

# DOCKET SECTION

BEFORE THE  
POSTAL RATE COMMISSION  
WASHINGTON, D.C. 20268-0001

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POSTAL RATE COMMISSION  
OFFICE OF THE SECRETARY

POSTAL RATE AND FEE CHANGES, 1997

Docket No. R97-1

MOTION OF UNITED STATES POSTAL SERVICE FOR RECONSIDERATION OF  
PRESIDING OFFICER'S RULING NO. R97-1/54, AND, IF NECESSARY  
POSTAL RATE COMMISSION ORDER NO. 1201  
(November 7, 1997)

The United States Postal Service hereby moves for reconsideration of Presiding Officer's Ruling No. R97-1/54, and, if necessary, Commission Order No. 1201.

## I. INTRODUCTION

On November 4, 1997, the Commission issued Order No. 1201, and the Presiding Officer issued Ruling No. R97-1/54. These items relate to the procedural controversy which has arisen in this docket concerning certain materials which were originally filed as library references, and which now, having been offered to be sponsored by various Postal Service witnesses, have become the subject of various motions to strike and/or delay the proceedings. Order No. 1201 determined that the disputed material could be accepted as evidence, and the case would not be stayed, but that further time would be taken to allow additional discovery and oral cross-examination, and the schedule would be revised accordingly. Ruling No. R97-1/54 implemented that portion of the Order regarding a revised procedural schedule, and, for example, pushed the filing date for all intervenor testimony back six weeks (from November 17 to December 30), and the filing date for reply briefs back almost a month (from March 13 to April 10).

The Postal Service appreciates the fact that, with these actions, the Commission and the Presiding Officer are striving to balance competing directives within their

statutory obligations. The Commission is required to conduct proceedings which protect the due process rights of all concerned while affording a fair opportunity for hearing on proposed rate and classification changes, but must endeavor to complete these proceedings within a 10-month period. By all appearances, the Commission and the Presiding Officer are doing their best to achieve all of these objectives. The Postal Service acknowledges that, just as it is no easy task for the Postal Service to react appropriately to evolutions in the ratemaking process and changing circumstances from case to case, it is no easy task for the Commission either.

Nevertheless, the Postal Service must respectfully move for reconsideration of the new schedule contained in the Presiding Officer's ruling, or, if necessary, Order No. 1201 itself. As things now stand, the combined effect of these two actions is to revise the schedule in such a way as to leave a perilously small amount of time for the Commission to complete its deliberations following the completion of all scheduled contributions from the parties. The Postal Service submits that the events which are the subject of this dispute do not warrant a disruption to the procedural schedule of this magnitude. The initial remedy we seek is simply to revise the procedural schedule back to something much closer to the status quo ante.

The Order directs the Presiding Officer to "issue a revised schedule in this case so as to continue these proceedings with the utmost expedition consistent with procedural fairness for the participants" (pg. 3). The Postal Service submits that the revised schedule does not comport with this instruction. As presented in detail below, the Postal Service urges the Presiding Officer to adopt a schedule reflecting much less drastic delay. Specifically, while hearings can remain scheduled for December 1-4, the Postal Service believes that a much shorter interval between completion of those hearings and the general submission of intervenor testimony should be

acceptable. The Postal Service submits that this can be done in accordance with the above language of Order No. 1201 and that, if it is, no further reconsideration of the Order itself should be necessary.

If the Presiding Officer concludes, however, that the schedule must be maintained as currently revised to be consistent with his interpretation of Order No. 1201, the Postal Service would submit, in the alternative, that certain portions of the Order itself merit reconsideration. In particular, the Postal Service disagrees with those portions of the Order which purport to suggest that alleged actions or inactions of the Postal Service were the "proximate cause"<sup>1</sup> of the delay inherent in the newly revised schedule. Many factors were at work, and the discussion in the Order does not reconcile all provisions of the Commission's rules, past history, or the entire sequence of events in this docket.

The Postal Service also disagrees with those portions of the Order which appear to suggest that the alleged actions or inactions of the Postal Service at issue in this controversy may, at some future time, constitute the basis for a determination, pursuant to section 3624(c)(2) of the Act, to extend the statutory 10-month period in which the Commission is obligated to transmit a recommended decision. If the Presiding Officer rearranges the schedule in accord with our suggestions, it would seem unlikely that the need to attempt to invoke section 3624(c)(2) would arise. Moreover, as there is no attempt in Order No. 1201 to address section 3624(c)(2) issues in depth, much less to actually apply the section, there is very little substance upon which a ripe request for reconsideration can be based. Nevertheless, under no circumstances does the Postal Service wish to appear to have acquiesced to the notion that the events of the type at issue in this controversy could ever provide the

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<sup>1</sup> Order No. 1201 at 19.

basis for lawful action pursuant to section 3624(c)(2). While the Commission's terse comments with respect to this matter appear perhaps to be nothing more than an attempt to avoid closing the door, it is the position of the Postal Service that they are not justified. Our position in this regard is set forth more fully below.

