may assume the sponsoring organization's interest in the property and responsibility for all maintenance and other decisions concerning the monument. Once accepted into the program, the Commission will provide for all necessary maintenance of the monument and charge the cost to the trust fund. to The sponsoring organization or others interested in the monument may add to the trust fund at any time to insure that adequate funds remain available. to The Commission will maintain the monument for as long a period as the trust fund account permits.

§ 401.11 Demolition criteria.

As authorized by the provisions of 36 U.S.C. 2106(e), the Commission may take necessary action to demolish any war memorial built outside the United States by a citizen of the United States, a State, a political subdivision of a State, a governmental authority (except a department, agency, or instrumentality of the United States Government), a foreign agency, or a private association and to dispose of the site of the memorial in a way the Commission decides is proper, if—

(a) The appropriate foreign authorities agree to the demolition; and

(b)(1) The sponsor of the memorial consents to the demolition; or

(2) The memorial has fallen into disrepair and a reasonable effort by the Commission has failed—

(i) To persuade the sponsor to maintain the memorial at a standard acceptable to the Commission; or

(ii) To locate the sponsor.

PART 402—[REMOVED]

■ 2. Part 402 is removed.

PART 403—[REMOVED]

■ 3. Part 403 is removed.

Theodore Gloukhoff,

Director, Personnel and Administration.

[FR Doc. 05–11040 Filed 6–2–05; 8:45 am]

BILLING CODE 6120–01–P

POSTAL RATE COMMISSION

39 CFR Part 3001

[Docket No. RM2005–3; Order No. 1439]

Negotiated Service Agreements

AGENCY: Postal Rate Commission.

ACTION: Final rule.

SUMMARY: This document adopts rules on procedures related to negotiated service agreements. The rules are designed to assist in clarifying the type of requests that qualify as extensions and the type of conditions that constitute modifications. Relative to the proposed rules, the final set of rules reflect several changes based on consideration of comments. These changes include adoption of deadlines for issuance of a recommended decision.

DATES: Effective July 5, 2005.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov*.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, general counsel, at 202–789–6818.

SUPPLEMENTARY INFORMATION:

Regulatory History

68 FR 52552, September 4, 2003.
69 FR 7574, February 18, 2004.
70 FR 4802, January 31, 2005.
70 FR 7704, February 15, 2005.

I. Introduction

This Order concludes the rulemaking docket addressing rules applicable to: (1) Postal Service requests to extend the duration of previously recommended and currently in effect negotiated service agreements, and (2) Postal Service requests to make modifications to previously recommended and currently in effect negotiated service agreements. The final rules appear after the Secretary's signature in this Order.

A notice and order establishing this rulemaking docket was issued on February 10, 2005.[1] The notice and order proposed a set of applicable rules, and established a March 14, 2005, date for interested persons to submit comments. It also established an April 11, 2005, date for interested persons to submit reply comments. Initial comments were received from Bank One Corporation (Bank One), Discover Financial Services, Inc. (DFS), HSBC North America Holdings Inc. (HSBC), Office of the Consumer Advocate (OCA), the United States Postal Service (Postal Service), and Valpak Direct Marketing Systems Inc. and Valpak Dealers' Association, Inc. (Valpak).[2] Reply comments were received from Bank One Corporation, Discover Financial Services, Inc., Office of the Consumer Advocate, and the United States Postal Service.[3]

The Commission appreciates the efforts of the commenters that participated in the process of developing new rules applicable to requests to renew or modify negotiated service agreements. This process is ongoing, and the rules are subject to change as more experience is gained in reviewing requests predicated on negotiated service agreements. A number of comments that improve clarity or specify requirements that the Commission originally did not consider were incorporated into the rules. All comments were appreciated, whether or not they led to an actual modification of a proposed rule, because the comments provide different points of view that the Commission otherwise might not have considered. A discussion of notable comments follows.

II. Discussion

Role of the Commission. Bank One argues that ''the Commission should adopt light-handed regulation of proposals to renew or modify existing NSAs as the presumptive starting point.'' This argument is prefaced by the statement: ''A request to renew or modify an existing NSA involves, by definition, an agreement whose basic terms have already been found by the Commission to be profitable for the Postal Service, free of undue discrimination against competitors of the NSA partner, and unobjectionable on any other identifiable ground.'' Bank One Comments at 8.

A Commission recommendation of a negotiated service agreement is not as conclusive as characterized by Bank One. A Commission recommendation is based on a reasonable probability that the agreement will be profitable, and an appearance that the agreement will be free of undue discrimination against competitors of the negotiated service agreement's partner. These conclusions are reached after independently analyzing the agreement and weighing the arguments of all participants in the proceeding. A finding of actual profitability can only be estimated after

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[1] Notice and Order Establishing Rulemaking Docket for Consideration of Proposed Rules Applicable to Requests to Renew or Modify Previously Recommended Negotiated Service Agreements, Order No. 1430, February 10, 2005; 70 FR 7704 (2005).

