POSTAL RATE COMMISSION

39 CFR 3001

[Docket No. RM98–2; Order No. 1219]

Revisions to Library Reference Rule

AGENCY: Postal Rate Commission.

ACTION: Proposed rule.

SUMMARY: The Commission proposes amending its rules of practice to clarify the use of library references in evidentiary proceedings. The proposed amendments specify conditions under which library references may be filed; improve labeling and identification; and establish a process for conditional acceptance that entails motion practice.

DATES: Comments should be filed on or before October 14, 1998.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, 202–789–6820.

SUPPLEMENTARY INFORMATION: The Commission's rules of practice authorize participants in evidentiary proceedings to label material as a library reference and file it with the Commission's docket section. *See generally* Rule 31(b), and Docket No. R97–1 Special Rule of Practice No. 5. Designation as a library reference and acceptance in the Commission's docket section confer no evidentiary status on the material; instead, these steps are part of an administrative practice designed to relieve participants of the burden of serving copies of voluminous material on others or to facilitate reference to, or identification of, the material.

The Commission's longstanding approach has been to allow the Postal Service and others to file material as a library reference without requiring them to make a threshold showing of the appropriateness of the designation, and without conducting an independent evaluation. In Docket No. R97–1, serious concerns arose that the library reference practice could be employed, either inadvertently or strategically, to insulate material from effective cross-examination (or to control the timing of such examination), and thereby interfere with participants' due process rights and the timely completion of Commission proceedings. A related concern was that the complexity of issues in Docket No. R97–1 and the extensive amount of material filed in support of the Service's request made it difficult to determine the contents of some library references; to distinguish between evidentiary and non-evidentiary material; and to determine responsibility for sponsorship. A series of rulings and orders addressed the immediate due process concerns of Docket No. R97–1, and a related Notice of Inquiry (NOI) invited comments on suggestions for improving the rule. *See, for example,* P.O. Ruling R97–1/20 (September 17, 1997); Order No. 1201 (November 4, 1997); and NOI No. 1, Question 3 (September 17, 1997). The comments are available for review in the Commission's docket room.

Scope of Proposed Rulemaking

The Commission proposes a limited update of its rules of practice to address certain aspects of the controversy that surfaced in Docket No. R97–1. Among other things, the revisions require that approval of the designation of material as a library reference be obtained through a motion. They also specify circumstances or conditions, in addition to those already identified in Commission rules, under which material can be designated as a library reference. The revisions also improve the labeling and description of material contained in library references, and require participants to file an electronic version of the material, absent a satisfactory demonstration of why an electronic version cannot be supplied, or should not be required to be supplied. These changes effectively eliminate the need for the special rule that was used in Docket No. R97–1, but do not address all of the issues that arose with respect to library references in Docket No. R97–1 or preclude the possibility that special rules governing the use of library references may continue to be needed. The remaining discussion briefly reviews comments submitted in response to NOI No. 1 in Docket No. R97–1; describes proposed revisions, and sets out proposed changes.

Comments Submitted in Response to NOI No. 1

In its response to the NOI, Nashua Photo Inc., District Photo Inc., Mystic Color Lab and Seattle Filmworks, Inc. (NDMS) state that they do not view ''the mere act of labeling a particular document as a library reference as especially problematic,'' even if the document is not voluminous as now anticipated by the Commission's rules. NDMS Response to NOI No. 1 on Interpretation of Commission Rules Authorizing the Use of Library References (October 3, 1997) at 2. They add:

> In fact, it may be a relatively harmless procedure if the party submitting the library reference feels the information in the library reference is information few would want to read, or that inclusion with testimony would be unduly burdensome, or divert the reader, or if the information is in the nature of a secondary source which is provided to facilitate access by other parties. Except for abuse, the designation of a document as a library reference should not, of itself, create a serious issue in a rate or classification proceeding.

Id. at 2.