II. PRESIDING OFFICER'S RULING NO. R97-1/54 SHOULD BE RECONSIDERED TO PROVIDE A SCHEDULE THAT IS CONSISTENT WITH THE NEED FOR UTMOST EXPEDITION IN THESE PROCEEDINGS

Given the timing of Order No. 1201, the Postal Service does not request change in the extension of discovery until November 14, 1997, or the scheduling of hearings to commence on December 1.<sup>2</sup> However, the Postal Service believes that the revised schedule creates an undue delay in the deadline for participant cases-in-chief. The library references listed in the Postal Service's response to Presiding Officer's Ruling No. R97-1/42 could have a material impact on only a limited number of issues. By December 1, moreover, participants will already have had almost 6 weeks since the close of hearings on the Postal Service's case to work on their cases-in-chief. In most cases, the additional information arising from the new written and oral cross examination concerning certain Postal Service library references should have, at most, only minimal impact on those cases-in-chief.

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<sup>2</sup> Since many of the library references at issue have already been entered into evidence, as discussed below, and participants have expressed no interest in, let alone conducted discovery on, most of the library references, the Postal Service expects that hearings may be completed in less than the four days in the Presiding Officer's revised schedule. If that is the case, the Postal Service urges the Presiding Officer to act, at that time, to move up whatever deadline has been set for the filing of participant cases. The Postal Service believes that given the Commission's interest in the "utmost expedition", the schedule should be changed whenever possible to save time.

Because of the limited scope of the library references which may be subject to cross-examination at the additional hearings, it is likely that most of the participant testimony will not relate at all to those library references or their evidentiary status. There is no need to delay the filing of such testimony at all, let alone for over 6 weeks. Even for testimony that is related to the library references, participants should be able to complete such testimony in much less than 26 days after the close of hearings.<sup>3</sup> For all these reasons, the Postal Service believes that participant cases should be due on December 10, 1997.<sup>4</sup>

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<sup>3</sup> In Docket No. R94-1, several parties asked for an 18-day extension of the deadline for filing of their direct cases, in order to respond to supplemental testimony filed by the Postal Service concerning the allocation of second-class mail costs, and an adjustment of proposed rates for within county and nonprofit second-class mail. The Presiding Officer granted an extension of only eight calendar, and five business, days, stating that "the restricted scope of potential additional testimony means that the more limited extension suggested by the Postal Service can be allowed without risking additional delay to subsequent stages of this case." Presiding Officer's Ruling No. R94-1/24, at 2. Such a conservative approach seems even more warranted in this docket, in which the risk is not only to subsequent stages of the case, but also to the Commission's compliance with the statutory 10-month deadline.

<sup>4</sup> If a participant can show that it has substantial testimony that depends on results from the extended discovery period or the December hearings, and therefore needs more time to prepare its case-in-chief, that participant could move for an extension of time in which to file its testimony. For a limited extension, the schedule could be maintained by extending discovery on that case-in-chief for a limited period, and scheduling hearings on that case-in-chief at the end of the regularly scheduled hearing period.

While the Postal Service is recommending a single date for the filing of participant testimony, the Postal Service believes that the utmost expedition of this proceeding might involve an earlier deadline for testimony that is not related to the library references which will be the subject of written or oral cross-examination, should the Presiding Officer decide not to change the December 30 deadline for testimony that is related to those library references.

Maintaining, in general, the periods between deadlines in Presiding Officer's Ruling No. R97-1/54, the completion of discovery on intervenors and the OCA could then be moved up to January 12, and hearings on the cases-in-chief of intervenors and the OCA could be held from February 2 through February 12.<sup>5</sup> Evidence in rebuttal to cases-in-chief of participants could then be due on February 23. Hearings on rebuttal to participants' direct evidence would then be held from March 2 through March 6. Filing of initial briefs would be due March 18, and reply briefs would be due March 27. Thus, the Commission would still have about six and one-half weeks to prepare its Recommended Decision before the 10-month deadline, significantly reducing the risk of a delay beyond that deadline.<sup>6</sup>

### III. MANY FACTORS CONTRIBUTED TO CREATING THE CIRCUMSTANCES WHICH HAVE NOW RESULTED IN AMENDMENT OF THE PROCEDURAL SCHEDULE

Reading parts of Order No. 1201, one might get the impression that there are very bright lines between all of the various categories of material that must be or may be submitted by the Postal Service with its request for a recommended decision. One might also get the further impression that, given those bright lines, it is a relatively straightforward task to apply the Commission's rules governing filing

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<sup>5</sup> The January 12 deadline for discovery provides a slightly longer discovery period than in the schedule in Presiding Officer's Ruling No. R97-1/54, because the discovery period proposed here would include the Christmas and New Year's Day holidays.