[2] Initial Comments of Bank One Corporation; Initial Comments of Discover Financial Services, Inc. (DFS); Initial Comments of HSBC North America Holdings Inc.; Office of the Consumer Advocate Comments in Response to Commission Order No. 1430; Initial Comments of the United States Postal Service; and Comments of Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. in Response to PRC Order No. 1430, all filed March 14, 2005.

[3] Reply Comments of Bank One Corporation; Reply Comments of Discover Financial Services, Inc. (DFS); Office of the Consumer Advocate Reply Comments in Response to Commission Order No. 1430; and Reply Comments of the United States Postal Service, all filed April 11, 2005.

the fact.[4] Similarly, an agreement that appears free of undue discrimination upon recommendation, could later exhibit undue discrimination in actual operation.

In regard to a request to renew an ongoing agreement, a review of the profitability of the initial agreement and consideration of any adverse effects that the agreement may have had on competitors and other mailers is required. It would be imprudent to renew an agreement without examining experience under the existing agreement. The burden initially falls on the proponents of the renewal request to demonstrate likely profitability during the extension, and past experience is an important consideration. Cost and revenue changes, along with the effect of any exogenous events that may have occurred since the original recommendation also must be considered. To support updated costs and volume projections, the proponents of the renewal request may rely on the accuracy of estimates in the existing agreement's docket.

The conclusiveness of Bank One's statement also implies that the Commission has, a priori, conclusively determined there is no risk from a negotiated service agreement. In most instances, this is impractical if not impossible.

The Commission strives to provide a forum for reviewing negotiated service agreements that is as expeditious and cost effective as achievable, while assuring that every agreement is in compliance with the requirements of the Act. With this in mind, the rules are designed to permit ''light-handed'' treatment consistent with the Commission's statutory obligations. The rules allow inquiry as necessary to meet the complexities presented by the actual request.

Bank One also suggests that ''[i]n the absence of a showing of probable cause to believe that the modified or extended NSA terms would violate the Act, the Commission should terminate the proceeding and recommend implementation of the renewed or modified NSA forthwith.'' *Id.* at 14.

The implication of this statement is that if no participant raises an issue in regard to complying with a requirement of the Act, the Commission's inquiry is at an end. The only Commission function which remains would be to issue a recommendation to implement the agreement. This implication ignores the Commission's responsibility under the Act to issue recommended decisions that are in accordance with the requirements of the Act. To fulfill this responsibility, the Commission independently analyzes every Postal Service request. The Commission relies substantially on the efforts of participants, especially proponents, in informing its recommendations; however, the Commission will act sua sponte to fill in gaps in information required to reach its recommendations.

Role of OCA. In PRC Order No. 1430 at 3, the Commission stated: ''The intent [of § 3001.197] is to limit use of the rule to instances where the proposed agreement and the existing agreement share substantially identical obligations. * * * In instances where there are no contested issues it should be possible for the Commission to issue its recommendation shortly after the prehearing conference.''[5]

Valpak expresses a concern that almost no mailer would be motivated to spend the funds necessary to challenge the assertion that the NSA renewal was substantially identical to the original agreement. Valpak urges the Commission to charge the Office of the Consumer Advocate (OCA) with the responsibility for investigating these factual matters. Valpak Comments at 1–2. In a similar light, Valpak suggests that OCA also be tasked with investigating ''intervening events'' when those issues arise in a request. *Id.* at 3.

The Postal Service's expectation is that the Commission will appoint OCA to represent the general public in 39 CFR 3001.197 and 3001.198 proceedings, but argues that OCA can decide for itself how to allocate its resources. Postal Service Reply Comments at 6.

In a somewhat broader context, Bank One asserts ''[u]nder the circumstances, a general requirement that the OCA launch a full blown investigation in every proceeding under Rule 197 or Rule 198 is likely to make society worse off by wasting the Commission's resources and deterring the establishment or renewal of arrangements that otherwise would have made both the Postal Service and third-party mailers better off.'' Bank One further asserts ''[r]ather, the extent (if any) of any activity by the OCA in an NSA proceeding should be left to the professional judgment of the OCA itself.'' Bank One Reply Comments at 2–3.

OCA is in the unique position of being appointed, as opposed to intervening, to represent the interests of the general public in virtually every proceeding before the Commission. Not only does OCA frequently provide an important counterpoint to the proponents' arguments, as referred to by Valpak, it performs its own independent analysis which is useful in better informing the Commission. The Commission, in this instance, will not promulgate a rule specifically assigning or excluding a particular issue for OCA to examine. This preserves the OCA's ability to inform the Commission with an independent point of view, and allows OCA to allocate its resources as it believes necessary.