However, NDMS further observe:

> Designation of library references becomes abusive if the party offering the library reference offers it with one or more of the following purposes or results: (i) To circumvent the requirement for the presentation of record evidence before the Commission; (ii) to circumvent the requirement that a live witness vouch for the accuracy and reliability of the study (or other information); (iii) to circumvent the requirement that a live witness be made available for written or oral cross-examination; or (iv) to interpose delay and unnecessary discovery and motions practice and associated expense on intervenors during a statutorily-limited proceeding where every day counts.

Id. at 2–3.

Alliance of Nonprofit Mailers (ANM)

ANM observes that the Commission has not set a minimum page limit or word count as a condition for designating a document as a library reference, but says it is ''unlikely that a blanket rule of this kind would be useful.'' ANM Comments (October 3, 1997) at 1–2. ANM also notes that a document of general interest and importance may warrant individual service even if voluminous and, conversely, that a document devoid of general interest or importance may be ''too voluminous reasonably to be distributed'' by individual service even if the document is short. Id. at 2.

In the absence of a bright line standard, ANM says that ''deciding which Postal Service library references were *not* 'too voluminous reasonably to be distributed' is likely to be more contentious than helpful.'' Id. Thus, instead of establishing a minimum page count or word count for library references, ANM suggests that the Commission should consider requiring parties sponsoring library references to provide individual copies to interested parties upon request. It further states that if this approach is adopted, the Commission might consider the advisability of prohibiting parties, with the possible exception of the Postal Service and the Commission's Office of the Consumer Advocate (OCA), from submitting blanket requests for copies of all library references. Id. Also, ANM said the Commission should make mandatory the now-voluntary practice of submitting library references in

electronic form for posting on, and downloading from, the Commission web site. Id.

ANM also states that the ''formalities of designating library references are far less critical than the need to ensure that data, studies or other information in a library reference, if relied upon by the sponsoring party, are open to meaningful cross-examination.'' Id. Therefore, it suggests that a party choosing to rely on a library reference in support of its case should be required to offer a witness sponsoring the library reference for cross-examination, except when the information at issue is of a kind that is normally admissible without a sponsoring witness, such as a statement against interest, or an admission by an adverse party. Id. at 3–4. ANM further contends that the Postal Service should be required to identify—when filing its formal request and written case-in-chief, but no later than the beginning of hearings—which portions of which library references will be sponsored into evidence, and by which witnesses. Id. at 4.

Newspaper Association of America (NAA)

NAA maintains that instead of revisions to existing rules, there simply should be adherence to and serious enforcement of the rules as they now exist. NAA Comments in Response to NOI No. 1 at 2 (October 3, 1998).

Parcel Shippers Association (PSA)

PSA's response does not directly address revisions, but cites its September 17, 1997 Memorandum of Law on the Issue of the Evidentiary Value of Unsponsored Library References, which reviewed PSA's concerns about the Service's reliance on unsponsored library references not only in Docket No. R97–1, but in Docket No. MC95–1 as well. PSA Response to NOI No. 1 at 1 (October 2, 1997). PSA notes that its memorandum makes clear that it ''is concerned about the status of Library Reference H–108, currently anonymously authored and unsponsored, but heavily relied upon by several Postal Service witnesses' filed testimony as the source of their testimony.'' Id.

Office of the Consumer Advocate (OCA)

In the course of extensive comments, the OCA notes that an ongoing problem with library references is that ''a fair number of them have merely been deposited in the Commission's docket room without any explanation for their purpose and being.'' OCA Response to NOI No. 1 on Interpretation of Commission Rules Authorizing the Use of Library References at 10 (October 3, 1997). It contends that a ''roadmap'' is necessary to ensure that it can evaluate the evidence contained in library references. Id. at 12. A related problem, according to the OCA, is the incompleteness of explanation about what is contained in a library reference. Id. at 20. It observes:

> * * * [USPS–LR–]H–146 described six computer programs that were not discussed in the Postal Service's direct testimony. Interrogatory OCA/USPS–T–12–35 was necessary to elicit information concerning the objectives and uses of such programs, and how the program may have changed over time. The Postal Service's failure to state clearly (without having the information extracted by OCA) that the outputs of these programs are used in the testimony and workpapers of witness Alexandrovich demonstrates how the Postal Service misuses the opportunity to file what is, in reality, evidence, as matter buried within a library reference.