<sup>6</sup> The Postal Service notes that the Commission completed its Recommended Decision 48 days after reply briefs were filed in Docket No. R94-1, 56 days after reply briefs in Docket No. R90-1, and 62 days after reply briefs in Docket No. R87-1.

requirements to put every set of material into the appropriate box, and afford it the appropriate treatment dictated by the rules. One might even be tempted to conclude that the task is so simple that prior experience with misclassification has been rare, and reasonable minds would have no reasonable basis to differ in some instances. While a casual reader might come away with these impressions, they would be inaccurate.

Before discussing perceived shortcomings in the analysis included with Order No. 1201, however, it may be useful to point to other portions of the Order which, in our view, properly bring the ultimate focus of the analysis back where it belongs. Throughout pages 12–19 of Order No. 1201, there are numerous references to the fact that the materials at issue in this dispute have all been available since the case was filed. There has been no delay in the provision of supporting material necessary for evaluation of the Postal Service's proposals. The Order states repeatedly that, through written discovery, parties have all had the opportunity to test, probe, or seek clarification of the contents of any library reference filed by the Postal Service. The Order relies on these facts to support its conclusion that accepting testimony to sponsor this material into evidence at this point in the proceeding, under the procedures further specified, does not deny any party its due process rights. To the extent that the central issue addressed by the Order is forward looking (i.e., "where do we go from here?"), the Postal Service believes that the analysis presented amply supports the substance of the Order.

Our disagreements with the analysis arise in the context of the discussions regarding what, at least for now, is the much less central question of "how did we get here?" Relevant to that topic, the Postal Service submits that the background discussion included with Order No. 1201 does not convey an entirely accurate picture of the choices available under the Commission rules, or how the practices of the Postal Service, the Commission, and the parties have evolved under those rules. Moreover, certain highly relevant events in this docket have been omitted from the chronological sequence of events.

A. Neither the Commission's Rules, Nor Commission Past Practice, Are as Simple as the Order Might Be Read to Suggest

On pages 6–14, Order No. 1201 attempts to present the framework that is intended to govern the types of matters at issue in this dispute. Specifically, at page 9, the Order states categorically that "[d]ocuments and detailed data and information are to be presented as exhibits." In the Order No. 1201 framework, the counterpart to exhibits are library references. Later on the same page, the Order also states:

The earliest Commission rules required that all participants be served with the testimony and exhibits the Postal Service submitted in support of a Request. Subsequent amendments provided an exception: that when documentation or materials were too voluminous reasonably to be distributed, they could be filed as library references, designated, and sponsored as evidence.

Order No. 1201, at 9.

There are at least two problems with this statement. The first is that, in fact, as noted in the Order at 6, Rule 53 has not been amended since 1971, and still requires that "prepared direct evidence shall be in the form of prepared written testimony and

documentary exhibits which shall be filed in accordance with § 3001.31." There is nothing in Rule 53 providing any exception to this requirement, and certainly no mention of library references.<sup>7</sup>

Second, Rule 31(k) refers to "all studies and analyses offered in evidence in hearing proceedings or relied upon as support for other evidence" (emphasis added). Contrary to the above quotation from the Ruling, Rule 31(k) clearly contemplates that, at least in some circumstances, studies may be relied upon even if they are not intended to be offered into evidence. How should such studies be filed? The only provision under the rules is in Rule 31(b), which provides that material can be designated as a library reference regardless of its evidentiary status. That certainly is the vehicle which has been used for these purposes in past proceedings.

There is another fundamental problem with the proposition that "[d]ocuments and detailed data and information are to be presented as exhibits." The Order uses this proposition to create a dichotomy between exhibits, on the one hand, which apparently are the primary vehicle by which detailed data and information are intended to be presented, and library references, which apparently are appropriate alternative vehicles only under very limited circumstances. The inference to be drawn

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<sup>7</sup> It is noted that in the first rate case (Docket No. R71-1), under the apparent contemporaneous interpretation of Rule 53, as it exists today, materials were submitted to the Chief Examiner and the Commission either as testimony or as exhibits, regardless of the character of the document, and regardless of whether the exhibits were admitted into evidence. See United States Postal Service, Action of the Governors under 39 U.S.C., Section 3625 and supporting record in the matter of Postal Rate and Fee Increases, 1971: Docket No. R71-1 before the Postal Rate Commission, Vol. 1, at xvi-xx, Vol IV, part 1, at 4-1 to 4-2.

is that, except in those limited circumstances, all detailed data and information should be presented as exhibits.