Burden of Proof. Bank One argues when a request for a renewal or a modification does not materially alter the terms of an existing negotiated service agreement, it not only warrants accelerated review, but a presumption that the modified agreement is just, reasonable, and otherwise lawful. It suggests that opponents of an agreement ''should bear the burden of making a showing of probable cause that the modified terms would violate one or more provisions of the Postal Reorganization Act.'' Bank One Comments at 11–12. HSBC's comments parallel those of Bank One. HSBC Comments at 3.

OCA contends that in regard to requests for renewals, proponents should not have to support retention of existing provisions, absent changed circumstances, but should be required to demonstrate the immateriality of changes they do wish to make. OCA notes that it is the lack of significant change that permits expedition in the first place. In regard to requests for modifications, OCA argues that expedition is more difficult. It contends that the proponent should be required to explain why the needed modification was overlooked in the initial proceeding and why the Commission should believe that no other difficulties still exist. OCA Reply Comments at 2.

The Postal Service argues that where particular issues surrounding a negotiated service agreement have been litigated, or could have been litigated before the Commission when the agreement was first recommended, there should be a rebuttable presumption that the agreement would not violate the Act. However, if the renewal or modification involves a change in rates or classifications, the Postal Service would expect to bear the burden of justifying such changes. Postal Service Reply Comments at 4–5.

[4] This is the primary purpose of the data collection plans included in all recommendations thus far.

[5] Similarly, ''[t]he intent of the rule [§ 3001.198] is to expedite proceedings where limited modifications are being proposed that do not materially alter the nature of the agreement.'' PRC Order No. 1430 at 6.

The Commission's starting point is that the Postal Service has the initial burden of demonstrating that all aspects of its requests are in compliance with all aspects of the Act.[6] In regard to requests for functionally equivalent agreements or requests to modify or extend existing agreements, the Postal Service is allowed to rely on (within limits) record testimony from previous dockets, and implicitly on the findings and conclusions of the Commission from those previous dockets. This reliance effectively creates a rebuttable presumption on the status of many issues that have been, or to some extent that could have been, previously litigated. Thus, the Postal Service fulfills much of its initial burden merely by referencing the applicable record testimony and Commission findings and conclusions.

The burden that remains is for the Postal Service to demonstrate that any change, internal or external, affecting an agreement does not cause the agreement to violate the Act. This obligation is broader than only justifying changes in rates or classifications. For example, if applicable new cost data or actual volumes become available during the span of the existing agreement, the Commission expects the Postal Service to incorporate such data into a request for renewal. Incorporation of these data may or may not lead to a rate or classification change. However, the proponents, including the Postal Service, still have the initial burden to demonstrate that the renewal agreement, with the new cost and volume data, continues to meet the requirements of the Act.

Normally, a prehearing conference is scheduled for the purpose of discussing issues in regard to Postal Service requests. At this conference, participants are required to address whether or not any material issues of fact exist that might require discovery or evidentiary hearings. Ideally, the information obtained at the conference allows the Commission to frame the issues open for discussion, and to limit discussion on issues that have been previously resolved or that are not relevant to the instant request. This limits the burden imposed on the proponents.

There is a distinct disadvantage in moving the initial burden to those that oppose a Postal Service request. Early in the process, interested persons may not be privy to sufficient information to make an informed decision on whether or not to challenge a request. This could lead to prolonged discovery because participants would have to probe every aspect of an agreement to determine the existence of issues. Because of the asymmetrical information advantage held by the proponents of the request, it is more expedient for the proponents to carry the initial burden, and to provide sufficient information with the request, so that other participants can make more informed decisions.

The Commission is not persuaded that the initial burden is onerous, or that it is improper to place this burden upon the Postal Service (and its co-proponents).

Scope of Proceeding. Bank One notes that the proposed rules are limited to proposals that do not materially alter the terms of an existing negotiated service agreement. It expresses concern that the three enumerated circumstances that could justify modifications to a negotiated service agreement may be too limiting. Bank One requests clarification that the list of allowable justifications is illustrative, and not exclusive. As an example of a desired modification that would not be allowed under the new rules, Bank One describes a change where ''the nature and circumstances of the likely modification may be foreseeable from the outset, but the parties may want to defer considering the changes until after gaining experience from actual operation of the NSA.'' Bank One Comments at 10–11.

HSBC's comments parallel those of Bank One. HSBC Comments at 2–3. DFS also supports Bank One's position. DFS Reply Comments at 1–2. The Postal Service concurs that the list should be illustrative and not exhaustive. It asserts that participants will have adequate opportunities to oppose a request to modify an agreement should such a case arise. Postal Service Reply Comments at 4.

The breadth of the proposed rules is an area of concern for the Commission. The goal is to draft rules for cases involving minimal controversies so that expedition can be realized, and bureaucratic requirements minimized. The key to meeting this goal is to limit the allowable differences open for consideration between the renewal or modification agreement, and the ongoing agreement.

