to change its rate more quickly in response to developments in the market.

Notice of Proposed Rule, 54 FR 11404– 11405 (March 20, 1989). The Commission also stated its resolve to "take into account the effect on the market" when recommending rates under the expedited rules. Id. No commenter in this docket claims that the Postal Service has engaged in anticompetitive conduct in the expedited delivery market in the interim.

As to the claim of preference in violation of § 403(c), the Commission concluded in RM88-2 that adoption of expedited procedural rules would not constitute "undue or unreasonable" discrimination because "Express Mail is the only class for which evidence supporting such rules has been given." Id. at 11399. Lacking evidence of a need to change rates for other classes expeditiously in response to competition, and of the likely impact such rate changes would have on postal finances, the Commission found it unreasonable to reject the proposed rules for Express Mail. The Commission also alluded to the possibility of extending the applicability of those rules, "[i]f it later appears that similar procedures might be suitable for another class. * * *'' Id. The Commission is in much the same posture in this docket, but with the significant difference that Docket No. RM95-2 has been initiated to consider "potential mechanisms for expediting its proceedings conducted under 39 U.S.C. 3624(a)," which includes rate change proceedings. See 59 FR 65987 (December 22, 1994). Consequently, the Commission's prior conclusion that the rules for Express Mail pose no undue preference problem is now reinforced by its contemporaneous docket to consider similar mechanisms for other types of requests.

The Commission also finds no merit in the arguments that the rules would operate in violation of the hearing requirements of the Administrative Procedure Act, or would trench upon the due process rights of intervenors. Contrary to those claims, the Postal Service would be required to sustain its burden as proponent under rules 57 through 57c, beginning with the data filing requirements laid down in § 3001.57a. If the Commission concludes that the Service's presentation poses one or more genuine issues of material fact, either at the suggestion of an intervenor or on its own motion, a formal hearing would be held. See § 57b(e)(5). Only in the event that no such issue was identified-an extremely rare occurrence in the

Commission's institutional experience would a hearing not be held. In the absence of any genuine issue of material fact, the Commission would be under no obligation to conduct a hearing.⁴

The discovery and hearing procedures established in rule 57b admittedly require prompt action by all parties involved, in furtherance of the declared purpose "to allow for consideration of Express Mail Market Response Rate Requests within 90 days, consistent with the procedural due process rights of interested parties." § 3001.57c. However, in fashioning these procedures in Docket No. RM88-2, the Commission devoted considerable effort to striking a workable balance between expedition and the due process rights of interested parties. In response to comments, the Commission rejected some of the expedited procedures proposed by the Postal Service and supplemented others. Notice of Proposed Rulemaking (Second Notice), 54 FR 11401-11403 (March 20, 1989); Notice of Proposed Rulemaking (Third Notice), 54 FR 25137-25139 (June 13, 1989). Nor did the Commission overlook the need for flexibility in administering the expedited procedural schedule. It stated: "If any particular date causes difficulty, the Presiding Officer can grant an extension of time * * *. When the Commission reviews its experience with these rules, we will be prepared to judge whether any of the scheduled dates should be changed in the rules." Third Notice of Proposed Rulemaking, 54 FR 25139. Consequently, at this time the Commission finds no basis for concern that re-enactment of these carefully considered rules would jeopardize the due process rights of participants in proceedings under rules 57 through 57c.

II. Institutional Issues

United Parcel Service also comments that re-enactment of the rules would be inappropriate because they allegedly pose a "risk of seriously undermining Congress' carefully crafted division of authority between the Commission and the Postal Service." UPS Comments at 15. UPS suggests that the rules would improperly delegate the Commission's responsibility for determining attributable costs to the Postal Service; could be invoked to nullify the Commission's rate recommendations for Express Mail in omnibus rate decisions and introduce reduced rates that could be in effect for years; and would serve as "a device for selectively deregulating postal ratemaking in the case of only

one favored class of mail." Id. at 15–16. In the Commission's view, these comments mischaracterize the purpose and intended operation of the Express Mail market response rules.

As the source and repository of the raw data from which cost estimates are derived, the Postal Service necessarily provides the principal input to the process of determining attributable cost levels. The Commission's functions thereafter are to provide a forum in which interested parties can probe and challenge the Service's estimates; and to decide whether the Service's proposals are supported by substantial evidence and consistent with the Postal Reorganization Act's policies and factors. Rules 57 through 57c provide expedited procedures, but also preserve these essential functions. They do not allow the Commission to recommend Express Mail rates that are unsupported by credible cost evidence or otherwise inconsistent with statutory factors. See the rule for decision in § 3001.57c. They will not be allowed to become a substitute for scrutiny in omnibus rate cases, as the Commission clearly stated in Docket No. RM88-2. See Second Notice of Proposed Rulemaking, 54 FR 11403 (March 20, 1989). Therefore, in no meaningful sense can they be characterized as a vehicle for deregulating Express Mail rates.

III. The Question of Need

Both United Parcel Service and the Office of the Consumer Advocate take the position that, because of the Postal Service's failure to invoke rules 57 through 57c during their initial five-year period of effectiveness, and changed circumstances in the expedited delivery market in that time, there is no demonstrable need for re-enacting the rules. On the basis of available information, the Commission believes that this conclusion may be incorrect, and at the very least is premature. While the expedited delivery market doubtless has changed in five years, the Postal Service appears to be correct in its characterization that, "[t]he most important feature that distinguishes competitors is price." Postal Service Petition at 4; *see* PRC Op. R94–1, November 30, 1994, para. 5402. In this fiercely competitive market, it is possible that expeditious adjustments in Express Mail rates may be useful to sustain the viability of that service to meet future competitive exigencies.5

⁴ See Costle v. Pacific Legal Foundation, 445 U.S. 198, 213–16 (1980).

⁵The Commission cannot agree with the contentions of UPS and OCA that the current modest contribution of Express Mail to the institutional costs of the Postal Service represents an "irreducible minimum" (OCA Comments at 4), leaving no room for operation of the market