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PRESIDING OFFICER'S  
RULING NO. MC96-3/28

POSTAL RATE COMMISSION  
OFFICE OF THE SECRETARY  
UNITED STATES OF AMERICA  
POSTAL RATE COMMISSION  
WASHINGTON, D.C. 20268-0001

Special Services Fees and Classifications

Docket No. MC96-3

PRESIDING OFFICER'S RULING DENYING  
MOTION TO STRIKE, ALLOWING DISCOVERY,  
AND ADJUSTING THE PROCEDURAL SCHEDULE

(November 27, 1996)

During the hearings of November 19, 1996, the Postal Service moved to strike certain responses from Major Mailers Association (MMA) witness Bentley to oral cross-examination propounded by the Office of the Consumer Advocate. The Postal Service was allowed to provide a written supplement to its motion; it filed supplemental comments on November 21, 1996.<sup>1</sup> The Service was also directed to indicate by November 25, 1996, whether it wanted to file rebuttal testimony concerning these responses. It submitted timely comments on that question.<sup>2</sup>

On November 25, 1996, MMA filed an opposition to the motion to strike in which it offered to respond expeditiously to written questions, or participate in an informal technical conference, to

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<sup>1</sup> Supplemental Comments of United States Postal Service to Motion to Strike Major Mailers Association Witness Bentley's New Analysis (Written Motion).

<sup>2</sup> Comments of the United States Postal Service Concerning Rebuttal Testimony to Major Mailers Association Witness Bentley's New Analysis.

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enable the Postal Service to quickly and easily understand the analyses referred to during witness Bentley's cross-examination.<sup>3</sup>

The Postal Service motion to strike the analyses presented by witness Bentley during cross-examination will be denied. The Service contends that it will not have an adequate opportunity to understand these analyses, and to prepare any rebuttal which might be warranted. The Service also claims that these analyses should be stricken because they directly contradict the witness's original testimony, Written Motion at 4, and because they utilize "outdated" information, Written Motion at 5. Finally, the Postal Service complains that counsel for MMA did not provide an adequate foundation for admission of these analyses into the record during redirect examination. None of these arguments is valid.

Witness Bentley presents testimony that, *inter alia*, points out that the Postal Service request is supported by analyses utilizing cost attributions different from those found appropriate by the Commission in recent cases. The Commission understands this to be the case, and previously issued orders in recognition of that fact. The Postal Service has submitted pleadings recognizing the existence of these distinctions.<sup>4</sup>

Witness Bentley testifies that these differences have a significant impact on the share of total Postal Service costs

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<sup>3</sup> Major Mailers Association's Response to United States Postal Service's "Supplemental Comments" to Motion to Strike MMA Witness Bentley's "New Analysis" (MMA Response).

<sup>4</sup> See for example, Order No. 1120 at 1-2; Statement of the United States Postal Service Concerning Order 1126, August 2, 1996, at 1.

that are attributed, and the proportion of total attributable costs associated with First-Class Mail. He supports his contention by reference to FY 95 data. He compares the FY 95 costs presented in the Postal Service request with a pro forma statement of FY 95 attributable costs lodged as a library reference by the Commission. Notice of Filing of Workpapers, September 20, 1996.

During cross-examination by counsel for OCA, witness Bentley was asked if he had any other basis for his conclusions. He answered that he had performed several analyses using older data. Tr. 6/2009. Counsel for the Postal Service at first objected to this response, and then asked that these data be made available, and indicated that the Service might require an extension of time to file rebuttal testimony concerning these analyses. Tr. 6/2012. Later, the Postal Service reconsidered its position, and made the pending motion that they not be admitted into evidence. Tr. 6/2029-31. During redirect, MMA counsel established the source of the data contained in those documents. Tr. 6/2037. The Postal Service stated that it had no desire to have the witness explain these analyses during the hearing. Tr. 6/2043.

A large portion of witness Bentley's direct testimony is subject to a separate, pending motion to strike filed by the Postal Service. Answers to that motion are due December 2, 1996. If the direct testimony is stricken from the record, cross-examination on that testimony may also be excised from the record. However, if witness Bentley's direct testimony is found

admissible, then the OCA cross-examination is proper, and the answers provided by witness Bentley are admissible into evidence.

It is reasonable and proper to ask a witness about his previous efforts to analyze an issue, and comparisons of analyses using data from previous periods often have significant probative value. In this instance, if the results of earlier analyses are inconsistent with witness Bentley's contentions, it could be especially meaningful.

The Postal Service claims that if witness Bentley's response to OCA's cross-examination is allowed to remain in the record, the Service will be denied due process because it cannot be given a meaningful opportunity to examine new analyses that are "neither simple nor straightforward". Written Motion at 2. These are serious contentions which warrant careful scrutiny. However, on examination, I find these claims are without substance.