For 39 CFR 3001.197 renewal requests, the focus of the Commission is on the Postal Service's justification for requesting the extension of a presumably beneficial negotiated service agreement. Maximum expedition can be afforded if the only request is to extend the termination date of the existing agreement. However, the Commission realizes that a renewal provides an opportune time to allow for additional modifications for the purpose of bringing an agreement up to date. The rule explicitly requires that any additional modifications ''do not alter the nature of the existing agreement.'' This is key to preserving the ability to expedite the procedure. The proposed rationale for updating an agreement could be to incorporate the effects of an intervening event into the agreement, or to incorporate new cost and volume information that might be used to update the schedule of rates and fees. These secondary modifications are in addition to extending the termination date. A third possibility, correction of a technical defect, is included because it would not be prudent to continue an agreement with a known technical error.[7]

For 39 CFR 3001.198 modification requests, the focus of the Commission is on the Postal Service's justification for requesting the modification. The requirement that the proposed modification does not materially alter the nature of the existing agreement is implicit, if the proceeding is to be expedited. The rule provides three rationales for modifying an existing agreement: To correct a technical defect, to account for unforeseen circumstances not apparent when the existing agreement was first recommended, or to account for an intervening event since the recommendation of the existing agreement. The stated reasons are sufficiently broad to allow for many types of modifications.

The Postal Service has several other options that it may choose to pursue if its request is broader than the scope of the proposed rules. For more extensive proposals, the Postal Service might find it appropriate to file under 39 CFR 3001.195 (new baseline proposal) or 39 CFR 3001.196 (functionally equivalent proposal).

Describing the allowable modifications as material versus immaterial, as suggested by Bank One, could be misleading. The Commission does not require that any of the allowable modifications be ''immaterial.'' However, requests for modifications that do not change the nature of the original agreement will be afforded expedition because most issues will have been resolved in the original agreement's docket.

[6] In regard to requests predicated on negotiated service agreements, the Postal Service may rely on testimony from its co-proponents to meet this burden.

[7] The Commission also is open to considering proposals for clearly minor changes that are sufficiently documented and justified which do not alter the nature of the existing agreement, but which may not technically fall into one of the listed characterizations, under the expedited rules.

For example, assume that a negotiated service agreement partner merges with another entity, and would like to incorporate that entity's mail volumes under the existing agreement. Further assume that the combined entity's mail characteristics are different from those considered in reviewing the existing negotiated service agreement, and as a result, additional Postal Service cost savings can be demonstrated. The Postal Service and its partner could properly seek to modify the existing agreement. In this instance the modification would accommodate a material change, but it would not alter the overall nature of the original agreement.

The Bank One example of where a modification is foreseeable from the outset, but the parties desire to gain experience before making a change does not fall into the acceptable category of modifications. What Bank One describes is experimental in nature. A negotiated service agreement may contain an experiment, but the primary purpose of a negotiated service agreement should not be to ''experiment.'' Negotiated service agreements should be based on sound financial analysis that indicates a likely win-win outcome from inception. If however, an intervening event might have been foreseeable, that fact does not prevent a modification to reflect the new situation that exists as a result of the intervening event.

The descriptions of allowable modifications in both rules fulfill the Commission's intent of narrowing the applicability of the rules such that expedition can be provided.

Establishing a Schedule. The Postal Service suggests that the Commission add language to proposed 39 CFR 3001.197(c) and 39 CFR 3001.198(c) requiring that: ''a schedule will be established which allows a recommended decision to be issued not more than 60 days after the determination is made to proceed under § 3001.197 [or § 3001.198].'' It argues that this language is in furtherance of the important objective for expedition, and is similar to the 39 CFR 3001.196(d)(1) language, which was helpful in expediting the proceedings in Docket Nos. MC2004–3 and MC2004–4.[8] Postal Service Comments at 2–3. Upon consideration of the initial comments from other commenters, the Postal Service modifies its position and suggests a 30- or 45-day schedule if there is no hearing, and a 90-day schedule if there is a hearing. Postal Service Reply Comments at 2–3.

Bank One contends that ''litigation costs are a major deterrent to pursuing an NSA, and the absence of clear procedural deadlines is an invitation to open-ended delay during the heat of litigation.'' Because of the more limited scope of proceedings under 39 CFR 3001.197 or 3001.198, than anticipated under 39 CFR 3001.196, Bank One proposes a 45-day schedule if there is not a hearing, and a 90-day schedule if there is a hearing. Bank One Comments at 12–13. HSBC's comments are in agreement with Bank One, and suggest identical time periods. HSBC Comments at 3–4.

DFS expresses similar concerns by arguing that ''[s]pecific time frames yield certainty.'' It submits that time frames of 30 days without a hearing, and 90 days with a hearing would be appropriate. DFS Comments at 3–5.

OCA argues that ''[s]uch deadlines would actually create incentives for delay.'' It contends that if the proponents knew that the Commission is committed to issuing a decision in a certain, short time, they would have no incentive to submit detailed information up front and leave the Commission to reach a rapid decision on the basis of incomplete information. OCA Reply Comments at 3.

