.64, or of why it should not be required to support a particular request, will be grounds for excluding from the proceeding a contention that the absence of the information should form a basis for

rejection of the request, unless the party desiring to make such contention:

(1) Demonstrates that, having regard to all the facts and circumstances of the case, it was clearly unreasonable for the Postal Service to propose the change in question without having first secured the information and submitted it in accordance with § 3001.64; or

(2) Demonstrates other compelling and exceptional circumstances requiring that the absence of the information in question be treated as bearing on the merits of the proposal.

§ 3001.69b Expedited minor classification cases—expedition of procedural schedule.

(a) The purpose of this section is to provide a schedule for expediting proceedings in which the Postal Service requests that the Commission recommend a change in mail classification and expedite consideration of that request on the ground that the change is minor in character.

(b) Within 5 days after receipt of a Postal Service request invoking the operation of §§ 3001.69 through 3001.69c, the Commission shall issue a notice of proceeding and provide for intervention by interested parties pursuant to § 3001.20. The notice of proceeding shall state that the Postal Service has denominated the mail classification change it requests a minor change, and has requested expedited consideration pursuant to §§ 3001.69 through 3001.69c. The notice shall further state the grounds on which the Postal Service submits that the requested change in mail classification is minor in character, and shall afford all interested parties 21 days after publication within which to intervene, submit responses to the Postal Service's request for consideration of its proposed mail classification change under the terms of §§ 3001.69 through 3001.69c, and request a hearing.

(c) Within 28 days after publication of the notice of proceeding pursuant to paragraph (b) of this section, the Commission shall decide whether to consider the request of the Postal Service as a minor classification change request under §§ 3001.69 through 3001.69c, and shall issue an order in the proceeding incorporating that ruling. The Commission shall order a request to be considered under §§ 3001.69 through 3001.69c if it finds that:

(1) The requested classification change is minor in character, and

(2) The effects of the requested change are likely to be appropriately limited in scope and overall impact.

(i) If the Commission determines that the request of the Postal Service is not

appropriate for consideration as a minor classification change request, no further procedures under §§ 3001.69 through 3001.69c shall be ordered, and the request will be considered in accordance with other appropriate provisions of subpart C of this part.

(ii) If the Commission determines that the Postal Service request is appropriate for consideration under §§ 3001.69 through 3001.69c, those respondents who request a hearing shall be directed to state with specificity within 14 days after publication of the notice the issues of material fact that require a hearing for resolution. Respondents shall also identify the fact or facts set forth in the Postal Service's filing that the party disputes, and when possible, what the party believes to be the true fact or facts and the evidence it intends to provide in support of its position.

(d) The Commission will hold hearings on a Postal Service request which is considered under §§ 3001.69 through 3001.69c when it determines that there are genuine issues of material fact to be resolved, and that a hearing is needed to resolve those issues. Hearings on the Postal Service request will commence within 21 days after issuance of the Commission order pursuant to paragraph (c) of this section. Testimony responsive to the Postal Service request will be due 14 days after the conclusion of hearings on the Postal Service request.

§ 3001.69c Expedited minor classification cases—time limits.

The Commission will treat cases to which §§ 3001.69 through 3001.69c apply as subject to the maximum expedition consistent with procedural fairness. The schedule for adoption of a recommended decision will therefore be established, in each such case, to allow for issuance of such decision not more than 90 days after the filing of the request of the Postal Service if no hearing is held, and not more than 120 days after the filing of the request if a hearing is scheduled.

3. Subpart I is added to read as follows:

Subpart I—Rules for Expedited Review to Allow Market Tests of Proposed Mail Classification Changes

Sec.	
3001.161	Applicability.
3001.162	Filing of market test proposal and supporting direct evidence.
3001.163	Procedures—expedition of public notice and procedural schedule.
3001.164	Rule for decision.
3001.165	Data collection and reporting requirements.
3001.166	Suspension, continuation or termination of proceeding.

Subpart I—Rules for Expedited Review to Allow Market Tests of Proposed Mail Classification Changes

§ 3001.161 Applicability.

The rules in this subpart apply in cases in which the Postal Service requests a recommended decision pursuant to section 3623 preceded by testing in the market in order to develop information necessary to support a permanent change. The requirements and procedures specified in this subpart apply exclusively to the Commission's determination to recommend in favor of or against a market test proposed by the Postal Service, and do not supersede any other rules applicable to the Postal Service's request for recommendation of a permanent change in mail classification. In administering this subpart, it shall be the policy of the Commission to recommend market tests that are reasonably calculated to produce information needed to support a permanent change in mail classification, and that are reasonably limited in scope, scale, duration, and potential adverse impact. Except in extraordinary circumstances and for good cause shown, the Commission shall not recommend market tests of more than one year in duration; however, this limitation is not intended to bar the Postal Service from conducting more than one market test in support of a potential permanent change in mail classification in appropriate circumstances.

