

the participants and the Commission. The rules must assure the provision of a timely review, while safeguarding due process requirements. The rules also provide for a standard of review that is appropriate for negotiated service agreements.

This rulemaking considers rules for reviewing Postal Service proposals based on baseline and functionally equivalent negotiated service agreements. The intent of the proposed rules for functionally equivalent negotiated service agreements is to reduce the procedural burden and expedite the proceeding otherwise applicable to a de novo review of a new or unique baseline negotiated service agreement.

The proposed rules do not include a definition for what qualifies as a functionally equivalent negotiated service agreement. The many possible forms and features that a negotiated service agreement can encompass make development of a universal definition of functional equivalency difficult, if not impossible. The proposed rules place the burden on proponents to explain why the newly proposed negotiated service agreement is functionally equivalent to a previously recommended negotiated service agreement.<sup>3</sup> The Commission will be left to decide, on a case by case basis, whether the Postal Service has met this burden. If the case for functional equivalency is not persuasive, the request will be subject to § 3001.195.

#### A. General Rules

##### Proposed § 3001.5(r)—Definitions

The proposed rules begin with a definition of the term “negotiated service agreement.” The definition is necessary for distinguishing the applicability of the proposed rules from rules that cover other subject areas. Several concepts are important in the definition. First, a negotiated service agreement is a contract. Second, the terms and conditions of the contract apply only to the Postal Service and the specific mailer, or mailers, named in the

contract. Third, the contract controls the provision of mailer-specific rates, fees, and/or postal services. Fourth, the duration of the contract must be defined in the contract.<sup>4</sup> Finally, the contract must be memorialized in writing. The proposed definition of a negotiated service agreement appears in attachment A, § 3001.5(r).<sup>5</sup>

##### Proposed § 3001.51 and § 3001.61—Applicability Amendments

The proposed amendments to rules 51 and 61 specify that Postal Service requests based on negotiated service Agreements, which otherwise would be considered pursuant to subparts B or C, shall instead be considered pursuant to subpart L.

##### Proposed § 3001.190—Applicability

Subsection (a) establishes that the rules proposed under subpart L, “Rules Applicable to Negotiated Service Agreements,” are applicable to Postal Service proposals based on negotiated service agreements. This subsection also incorporates subpart A, “Rules of General Applicability,” into subpart L.

Subsection (b) states the general policy considerations of the Commission to justify the need for the proposed rules for negotiated service agreements. These policy considerations do not supercede any provision of the Act, but merely highlight issues that the Commission will consider important when reviewing negotiated service agreements.

This subsection also expresses the Commission’s strong preference that negotiated service agreements be limited in duration to three years or less. Negotiated service agreements by their nature have features that are discriminatory, and have the potential to cause harm to the marketplace.<sup>6</sup> There also is a potential for harm to the Postal Service, and thereby to other mailers, where negotiated service agreements are predicated on less than complete knowledge of the mailer-specific mailing costs and

characteristics.<sup>7</sup> Furthermore, over time, the material facts on which an agreement is based will tend to change, making uncertain the future benefits of any agreement. Imposing a maximum duration limits the time that any potential risk might be in effect, and allows a fixed time over which an analysis can be performed to quantify this risk. It also provides an opportunity to periodically analyze the pros and cons of allowing the agreement to extend into the future.

The Commission’s preference to place a limit on duration is also based on the concern that the interaction between negotiated service agreements and omnibus rate cases is not understood. Overall Postal Service costs and revenues are reviewed during every omnibus rate proceeding—which typically occur every three years. The methodology for incorporating the impact of negotiated service agreements into an omnibus rate case has not been developed. Furthermore, the effect of an omnibus rate case on a negotiated service agreement is not known. There is a potential that the impact of negotiated service agreements on overall costs and revenue, information that is required when considering an omnibus rate case, could perpetually escape review if not properly incorporated. While the preference for a maximum three-year duration does not fully address these concerns, it should at least help by placing bounds on the possible effects of negotiated service agreements which must be evaluated in future omnibus rate proceedings.

The preference for a three-year maximum duration contains two explanatory notes. The proposed subpart L contemplates a procedure for rapid and repeated renewals of a previously recommended negotiated service agreement. There is no known reason that a negotiated service agreement that is shown to benefit the Postal Service, meets the statutory requirements, and does not cause any undue harm, should not be allowed to be renewed indefinitely. The proposed rule also allows for the prompt review of a functionally equivalent negotiated service agreement. The intent of the rule is that the duration of the functionally equivalent negotiated service agreement should not be dependent on the duration of the underlying negotiated

<sup>3</sup> Functional equivalency is broader than the literal terms and conditions of the negotiated service agreement. Just as similarly situated mailers do not necessarily have to have identical characteristics, functionally equivalent negotiated service agreements do not necessarily have to have identical terms and conditions. The Commission will have to examine the facts and surrounding circumstances of each proposal to make a functional equivalency determination. As an example of factors outside of the literal terms and conditions of the negotiated service agreement, whether the Postal Service derives a “functionally equivalent” benefit from the proposed agreement could bear on an argument for functional equivalency.

<sup>4</sup> The proposed language is interpreted to be broad enough to include allowing for triggering events that may initiate or terminate the contract, in addition to setting a fixed duration.

<sup>5</sup> The complete text of each proposed rule appears in attachment A. The proposed rules in attachment A should be read in parallel with the explanations provided in this notice and order.

<sup>6</sup> Negotiated service agreements are discriminatory in that their application is restricted to the contracting parties. The negative connotation of discrimination is presumed to be ameliorated by making similar negotiated service agreements available to similarly situated mailers. The proposed rules are designed to facilitate this process.

<sup>7</sup> For example, the Capital One Negotiated Service Agreement was predicated on Postal Service average costs as opposed to mailer-specific costs, and on less than complete knowledge of Capital One’s likely future mailing strategies.