The Commission included a scheduling requirement in the rules for functionally equivalent negotiated service agreements partly because of the belief that requests for functionally equivalent agreements should be less complex to review than requests for new baseline agreements. The complexity should be less because most issues would have been litigated and resolved in the baseline docket, and the proponents of the functionally equivalent request would be allowed to rely on record testimony from the baseline docket. The perception that functionally equivalent requests are less complex to review allowed the Commission to be comfortable with including scheduling requirements. In practice, this expectation has been validated. Participants have identified and resolved issues within the applicable time periods.

The proposed rules for modifications and renewals are purposely designed to be applicable only in specific, limited circumstances, which appear more restrictive than a request for a functionally equivalent request. Most, if not all, policy and methodology issues should have been litigated and resolved in the original docket, and will be off the table with a modification or renewal request. Thus, the Commission finds it reasonable to include a scheduling requirement in the rules for modifications and renewals. The Commission will initially adopt a 45-day, 90-day scheduling requirement. The time frames can be revisited after actual experience is gained.

The Commission will strive to issue its decisions as expeditiously as possible consistent with due process and the statutory requirements; however, shorter time frames might not allow sufficient opportunity for analysis if issues do arise. In addressing the OCA's concern, if there is an absence of detail with the material submitted with the request, or complex issues do arise, the Commission will be able to adjust its schedule to allow participants adequate time to address relevant and material concerns, even if this means not meeting the self-imposed scheduling requirements.

DFS contends that it is not clear whether a participant can request a hearing in 39 CFR 3001.197 or 3001.198 when there are material questions of fact that need to be resolved. DFS Comments at 4.

Including a separate scheduling requirement for instances when a hearing is requested is a clear indication that participants may request a hearing on requests for either modification or renewal. As in all proceedings, discovery is available after notice of the request, and the filing of a notice of intervention. The Commission will add subsection (d) to rule 39 CFR 3001.197 as follows:

(d) The Commission will treat requests to renew negotiated service agreements as subject to accelerated review consistent with procedural fairness. If the Commission determines that it is appropriate to proceed under 39 CFR 3001.197, a schedule will be established which allows a recommended decision to be issued not more than: (1) 45 days after the determination is made to proceed under 39 CFR 3001.197, if no hearing is held; or (2) 90 days after the determination is made to proceed under 39 CFR 3001.197, if a hearing is scheduled.

The Commission will add subsection (d) to rule 39 CFR 3001.198 as follows:

(d) The Commission will treat requests to modify negotiated service agreements as subject to accelerated review consistent with procedural fairness. If the Commission determines that it is appropriate to proceed under § 3001.198, a schedule will be established which allows a recommended decision to be issued not

[8] For example, 39 CFR 3001.196(d)(1) (functionally equivalent request) requires that a schedule be established which allows a recommended decision to be issued not more than: (1) 60 days after the determination is made to proceed under 39 CFR 3001.196, if no hearing is held; or (2) 120 days after the determination is made to proceed under 39 CFR 3001.196, if a hearing is scheduled.

more than: (1) 45 days after the determination is made to proceed under § 3001.198, if no hearing is held; or (2) 90 days after the determination is made to proceed under § 3001.198, if a hearing is scheduled.

Additional Option to Proceed Under 39 CFR 3001.196. Following the prehearing conference, the Commission must decide which procedural path the request will follow. Several commenters argue that if the Commission determines it is not appropriate to proceed under 39 CFR 3001.197 (renewal request), it might be appropriate to proceed under 39 CFR 3001.196 (functionally equivalent request). The proposed rule only allows for proceeding under 39 CFR 3001.195 (new baseline request) in this instance. The commenters also argue for a similar change to the parallel terminology proposed for 39 CFR 3001.198 (modification request). Bank One Comments at 14–15; DFS Comments at 5–6; HSBC Comments at 5; Postal Service Comments at 3; and Valpak Comments at 3.

The Commission concurs that proceeding under 39 CFR 3001.196 (functionally equivalent request) is a viable option to proceeding under 39 CFR 3001.195 (new baseline request) when the Commission decides it is not appropriate to proceed either under 39 CFR 3001.197 (renewal request) or 39 CFR 3001.198 (modification request). The last sentence of 39 CFR 3001.197(c) will be changed to read: ''If the Commission's decision is to not proceed under § 3001.197, the docket will proceed under § 3001.195 or § 3001.196, as appears appropriate.'' The last sentence of § 3001.198(c) will be changed to read: ''If the Commission's decision is to not proceed under § 3001.198, the docket will proceed under § 3001.195 or § 3001.196, as appears appropriate.''