Id. at 20 (fn. omitted).

The OCA suggests that Rule 53 should be amended to require the Service to identify, at the time it files its request, the evidence on which it intends to rely, and the witness whose responsibility it will be to answer questions concerning all filed material. Id. at 21. Among other things, the OCA also suggests amendments to address the sponsorship of institutional responses and surveys and what it refers to as an ''administrative change'' which would require a party filing a library reference to supply both the statistical information and the accompanying text in diskette form. Id. at 22–27.

Postal Service

The Postal Service acknowledges that the Docket No. R97–1 experience may justify clarifying or revising the library reference practice, but indicates it ''does not believe that it is a foregone conclusion that a formal rulemaking is necessary. * * *'' Response of the United States Postal Service to NOI No. 1 at 4 (October 6, 1997). It suggests that ''[f]urther clarification or refinement of the Commission's existing practices, as well as a better understanding of the effect on the evidentiary record, may obviate a formal rule change.'' Id.

Proposed Revisions

Based on recent experience in Docket No. R97–1 and other dockets, and on the comments submitted in response to NOI No. 1, the Commission has determined that certain improvements in its rules of practice are necessary and desirable. The Commission's proposal draws on suggestions and observations made in comments briefly reviewed above. Since the practice of allowing participants to designate material as a library reference is intended to foster convenience, a central focus of the revisions is on adequate identification of material contained in a library reference and its relationship to issues in the proceeding. The proposal does not include a page limit, but anticipates that if ''volume'' or length is a reason for designating material as a library reference, this will be addressed in the participant's motion. An electronic version of the document or material is to be filed, absent a showing of why this cannot or should not be supplied.

The most significant change is the introduction of formal motion practice, with conditional acceptance of the material proposed for designation pending a ruling. The proposed rule provides that the motion is to affirmatively address various matters, such as an explanation of how the material relates to the participant's case or to issues in the proceeding; whether the material will be entered into the evidentiary record; and the anticipated sponsor.

The rule reflects the longstanding principle, which appears in the existing rule, that designation of a material as a library reference and acceptance in the Commission's docket room does not confer evidentiary status on the material.

List of Subjects in 39 CFR Part 3001

Administrative practice and procedure, Postal Service.

For the reasons stated in the preamble, 39 CFR 3001.31 is amended 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(b), 3603, 3622–24, 3661, 3662.

2. Amend § 3001.31 by revising paragraph (b) to read as follows:

§ 3001.31 Evidence.

* * * * *

(b) *Documentary material*—(1) *General.* Documents and detailed data and information shall be presented as exhibits. Where relevant and material matter offered in evidence is embraced in a document containing other matter not material or relevant or not intended to be put in evidence, the participant offering the same shall plainly designate the matter offered excluding the immaterial or irrelevant parts. If other matter in such document is in such bulk or extent as would unnecessarily encumber the record, it may be marked

for identification, and, if properly authenticated, the relevant and material parts thereof may be read into the record, or, if the Commission or presiding officer so directs, a true copy of such matter in proper form shall be received in evidence as an exhibit. Copies of documents shall be delivered by the participant offering the same to the other participants or their attorneys appearing at the hearing, who shall be afforded an opportunity to examine the entire document and to offer in evidence in like manner other material and relevant portions thereof.

(2) *Library references.* The term ''library reference'' is a generic term or label that participants and others may use to identify or designate certain documents or things (''material'') filed with the Commission's docket section. The practice of filing a library reference is authorized primarily as a convenience to participants and the Commission under certain circumstances. These include:

(i) when the participant satisfactorily demonstrates that the physical characteristics of the material, such as number of pages or bulk, are reasonably likely to render compliance with service requirements unduly burdensome;

(ii) when the participant satisfactorily demonstrates that interest in the material or things so labeled is likely to be so limited that service on the entire list would be unreasonably burdensome, and the participant agrees to serve the material on individual participants upon request;

(iii) when the participant satisfactorily demonstrates that designation of material as a library reference is appropriate because the material constitutes a secondary source. A ''secondary source'' is one that provides background for a position or matter referred to elsewhere in a participant's case or filing, but does not constitute essential support and is unlikely to be a material factor in a decision on the merits of issues in the proceeding;

(iv) when the participant satisfactorily demonstrates that the reference to, identification of, or use of the material would be facilitated if it is filed as a library reference; or

(v) when otherwise justified by circumstances, as determined by the Commission or presiding officer.

