

Commission (which has primary ratemaking responsibility under the Act)²³ has demonstrated a need for a limited amount of documentation of routine financial reports to make the ratesetting process function properly.

The Commission's Periodic Reporting Rule is a restrained exercise of its authority to establish procedures that ensure that its hearings afford meaningful due process both to the Postal Service and to the affected public, and ensure that the Commission maintains the expertise that is required to make informed rate recommendations. As such, it is authorized under § 3603 of the Act.

In deciding whether the updated Periodic Reporting Rule is an appropriate exercise of the Commission's § 3603 authority, the questions to be answered are whether the need for the information identified by the Commission is real and substantial, and whether providing it would significantly impair the functioning of the Postal Service.

The Need of Litigants for Meaningful Due Process

If there is a common theme among the comments received in this docket from potential intervenors in rate cases, it is that, under current circumstances, the litigation "playing field" in omnibus rate cases is tilted so steeply in favor of the Postal Service that their basic right to due process is jeopardized. The causes are severe asymmetry in the time and resources available to prepare for a rate filing, severe asymmetry in access to relevant information, the immense scope and detail of the filing, and the short statutory deadline for digesting and reacting to it. As the American Bankers Association points out

[m]uch of the complexity associated with omnibus rate cases for the Commission and intervenors arises from the fact that they cannot even begin to prepare for such a case until it is filed. The changes to the Commission's rules as proposed in Commission Order No. 1358, which would require the USPS to periodically file much of the basic information upon which requests for new rates are based, would greatly facilitate effective decision making by the Commission and effective participation by intervenors in omnibus rate cases.

ABA Comments at 1–2. American Business Media concurs:

[w]ith data available on an ongoing basis, not only would the Commission be better prepared for a rate filing, but the Postal Service's customers would not bear the burden of having the ten or twelve feet of

papers, plus computer material, dropped on them with the expectation that they can review, understand, question, and refute those portions that are relevant in time for the Commission to issue a recommended decision in ten months.

ABM Reply Comments at 2. The OCA summarizes the dilemma of intervenors:

[a]s a participant in rate cases, the OCA has watched the complexity and sophistication of Postal Service presentations rise exponentially. The "lead" time required by the OCA (or any other participant) to match the level of the Service's evidence has also increased exponentially. But the Postal Service seeks to preserve its lead-time advantage of "six months" while denying any lead time to participants. At some point (already passed, as far as the OCA is concerned) the advantage to the Postal Service becomes overwhelming, and due process evaporates. Whatever may have motivated the Commission to propose the new periodic reporting rules, the effect of their implementation will be to level the litigation field for participants other than the Postal Service.

OCA Reply Comments at 4–5. [Footnote omitted.]

That the playing field is tilted is not merely the self-serving perception of intervenors in rate cases. The Federal court of appeals in *Association of American Publishers, Inc. v. Governors of the United State Postal Service*, 485 F.2d 768, 779 (D.C. Cir. 1973) has commented on the problem as well:

[The Postal Service] alone takes in the full scope of Postal Service operations when presenting its proposals. And it alone is in a position to influence the Postal Service's day-to-day accounting procedures and record keeping. Outsider challenges to the fundamental approach the Postal Service takes to ratemaking are unlikely to meet with stunning success under these circumstances [footnote omitted].

The problem of securing meaningful due process for intervenors in rate cases is real and substantial, and the information required by the updated Periodic Reporting Rule is reasonably designed to partially solve that problem. The remaining question is whether providing that information would significantly impair the functioning of the Postal Service. The Commission has explained earlier that the burden of complying with the rule is a tiny fraction of the burden of documenting a full-blown rate case, primarily because the Postal Service produces almost all of this information routinely anyway, for reasons apart from the rule.

The Postal Service's Assertions of Commercial Sensitivity Are Unexpectedly Broad

The Postal Service, unexpectedly, asserts that the majority of the

information required by the rule is commercially sensitive. It is very difficult to evaluate this assertion because it is made at such a general level. The Postal Service makes almost no effort to identify which of the diverse information required by the rule it now believes falls in this category.

There are a number of reasons that this broad assertion of commercial sensitivity is unexpected. One is because the subject matter of the information required by the rule is information that the rule has required for decades, and the Postal Service has provided for decades, without suggesting that it is commercially sensitive. Another reason that this assertion is unexpected is because the information required by the rule is information that the Postal Service has routinely provided in omnibus rate cases without asserting that it is sensitive and without seeking to file it under protective conditions. Furthermore, on several occasions, the Postal Service has voluntarily disclosed much of the CRA documentation that it now seeks the most strenuously to withhold. In 1998, for example, after the Docket No. R97–1 omnibus rate case was concluded, the Postal Service voluntarily provided the Commission with an extensively documented interim-year CRA that was calculated according to Commission attribution methods. The documentation included the B workpaper spreadsheets and some of the input datasets that the updated Periodic Reporting Rule now requires. There was no assertion that this information was commercially sensitive, and no request that it be maintained under protective conditions. Similarly, on May 30 of this year, the Postal Service voluntarily included with its CRA submitted under the prior version of the Periodic Reporting Rule, the B workpaper spreadsheets for the major costs segments (Segments 3, 6, 7, and 14).²⁴

Taken together, this history adds up to a shift in the attitude of the Postal Service toward the commercial sensitivity of the CRA documentation that the updated rule requires. This new attitude is not satisfactorily justified by the Postal Service. Once facility identifiers are removed from the required datasets, there is no apparent commercial use to which any of this

²³ See *National Association of Greeting Card Publishers v. USPS*, 462 U.S. 810, 821 (1983) quoting S. Rep. No. 91–912 at 4 (1970).

²⁴ See Letter of May 30, 2003, from Daniel J. Foucheaux, Chief Counsel, Ratemaking, to the Hon. Steven W. Williams, Secretary, Postal Rate Commission. This was apparently done on the assumption that the B workpapers for these cost segments are the current counterpart to the CRA documentation that it had provided in past years under the Periodic Reporting Rule.