Rule Specific Changes. The Postal Service proposes three rule specific changes. First, it notes that § 3001.197(a)(4) and § 3001.198(a)(4) request ''[a]ll studies developing information pertinent to the request, whereas § 3001.196(a)(4), a parallel rule, references ''special studies.'' The Postal Service proposes that the references to ''studies'' be changed to ''special studies.'' Postal Service Comments at 3. Second, the Postal Service proposes to add the phrase ''since the recommendation of the existing agreement'' after the words ''intervening event'' in § 3001.198(a)(3) to clarify when an intervening event must occur, and to make this language consistent with § 3001.197(a)(3). *Id.* at 4.

Both proposals improve the consistency and clarity of the rules. Section 3001.197(a)(4) will be changed to: ''All special studies developing information pertinent to the request completed since the recommendation of the existing agreement.'' Section 3001.198(a)(3) will be changed to: ''A detailed description of the technical defect, unforeseen circumstance, or intervening event since the recommendation of the existing agreement, to substantiate the modifications proposed in (a)(2).'' Section 3001.198(a)(4) will be changed to: ''All special studies developing information pertinent to the request completed since the recommendation of the existing agreement.''

The third Postal Service suggestion proposes to add the phrase ''rationale for revising the schedule of rates or fees'' to § 3001.198(a)(3) (modification request). It argues that there will be instances where a modification will involve this type of revision, for example, a request to modify a cap. *Id.* at 4.

The Commission assumes that if the Postal Service and its co-proponent request a modification, for example a modification of a stop-loss cap value, they will do so because they need to correct for a technical defect, account for an unforeseen circumstance not apparent when the existing agreement was first recommended, or account for an intervening event since the recommendation of the existing agreement as specified in § 3001.198(a). The technical defect, unforeseen circumstance, or intervening event provides the rationale for proposing the modification to the agreement. The above rationale might support a revision to the schedule of rates or fees; however, the desire to modify the schedule of rates or fees in itself is not a sufficient rationale to initiate a modification. Section 3001.198(a)(3) as proposed requires the Postal Service to describe the technical defect, unforeseen circumstance, or intervening event, which will focus the Commission's review on the rationale for proposing the modification. Including the Postal Service's proposed phrase ''rationale for revising the schedule of rates or fees'' in § 3001.198(a)(3) could be misinterpreted to imply that revising the schedule of rates or fees in itself is somehow a rationale for a modification. The Commission will not adopt this proposal.

Presentation of Spreadsheet Information. OCA comments that ''the use of identical spreadsheets in a renewal or modification case as were used in the original request greatly enhances the ability of participants to evaluate the financial effect of new proposals.'' OCA Comments at 1.

DFS concurs that the use of similar spreadsheets makes sense, but does not concur that a specific requirement should be placed in the rules. DFS Reply Comments at 2. While the Postal Service acknowledges that it will often be helpful and expeditious to use parallel spreadsheets, it also believes there may be reasons not to do so. The Postal Service does not believe that this should be required by the rules. Postal Service Reply Comments at 5–6.

Presenting information in a similar format to what was provided in the original request could benefit an expedited review of the new request. However, the Commission will not require the use of ''identical'' spreadsheets. This is too restrictive and would not allow for change due to modifications in the agreement, or improvements in developing and presenting analyses. Also, the rules require that analyses be presented using the Commission's methodology, which may differ from what was presented in the original request. Use of the Commission's methodology is meant as a means for expediting the review process.

Miscellaneous Issues. DFS stresses the importance of coming to the prehearing conference prepared to discuss the appropriate rule under which to proceed, whether or not a hearing is necessary, and the basis of any disputed fact that requires further consideration. DFS asserts that this can be possible if parties start discovery immediately after the filing and notice of a request for a proposed negotiated service agreement. DFS Comments at 6–7.

The Commission concurs that it is critical for participants to come prepared to the prehearing conference. The information provided to the Commission either prior to or during the prehearing conference allows the Commission to decide the most appropriate, expeditious procedural path under the specific circumstances of the request. As soon as the Commission issues notice of a request and a participant files a notice of intervention, that participant may proceed with discovery to begin examining the issues. Nonetheless, potential participants may not be instantly aware of Postal Service requests, and time must be allowed to assure due process.

DFS questions whether parallel rules are required for extensions and modifications, or whether one combined rule would be simpler. *Id.* at 7. The Commission considered combining the separate rules for extensions and modifications into one rule, but opted

for two parallel rules because of the clear signal that will be sent to potential participants as to the context of each proceeding. Separate rules also add flexibility to modifying one rule, but not the other.

III. Ordering Paragraphs

It is ordered:

1. Any suggestion for modification of the proposed rule not specifically addressed by this order is not accepted for incorporation into the final rule.

2. The Commission hereby adopts the final amendments to rules 197 and 198 that follow the Secretary's signature into the Commission's Rules of Practice and Procedure appearing in 39 CFR Part 3001.

3. The Secretary shall arrange for publication of this Order Establishing Rules Applicable to Requests to Renew or Modify Previously Recommended Negotiated Service Agreements in the **Federal Register**. These changes will take effect 30 days after publication in the **Federal Register**.

By the Commission.

Garry J. Sikora,

Acting Secretary.