§ 3001.162 Filing of market test proposal and supporting direct evidence.

Whenever the Postal Service determines to request that the Commission submit a recommended decision on a change in mail classification preceded by testing in the market, the Postal Service shall file with the Commission, in addition to its request for a permanent change in mail classification pursuant to section 3623, a request for a recommended decision in favor of its proposed market test of the requested change in mail classification. Each formal request filed under this subpart shall include such information and data and such statements of reasons and bases as are necessary and appropriate fully to inform the Commission and the parties of the nature, scope, significance and impact of the proposed market test, and to show that it is in the public interest and in accordance with the policies of the Act and the applicable criteria of the Act. Each formal request shall also include the following particular information:

(a) A description of the services to be provided in the market test, and the

relationship between the services to be provided and the permanent change or changes in the mail classification schedule requested by the Postal Service;

(b) A statement of each rate or fee to be charged for each service to be provided during the market test, together with all information relied upon to establish consistency of those rates and fees with the factors specified in section 3622(b);

(c) A description of the number and extent of the service areas in which the market test will be conducted, including the number and type of postal facilities which will be used;

(d) A statement of the planned duration of the market test;

(e) Proposed Domestic Mail Classification Schedule provisions which incorporate the information required in paragraphs (a) through (d) of this section;

(f) An estimate of the number of customers who will participate in the market test, together with a description of the means by which the Postal Service plans to provide equal access to all potential users in the test market service areas; and

(g) A plan for testing the proposed change or changes in the market, including a plan for gathering the data needed to support a permanent change in mail classification and for reporting the test data to the Commission. If periodic reporting of the test data would be harmful to the purposes of the test, such as by revealing information that might encourage competitors or mailers to take actions that would affect the test results, the plan may provide for presentation of the test data as part of the subsequent filing of data supporting a permanent mail classification change.

§ 3001.163 Procedures—expedition of public notice and procedural schedule.

(a) The purpose of this section is to provide a schedule for expediting proceedings in which the Postal Service proposes to conduct a market test of a requested change in mail classification it has submitted to the Commission pursuant to section 3623.

(b) Persons who are interested in participating in proceedings to consider Postal Service requests to conduct a market test may register at any time with the Secretary of the Postal Rate Commission, who shall maintain a publicly available list of the names and business addresses of all such registrants. Persons whose names appear on this list will automatically become parties to each proceeding in which the Postal Service requests to conduct a market test pursuant to this

subpart. Other interested persons may intervene pursuant to § 3001.20 within 28 days after the filing of a formal request made under the provisions of this subpart. Parties may withdraw from the register or a particular case by filing a notice with the Commission.

(c) When the Postal Service files a request under the provisions of this subpart, it shall on that same day effect service by hand delivery of the complete filing to each person registered pursuant to paragraph (b) of this section who maintains an address for service within the Washington metropolitan area and service the complete filing by Express Mail service on all other registrants. Each registrant is responsible for insuring that his or her address remains current.

(d) When the Postal Service files a request under the provisions of this subpart, it shall on that same day send by Express Mail to all participants in the most recent omnibus rate case a notice which briefly describes its proposal. This notice shall indicate on its first page that it is a notice of a Market Test Request to be considered under this subpart, and identify the last day for filing a notice of intervention with the Commission.

(e) Within 5 days after receipt of a Postal Service request under the provisions of this subpart, the Commission shall issue a notice of proceeding and provide for intervention by interested parties pursuant to § 3001.20. In the event that a party wishes to dispute a genuine issue of material fact to be resolved in the consideration of the Postal Service's request, that party shall file with the Commission a request for a hearing within the time allowed in the notice of proceeding. The request for a hearing shall state with specificity the fact or facts set forth in the Postal Service's filing that the party disputes, and when possible, what the party believes to be the true fact or facts and the evidence it intends to provide in support of its position. The Commission will hold hearings on a Postal Service request made pursuant to this subpart when it determines that there is a genuine issue of material fact to be resolved, and that a hearing is needed to resolve that issue.

§ 3001.164 Rule for decision.

The Commission will issue a decision in accordance with the policies of the Postal Reorganization Act recommending either in favor of or against the Postal Service's proposed market test. The purpose of this subpart is to allow for consideration of proposed market tests within 90 days, consistent

with the procedural due process rights of interested persons.

§ 3001.165 Data collection and reporting requirements.

In any case in which the Commission has issued a recommended decision in favor of a market test requested by the Postal Service, and the Board of Governors has put the market test recommended by the Commission into effect, the Postal Service shall gather test data and report them to the Commission in accordance with the plan submitted pursuant to § 3001.162(f). If the Postal Service's plan for reporting test data does not provide for periodic reporting during the conduct of the test, the Postal Service shall submit all test data to the Commission no later than 60 days following the conclusion of the test.

