

market conditions. Interested persons were invited to comment. 59 FR 65985-65987 (December 22, 1994). After reviewing the comments submitted, the Commission has determined that the published rules should be re-enacted, subject to a five-year sunset provision.

EFFECTIVE DATE: These rules will become effective March 6, 1995 and ending March 6, 2000 if not re-enacted by the Commission after the provision of an opportunity for public comment.

ADDRESSES: Correspondence should be sent to Margaret P. Crenshaw, Secretary of the Commission, 1333 H Street NW, Washington, DC 20268-0001.

FOR FURTHER INFORMATION CONTACT: Stephen Sharfman, Legal Advisor (telephone: (202) 789-6820).

SUPPLEMENTARY INFORMATION: On August 15, 1994, the United States Postal Service filed a petition for institution of a rulemaking to re-enact Commission rules that establish special procedures for considering Postal Service requests to change Express Mail rates in response to market conditions. These rules, codified at 39 CFR 3001.57 through 3001.57c, were adopted as the culmination of the Commission's Docket No. RM88-2 in August, 1989; at that time, the Commission included a five-year sunset provision in 39 CFR 3001.57(b). Order No. 836, 54 FR 33681 (August 16, 1989). Consequently, by their own terms the rules ceased to be effective in mid-August of 1994.

The Commission granted the Postal Service's petition and began this rulemaking on December 14, 1994. Order No. 1038; Notice of Proposed Rulemaking, 59 FR 65985-87 (December 22, 1994). In its Notice of Proposed Rulemaking, the Commission published the pre-existing rules, stated its preliminary agreement with the Postal Service's position that the Express Mail market response rules should be retained, and established January 23, 1995, as the due date for comments by interested parties. *Id.* at 65985.

Two sets of comments were submitted in response to the Notice of Proposed Rulemaking in this docket.¹ United Parcel Service (UPS), a competitor of the Postal Service in the expedited delivery market, opposes re-enactment of the rules because: (1) Circumstances have changed since their initial adoption in

a manner that allegedly negates any possible justification for their continued existence; (2) the rules are unnecessary because other available Commission rules provide adequate avenues for expedited consideration of specific Postal Service rate requests; and (3) the rules allegedly are contrary to the letter and spirit of the Postal Reorganization Act, the Administrative Procedure Act, and fundamental considerations of due process. The Commission's Office of the Consumer Advocate (OCA) opposes re-enactment on similar grounds: that there is less demonstrable need for, and opportunity to use, the rules than was anticipated when they were adopted in Docket No. RM88-2; and that it would be more efficient to devise comprehensive rules of procedure applicable to any class of mail, in the context of the Commission's Procedural Streamlining Inquiry, Docket No. RM95-2. Because these comments raise a variety of issues, the latter will be grouped by category for consideration.

I. Alleged Legal Defects

Commenter United Parcel Service argues that certain features of rules 57 through 57c violate pertinent portions of the Postal Reorganization Act, the Administrative Procedure Act, and applicable due process requirements. For the most part, these comments replicate earlier arguments considered and rejected during the course of the RM88-2 proceeding, and the Commission finds them equally unpersuasive now.

UPS suggests that by contemplating the recommendation of Express Mail rates near the level of estimated attributable costs, the market response rules could yield rates which fail to recover the portion of institutional costs "reasonably assignable" to Express Mail, in contravention of 39 U.S.C. 3622(b)(3). UPS Comments at 7-8. UPS also argues that the recommendation of such rates would produce an overall rate schedule that fails to satisfy the "fair and equitable" standard of § 3622(b)(1). *Id.* at 8-9. However, these criticisms overlook the special rationale on which the market response rules are premised, and the particular restrictions on the rates which the Postal Service can propose under the rules. The appropriate level of "reasonably assignable" costs is determined by reference to the non-cost factors in § 3622(b);² the Postal Service could invoke rules 57 through 57c only where

one or more of the policies of the Act arguably applies with such force as to justify a minimal contribution to institutional costs.³ Additionally, the rules establish two different protective rate floors which the Postal Service must observe in its requests. Under section 57b(b), the Service is forbidden to propose rates less than the *greater* of average per piece attributable costs: (1) As determined in the most recent omnibus rate case, or (2) as estimated for the most recent fiscal year for which information is available. Section 57b(b)(2) also prohibits proposal of a rate "for any rate cell which is lower than the estimated test period attributable cost of providing that rate cell with service." The Commission retained these restrictions in the final rules adopted in Docket No. RM88-2, over the objections of the Postal Service, in order "to eliminate the risk that new Express Mail rates would be a burden on other classes of mail[.]" and to ensure "that the relationships among the classes of mail—in terms of contribution to institutional costs—are disturbed as little as possible." Order No. 836 at 15, 13. Thus, the Commission has already considered and accommodated the concerns raised by UPS, and there is no reasonable basis for concern that re-enactment of the rules would degrade the Commission's sound application of the § 3622(b) (1) and (3) factors.

The Commission also rejects the claims of UPS that the market response rules constitute "a clear license to engage in unfair competition with private sector enterprises, in violation of Section 3622(b)(4) [.] and that they "violate the discrimination prohibition in Section 403(c) of the Act" by establishing a preference for Express Mail users. UPS Comments at 9. During the course of the RM88-2 proceeding the Commission received comments from several parties—including the Bureau of Competition of the Federal Trade Commission—regarding the Postal Service's participation in the expedited parcel delivery market. On the basis of that record, the Commission concluded that there was no justification for:

* * * any finding that the Postal Service is so restricting the ability of other firms to compete in the expedited delivery market through use of the Private Express Statutes that it should not be given even the potential

¹ Additionally, while no provision had been made for reply comments, Advertising Mail Marketing Association (AMMA) submitted reply comments on February 3, 1995, together with a motion for leave to file such comments. In order to avoid prejudice to other parties that may have been inclined to file replies, the Commission shall grant AMMA's motion only in part, and will consider its comments strictly as an expression of support for re-enactment of the pre-existing rules.

² See *National Association of Greeting Card Publishers v. U.S. Postal Service*, 462 U.S. 810, 834 (1983): "The Rate Commission is to assign remaining costs on the basis of the other eight factors set forth by § 3622(b)."

³ Section 57a(c) requires that every formal request under §§ 57 through 57c "contain an explanation of why the change proposed by the Postal Service is a reasonable response to the change in the market for expedited delivery services to which it is intended to respond."