List of Subjects in 39 CFR Part 3001

Administrative practice and procedure, Postal service.

■ For the reasons discussed above, the Commission amends 39 CFR part 3001 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, 3663.

■ 2. Revise § 3001.197 to read as follows:

§ 3001.197 Requests to renew previously recommended negotiated service agreements with existing participant(s).

(a) This section governs Postal Service requests for a recommended decision seeking to extend the duration of a previously recommended and currently in effect negotiated service agreement (existing agreement). The purpose of this section is to establish procedures that provide for accelerated review of Postal Service requests to extend the duration of an existing agreement under substantially identical obligations. In addition to extending the duration of the existing agreement, modifications may be entertained that do not materially alter the nature of the existing agreement for the purposes of: correcting a technical defect, updating the schedule of rates and fees, or accounting for an intervening event since the recommendation of the existing agreement. The Postal Service request shall include:

(1) Identification of the record testimony from the existing agreement docket, or any other previously concluded docket, on which the Postal Service proposes to rely, including citation to the locations of such testimony;

(2) A detailed description of all proposed modifications to the existing agreement;

(3) A detailed description of any technical defect, rationale for revising the schedule of rates and fees, or intervening event since the recommendation of the existing agreement, to substantiate the modifications proposed in paragraph (a)(2) of this section;

(4) All special studies developing information pertinent to the request completed since the recommendation of the existing agreement;

(5) A comparison of the analysis presented in § 3001.193(e)(1)(ii) and § 3001.193(e)(2)(iii) applicable to the existing agreement with the actual results ascertained from implementation of the existing agreement, together with the most recent available projections for the remaining portion of the existing agreement, compared on an annual or more frequent basis;

(6) The financial impact of the proposed negotiated service agreement on the Postal Service in accordance with § 3001.193(e) over the extended duration of the agreement utilizing the methodology employed by the Commission in its recommendation of the existing agreement; and

(7) If applicable, the identification of circumstances unique to the request.

(b) When the Postal Service submits a request to renew a negotiated service agreement, it shall provide written notice of its request, either by hand delivery or by First-Class Mail, to all participants in the Commission docket established to consider the original agreement.

(c) The Commission will schedule a prehearing conference for each request. Participants shall be prepared to address at that time whether or not it is appropriate to proceed under § 3001.197, and whether or not any material issues of fact exist that require discovery or evidentiary hearings. After consideration of the material presented in support of the request, and the argument presented by the participants, if any, the Commission shall promptly issue a decision on whether or not to proceed under § 3001.197. If the Commission's decision is to not proceed under § 3001.197, the docket will proceed under § 3001.195 or § 3001.196, as appears appropriate.

(d) The Commission will treat requests to renew negotiated service agreements as subject to accelerated review consistent with procedural fairness. If the Commission determines that it is appropriate to proceed under § 3001.197, a schedule will be established which allows a recommended decision to be issued not more than:

(1) Forty-five (45) days after the determination is made to proceed under § 3001.197, if no hearing is held; or

(2) Ninety (90) days after the determination is made to proceed under § 3001.197, if a hearing is scheduled.

■ 3. Revise § 3001.198 to read as follows:

§ 3001.198 Requests to modify previously recommended negotiated service agreements.

(a) This section governs Postal Service requests for a recommended decision seeking a modification to a previously recommended and currently in effect negotiated service agreement (existing agreement). The purpose of this section is to establish procedures that provide for accelerated review of Postal Service requests to modify an existing agreement where the modification is necessary to correct a technical defect, to account for unforeseen circumstances not apparent when the existing agreement was first recommended, or to account for an intervening event since the recommendation of the existing agreement. This section is not applicable to requests to extend the duration of a negotiated service agreement. The Postal Service request shall include:

(1) Identification of the record testimony from the existing agreement docket, or any other previously concluded docket, on which the Postal Service proposes to rely, including citation to the locations of such testimony;

(2) A detailed description of all proposed modifications to the existing agreement;

(3) A detailed description of the technical defect, unforeseen circumstance, or intervening event since the recommendation of the existing agreement, to substantiate the modifications proposed in paragraph (a)(2) of this section;

(4) All special studies developing information pertinent to the request completed since the recommendation of the existing agreement;

(5) If applicable, an update of the financial impact of the negotiated service agreement on the Postal Service

in accordance with § 3001.193(e) over the duration of the agreement utilizing the methodology employed by the Commission in its recommendation of the existing agreement; and

(6) If applicable, the identification of circumstances unique to the request.

(b) When the Postal Service submits a request to modify a negotiated service agreement, it shall provide written notice of its request, either by hand delivery or by First-Class Mail, to all participants in the Commission docket established to consider the original agreement.