§ 3001.166 Suspension, continuation or termination of proceeding.

(a) In any case in which the Commission has issued a recommended decision in favor of a market test requested by the Postal Service, and the Board of Governors has put the market test recommended by the Commission into effect, the Postal Service may move for suspension of the proceeding in which its request for a permanent change in mail classification is to be considered. The Commission shall grant the Postal Service's motion for suspension if, in the Commission's opinion, it would be reasonable under the circumstances to defer consideration of the request until the information to be produced in connection with the market test becomes available.

(b) At any time during the pendency of a market test recommended by the Commission pursuant to this subpart, or following the completion of such a market test, the Postal Service may move to revise or withdraw its request for a permanent change in mail classification. If the Postal Service moves to revise its request, it shall file with the Commission all data necessary to support its amended request. If the Postal Service moves to withdraw its request, it need not produce the test data that would otherwise be submitted pursuant to § 3001.165.

4. Subpart J is added to read as follows:

Subpart J—Rules for Expedited Review of Requests for Provisional Service Changes of Limited Duration

Sec.

3001.171 Applicability.

3001.172 Filing of formal request and prepared direct evidence.

3001.173 Procedures—expedition of public notice and procedural schedule.

3001.174 Rule for decision.

3001.175 Data collection and reporting requirements.

3001.176 Continuation or termination of provisional service.

Subpart J—Rules for Expedited Review of Requests for Provisional Service Changes of Limited Duration

§ 3001.171 Applicability.

The rules in this subpart apply in cases in which the Postal Service requests that the Commission recommend the establishment of a provisional service which will supplement, but will not alter, existing mail classifications and rates for a limited and fixed duration. The requirements and procedures specified in this subpart apply exclusively to the Commission's determination to recommend in favor of or against a provisional service proposed by the Postal Service, and do not supersede the rules applicable to requests for permanent changes in rates, fees, mail classifications, and in the nature of postal services. In administering this subpart, it shall be the policy of the Commission to recommend the introduction of provisional services that enhance the range of postal services available to the public, without producing a material adverse effect overall on postal revenues or costs, and without causing unnecessary or unreasonable harm to competitors of the Postal Service. Except in extraordinary circumstances and for good cause shown, the Commission shall not recommend provisional services of more than two years in duration; however, the Commission may grant a request to extend a provisional service for an additional year if a Postal Service request to establish the provisional service as a permanent mail classification is pending before the Commission.

§ 3001.172 Filing of formal request and prepared direct evidence.

(a) Whenever the Postal Service determines to request that the Commission submit a decision recommending the establishment of a provisional service of limited and fixed duration, it shall file a request for a change in mail classification pursuant to section 3623 that comports with the requirements of subpart C of the rules of practice and of this subpart. Each formal request shall include the following particular information:

(1) A description of the proposed classification, including proposed Domestic Mail Classification Schedule language and rate schedules;

(2) An explanation and complete documentation of the development of the rates proposed for the provisional service;

(3) A termination date on which the proposed provisional service will be discontinued;

(4) An estimate of the effect of implementing the proposed provisional service on overall Postal Service costs and revenues during the period in which it is in effect; and

(5) A plan for meeting the data collection and reporting requirements specified in § 3001.175.

(b) If the Postal Service believes that data required to be filed under § 3001.64 are unavailable, it shall explain their unavailability, as required by § 3001.64(a)(2)(i), (ii), and (iv). In particular, if the provisional character of the request bears on the unavailability of the data in question, the Postal Service shall explain in detail the nexus between these circumstances. A satisfactory explanation of the unavailability of data will be grounds for excluding from the proceeding a contention that the absence of the data should form a basis for rejection of the request, unless the party desiring to make such contention:

(1) Demonstrates that, having regard to all the facts and circumstances of the case, it was clearly unreasonable for the Postal Service to propose the change in question without having first secured the data which are unavailable, or

(2) Demonstrates other compelling circumstances requiring that the absence of the data in question be treated as bearing on the merits of the proposal.

§ 3001.173 Procedures—expedition of public notice and procedural schedule.

(a) The purpose of this section is to provide a schedule for expediting proceedings in which the Postal Service requests that the Commission recommend the establishment of a provisional service which will supplement, but will not alter, existing mail classifications and rates for a limited and fixed duration.

(b) Persons who are interested in participating in proceedings to consider Postal Service requests to establish a provisional service may register at any time with the Secretary of the Postal Rate Commission, who shall maintain a publicly available list of the names and business addresses of all such registrants. Persons whose names appear on this list will automatically become parties to each proceeding in which the Postal Service requests establishment of a provisional service pursuant to this subpart. Other

interested persons may intervene pursuant to § 3001.20 within 28 days after the filing of a formal request made under the provisions of this subpart. Parties may withdraw from the register or a particular case by filing a notice with the Commission.