(3) *Form and timing of required demonstration.* The requisite demonstration shall be provided in the form of a motion. In general, the motion shall be accompanied by the simultaneous filing, with the Commission's docket section, of a copy of the material proposed for designation as a library reference. If appropriate, a comprehensive description of the material may be filed with the docket section in lieu of the material itself.

The motion shall set forth with particularity the reason(s) why designation of the material as a library reference is being sought; explain how the material relates to the participant's case or to issues in the proceeding; indicate whether the material contains a survey or survey results; and provide a good-faith indication of whether the participant anticipates that the material will be entered, in whole or in part, into the evidentiary record. The motion shall also identify authors or others materially contributing to the preparation of the library reference.

If the participant filing the library reference anticipates seeking to enter all or part of the material contained therein into the evidentiary record, the motion also shall identity portions expected to be entered and the expected sponsor(s).

(4) *Conditional acceptance.* Material accompanying a motion invoking the library reference designation shall be accepted in the Commission's docket section conditionally, pending a ruling on the merits of the motion.

(5) *Labels and descriptions.* Material proposed to be filed as a library reference shall be labeled in a manner consistent with standard Commission notation and any other conditions the Presiding Officer or Commission establishes. In addition, material designated as a library reference shall include a preface or summary addressing the following matters: The proceeding and document or issue to which the material relates; the identity of the participant designating the library reference; the identity of the witness or witnesses who will be sponsoring the material or the reason why a sponsor cannot be identified; and to the extent feasible, other library references or testimony referred to within. In addition, the preface or summary shall explicitly indicate whether the library reference is an update or revision to a library reference filed in another Commission proceeding, and provide an adequate identification of the predecessor material.

(6) *Electronic version.* Material filed as a library reference shall also be made available in an electronic version, absent a showing of why an electronic version cannot be supplied or should not be required to be supplied.

(7) *Status of library references.* Designation of material as a library reference and acceptance in the Commission's docket section does not confer evidentiary status. The evidentiary status of the material is governed by this section.

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Dated: August 27, 1998.

Margaret P. Crenshaw,

Secretary.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[LA–47–1–7388b; FRL–6156–2]

Approval and Promulgation of Implementation Plans; Louisiana: Reasonable Available Control Technology for Emissions of Volatile Organic Compounds from Batch Processes

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: In this action, EPA is approving a revision to the Louisiana State Implementation Plan rule requiring Reasonable Available Control Technology for emissions of Volatile Organic Compounds from Synthetic Organic Chemical Manufacturing Industry Batch Processes. In the Rules and Regulations Section of this **Federal Register**, EPA is approving the State's SIP revision as a direct final rule without prior proposal because the Agency views this as a noncontroversial revision and anticipates no adverse comments. The rationale for the approval is set forth in the direct final rule. If no relevant adverse comments are received in response to this rule, no further activity is contemplated in relation to this proposed rule. If EPA receives relevant adverse comments, EPA will publish a timely withdrawal informing the public that the final rule will not take effect, and all relevant public comments received during the 30-day comment period set forth below will be addressed in a subsequent final rule based on this proposed rule. Any parties interested in commenting on this action should do so at this time.

DATES: Comments must be received in writing by October 8, 1998.

ADDRESSES: Written comments should be addressed to Thomas H. Diggs, Chief, Air Planning Section, at the EPA Region 6 Office listed below. Copies of the documents relevant to this proposed rule are available for public inspection during normal business hours at the following locations. Anyone wanting to examine these documents should make