(c) The Commission will schedule a prehearing conference for each request. Participants shall be prepared to address at that time whether or not it is appropriate to proceed under § 3001.198, and whether or not any material issues of fact exist that require discovery or evidentiary hearings. After consideration of the material presented in support of the request, and the argument presented by the participants, if any, the Commission shall promptly issue a decision on whether or not to proceed under § 3001.198. If the Commission's decision is to not proceed under § 3001.198, the docket will proceed under § 3001.195 or § 3001.196, as appears appropriate.

(d) The Commission will treat requests to modify negotiated service agreements as subject to accelerated review consistent with procedural fairness. If the Commission determines that it is appropriate to proceed under § 3001.198, a schedule will be established which allows a recommended decision to be issued not more than:

(1) Forty-five (45) days after the determination is made to proceed under § 3001.198, if no hearing is held; or

(2) Ninety (90) days after the determination is made to proceed under § 3001.198, if a hearing is scheduled.

[FR Doc. 05–10913 Filed 6–2–05; 8:45 am]

BILLING CODE 7710–FW–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 228

[FRL–7919–9]

Ocean Disposal; Designation of Dredged Material Disposal Sites in Central and Western Long Island Sound, CT

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: With the publication of this final rule, EPA is designating two open-water dredged material disposal sites, Central Long Island Sound (CLIS) and Western Long Island Sound (WLIS), for the disposal of dredged material from harbors and navigation channels in the Long Island Sound vicinity in the states of Connecticut and New York. This action is necessary to provide long-term, open-water, dredged material disposal sites as an alternative for the possible future disposal of such material. The basis for this action is described in a Final Environmental Impact Statement (FEIS) published by EPA in March 2004. The FEIS identifies designation of the CLIS and WLIS dredged material disposal sites as the preferred alternatives from the range of options considered. On September 12, 2003, EPA published in the **Federal Register** a proposed rule and a notice of availability of a Draft EIS (DEIS) for this action. These disposal site designations are subject to various restrictions designed to support the goal of terminating or reducing the disposal of dredged material into Long Island Sound, as explained below in subsection E. 3 of the Supplementary Information section.

EPA has conducted the disposal site designation process consistent with the requirements of the Marine Protection, Research, and Sanctuaries Act (MPRSA), the Clean Water Act (CWA), the National Environmental Policy Act (NEPA), the Coastal Zone Management Act (CZMA), and other relevant statutes and regulations. Under NEPA, federal agencies prepare a public record of decision (ROD) at the time of their decision on any action for which an FEIS has been prepared. This **Federal Register** notice for the final rule will also serve as EPA's ROD for the site designations.

The site designations are intended to be effective for an indefinite period of time. EPA has agreed, however, that use of the sites pursuant to these designations may be suspended or terminated in accordance with the Restrictions included in the final rule.

The designation of these two disposal sites does not by itself authorize the disposal of dredged material from any particular dredging project at either site. The designation of the CLIS and WLIS disposal sites simply makes those sites available for use for the dredged material from a specific project if no environmentally preferable, practicable alternative for managing that dredged material exists, and if analysis of the dredged material indicates that it is suitable for open-water disposal.

Thus, each proposed dredging project will be evaluated to determine whether there are practicable, environmentally preferable alternatives to open-water disposal. In addition, the dredged material from each proposed disposal project will be subjected to MPRSA and/or CWA sediment testing requirements to determine its suitability for possible open-water disposal at an approved site. Alternatives to open-water disposal that will be considered include upland disposal and beneficial uses such as beach nourishment. If environmentally preferable, practicable disposal alternatives exist, open-water disposal will not be allowed. In addition, the dredged material will undergo physical, chemical, and biological analysis to determine its suitability for open-water disposal. EPA will not approve dredged material for open-water disposal if it determines that the material has the potential to cause unacceptable adverse effects to the marine environment or human health. The review process for proposed disposal projects is discussed in more detail below and in the FEIS.

As dredged material disposal sites designated by EPA under the MPRSA, CLIS and WLIS also will be subject to newly developed, detailed management and monitoring protocols to track site conditions and prevent the occurrence of unacceptable adverse effects. These management and monitoring protocols are described in the CLIS and WLIS Site Management and Monitoring Plans (SMMPs), which are incorporated in the FEIS as Appendix J. EPA is authorized to close or limit the use of these sites to further disposal activity if their use causes unacceptable adverse impacts to the marine environment or human health.

DATES: This final regulation is effective on July 5, 2005.

ADDRESSES: EPA has established a file supporting this action that includes the **Federal Register** notice for this final rule, the FEIS and its appendices, including the SMMPs and responses to public comments, and other supporting documents.

1. *In person.* The file is available for inspection at the following location: EPA New England Library, One Congress St., Suite 1100, Boston, MA 02114–2023. For access to the documents, call Peg Nelson at (617) 918–1991 between 10 a.m. and 3 p.m. Monday through Thursday, excluding legal holidays, for an appointment.

2. *Electronically.* You also may review and/or obtain electronic copies of the rule, FEIS, and various support documents from the EPA home page at *http://www.epa.gov/fedrgstr/,* or on the