(c) When the Postal Service files a request under the provisions of this subpart, it shall on that same day effect service by hand delivery of the complete filing to each person registered pursuant to paragraph (b) of this section who maintains an address for service within the Washington metropolitan area and serve the complete filing by Express Mail service on all other registrants. Each registrant is responsible for insuring that his or her address remains current.

(d) When the Postal Service files a request under the provisions of this subpart, it shall on that same day send by Express Mail service to all participants in the most recent omnibus rate case a notice which briefly describes its proposal. Such notice shall indicate on its first page that it is a notice of a Request for Establishment of a Provisional Service to be considered under this subpart, and identify the last day for filing a notice of intervention with the Commission.

(e) Within 5 days after receipt of a Postal Service request under the provisions of this subpart, the Commission shall issue a notice of proceeding and provide for intervention by interested parties pursuant to § 3001.20. In the event that a party wishes to dispute a genuine issue of material fact to be resolved in the consideration of the Postal Service's request, that party shall file with the Commission a request for a hearing within the time allowed in the notice of proceeding. The request for a hearing shall state with specificity the fact or facts set forth in the Postal Service's filing that the party disputes, and when possible, what the party believes to be the true fact or facts and the evidence it intends to provide in support of its position. The Commission will hold hearings on a Postal Service request made pursuant to this subpart when it determines that there is a genuine issue of material fact to be resolved, and that a hearing is needed to resolve that issue.

§ 3001.174 Rule for decision.

The Commission will issue a decision in accordance with the policies of the Postal Reorganization Act recommending either in favor of or against the Postal Service's proposed provisional service of limited duration.

The purpose of this subpart is to allow for consideration of proposed provisional services within 90 days, consistent with the procedural due process rights of interested persons.

§ 3001.175 Data collection and reporting requirements.

In any case in which the Commission has issued a recommended decision in favor of a provisional service of limited duration requested by the Postal Service, and the Board of Governors has put the provisional service recommended by the Commission into effect, the Postal Service shall collect and report data pertaining to the provisional service during the period in which it is in effect in accordance with the periodic reporting requirements specified in § 3001.102. If the Postal Service's regular data reporting systems are not revised to include the provisional service during the period of its effectiveness, the Postal Service shall perform, and provide to the Commission on a schedule corresponding to § 3001.102 reports, special studies to provide equivalent information to the extent reasonably practicable.

§ 3001.176 Continuation or termination of provisional service.

At any time during the period in which a provisional service recommended by the Commission and implemented by the Board of Governors is in effect, the Postal Service may submit a formal request that the provisional service be terminated, or that it be established, either as originally recommended by the Commission or in modified form, as a permanent mail classification. Following the conclusion of the period in which the provisional service was effective, the Postal Service may submit a request to establish the service as a mail classification under any applicable subpart of the Commission's rules.

5. Subpart K is added to read as follows:

Subpart K—Rules for Use of Multi-Year Test Periods

Sec.

3001.181 Use of multi-year test period for proposed new services.

3001.182 Filing of formal request and prepared direct evidence.

Subpart K—Rules for Use of Multi-Year Test Periods

§ 3001.181 Use of multi-year test period for proposed new services.

The rules in this subpart apply to Postal Service requests pursuant to

section 3623 for the establishment of a new postal service, with attendant rates, which in the estimation of the Postal Service cannot generate sufficient volumes and revenues to recover all costs associated with the new service in the first full fiscal year of its operation. In administering these rules, it shall be the Commission's policy to adopt tests periods of up to 5 fiscal years for the purpose of determining breakeven for newly introduced postal services where the Postal Service has presented convincing substantial evidence in support of the test period proposed.

§ 3001.182 Filing of formal request and prepared direct evidence.

In filing a request for establishment of a new postal service pursuant to section 3623, the Postal Service may request that its proposal be considered for a test period of longer duration than the test period prescribed in § 3001.54(f)(2). Each such request shall be supported by the following information:

(a) The testimony of a witness on behalf of the Postal Service, who shall provide:

(1) A complete definition of the multi-year test period requested for the proposed new service;

(2) A detailed explanation of the Postal Service's preference of a multi-year test period, including the bases of the Service's determination that the test period prescribed in § 3001.54(f)(2) would be inappropriate; and

(3) A complete description of the Postal Service's plan for achieving an appropriate contribution to institutional costs from the new service by the end of the requested test period.

(b) Complete documentary support for, and detail underlying, the test period requested by the Postal Service, including:

(1) Estimated costs, revenues, and volumes of the proposed new service for the entire requested test period;

(2) Return on Investment projections and all other financial analyses prepared in connection with determining the cost and revenue impact of the proposed new service; and

(3) Any other analyses prepared by the Postal Service that bear on the overall effects of introducing the proposed new service during the requested test period.

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