First, the three tables provided by witness Bentley, Tr. 6/2039-41, do not present new, particularly innovative, or particularly complex analyses. While a participant might have questions about the source of some figures, or about computations used to develop other figures in these tables, there appears to be nothing likely to confound a sophisticated party such as the Postal Service. Second, admission of these tables into evidence is consistent with providing both the Postal Service, and OCA, with due process. Both are entitled to an opportunity to question the witness and develop a complete record, and OCA is entitled to have the answers to relevant questions admitted into evidence.

Trial counsel often must explore matters raised during cross-examination. The Postal Service refusal to question witness Bentley does not establish that it did not have an adequate opportunity to gain a full understanding of these three tables. It could easily be found that the Postal Service waived its opportunity to question witness Bentley on these analyses and that nothing further is required to develop the record in this area. MMA Response at 7. However, MMA cooperatively continues to offer to provide the Postal Service with prompt written or oral clarification of these tables, and under that circumstance, I will allow the Service an opportunity to conduct discovery concerning them. The Service notes that one month was allowed for discovery on all aspects of the evidentiary presentations of all participants other than the Postal Service. Written Motion at 2. This fact points to a conclusion that far less time need be set aside to prepare questions concerning three tables manipulating numbers sourced to public documents, specifically Postal Service testimony and Commission recommended decisions.

Finally, the Postal Service contends that allowing it to fully exercise its rights to discovery and rebuttal might extend the procedural schedule for this case, a result it does not seek. I conclude that delay is not an inescapable result of allowing the Postal Service to question witness Bentley about these three tables or to develop additional rebuttal testimony.<sup>5</sup> Furthermore, a short delay in closing the evidentiary record in

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<sup>5</sup> As pointed out in the MMA Response, at 6, to the extent delay results, it would seem to be the proximate result of the failure of the Postal Service to comply with Commission Orders 1120 and 1126. See Order 1134 at 17.

this case may be justified if it allows participants to focus on understanding the evidence of record.

The Postal Service arguments that these tables contradict witness Bentley's testimony, and that they utilize outdated information, are not sound reasons to strike this evidence. The purpose of cross-examination is often to elicit information contradicting the witness's prepared testimony. Such information is often particularly relevant and material. The Commission should have the opportunity to evaluate Bentley's direct testimony in light of his answers on cross-examination. The fact that the Bentley tables use data from R94-1 does not render them so dated as to be meaningless. Again, the Commission should have the opportunity to evaluate the materiality of data from prior years. Finally, I find the foundation developed during redirect adequate to enable the Commission and participants to understand the context of these three tables.

I will allow the Postal Service to engage in formal and informal discovery on these tables through December 6, 1996. MMA has volunteered to respond promptly to questions and to make witness Bentley available for informal conferences should that be requested. Thus, I will expect MMA to respond to discovery requests within seven days or less. The Service may determine additional testimony is unnecessary or, since the topic of concern appears quite narrow, it may be able to submit its testimony on or before December 13, 1996, in which case it may be possible to receive that testimony during the already scheduled hearing dates. If, following discovery, the Postal Service determines that it wishes to submit rebuttal testimony concerning

these three tables that cannot be prepared expeditiously, it should file a written request by December 16, 1996, describing the scope of its intended presentation and describing the amount of time it requires to prepare its presentation. Appropriate schedule adjustments, if any, can be made at that time.

This tangential controversy need not prevent the Postal Service or any other participant from adhering to the procedural schedule already established in this case. Nonetheless, I recognize that the intervention of the holiday season may cause scheduling problems, and I would like to ensure that this issue does not seriously affect either counsel or witnesses' holidays. Therefore, I will defer the dates for filing briefs and reply briefs by one week.

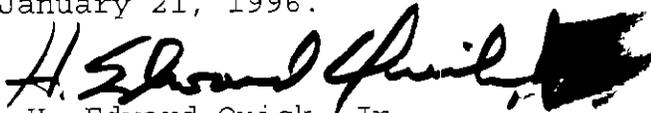
#### RULING

1. The Postal Service motion to strike portions of the cross-examination of Major Mailers Association witness Bentley is denied.

2. The Postal Service is authorized to conduct discovery concerning tables sponsored by witness Bentley, Tr. 6/2039-41, and present rebuttal, as described in the body of this ruling.

3. The procedural schedule for this case is amended as follows:

- Initial briefs are due January 14, 1996;
- Reply briefs are due January 21, 1996.

  
H. Edward Quick, Jr.  
Presiding Officer