On pages 10–11, the Order compares dockets on the basis of the respective numbers of exhibits versus library references. The dichotomy, however, is a false one. Such comparisons are not necessarily informative because this framework fails to account for the wide variety of factors that may be operative. The most obvious omission from the discussion is the existence of workpapers.<sup>8</sup> For example, the Order (at 10) cites Docket Nos. R84–1 and R87–1 as cases in which the Postal Service filed many exhibits, but relatively few library references. In both of those cases, however, the Postal Service also filed numerous and extensive workpapers. Consistent with the Commission’s rules, the decision where to locate “detailed data and information” does not involve a purely binary choice between exhibits and library references, as the Order might appear to suggest. It involves, rather, a decision between at least three choices—exhibits, workpapers, and library references.<sup>9</sup>

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<sup>8</sup> While the Order on pages 7 and 8 makes passing reference to workpapers, no attempt is made to account for their significance in the larger discussion which essentially purports to divide the relevant universe between exhibits on the one hand, and library references on the other.

<sup>9</sup> In fact, there is an additional option—presentations within the text of the testimony utilizing tables, charts, figures, and graphs. Given developments in word processing software, these options are used increasingly to present “detailed data and information” in situations in which, in previous years when the typewriter was the technology for the production of testimony, such information could only have been appended as an exhibit. This factor alone explains much of the decline in the absolute number of formal exhibits presented in recent cases, in comparison to earlier cases. In the current environment, in the context of prefiled written documents, the concept of an exhibit as something distinct from the testimony to

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This distinction is critical because, to the extent that the Order further suggests (pgs. 11, 13) that exhibits are to be preferred over library references because only exhibits are served on all parties, this discussion completely ignores the existence of workpapers. Like library references, and unlike exhibits, copies of workpapers are not served on all parties. Unless one interprets Rule 53 to preclude, by omission, the utilization of the workpapers authorized by Rule 54, neither the Commission's rules nor long-standing Commission practices create any limitations on when material can be placed in workpapers rather than in exhibits. Yet from the perspective of a party trying to review the Postal Service's filing, a citation to a library reference is just as useful as a citation to a workpaper.

Therefore, it is misleading to imply that placing information in a library reference has necessarily deprived the parties of access that they would have had if the material had been more directly linked with the testimony of a specific witness. That would only be the case in those rare instances in which the material, if not placed in a library reference, would have gone into testimony or an exhibit rather than into a workpaper. In the vast majority of instances, the relevant choice would be between library reference and workpaper, not between library reference and exhibit.<sup>10</sup>

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<sup>9</sup> (...continued)

which it is attached is a bit of an anachronism. Certainly no legal consequences flow from whether a set of numbers appended at the end of a piece of testimony is separately designated as an exhibit, or merely labeled as a table and considered part of the testimony. In either instance, they are handled identically in the hearing room.

<sup>10</sup> Consider the last full paragraph on page 13 of the Order. If the opening sentence were corrected to state that subpart B of the Commission's rules "requires the Postal  
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Moreover, many factors which are entirely independent of any purported trend to substitute library references for exhibits have contributed to the growth in the number of library references. The Commission should be well aware of these factors, because most have their roots in cumulative accretions to the Commission's rules regarding the basic documentation that the Postal Service must provide with its case. The vast majority of additional library references submitted with the filing in Docket Nos. R90-1 and R97-1 are not types of material which were furnished as exhibits in Dockets R84-1 and R87-1, but are instead types of material that were not furnished at all.

Looming behind all of these developments is the effect of increased reliance on computers in conducting all phases of the preparation and litigation of rate cases. While controversy occasionally arose regarding such issues in the past, the Postal Service now routinely submits virtually all of the analyses upon which its case is based in machine-readable form. This includes not only the relatively large databases that have traditionally been the foundation of econometric research and cost and volume modeling (e.g., base year model, rollforward model, and volume forecasting model), but also spreadsheets that are employed in everything from cost avoidance studies to rate design.

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<sup>10</sup> (...continued)

Service to identify, and provide as testimony, exhibits, or workpapers, the information it considers the support for its request," and if the second sentence were likewise amended to note that "testimony and exhibits are to be provided to all participants" but workpapers are not, then the point which the remainder of the paragraph attempts to make becomes rather immaterial.

Library references are the only practical vehicle available to file computer-related material. Many of the library references filed in this case contain a machine-readable component. Some of this material is specifically required by the Commission's rules to be filed in a machine-readable version. Others are merely filed in that fashion as a convenience to the parties (and with the expectation that, if they were not so submitted with the filing, they would have to be very shortly in response to discovery requests). The Postal Service cannot imagine that the Commission would want to do anything to discourage this practice. Yet such practice, while certainly leading to an increase in the number of library references, has nothing to do with the exhibit/library reference dichotomy upon which so much of Order No. 1201 appears to be based.

As indicated above, applying the Commission's rules is no easy task. Coming out of its routine data collection systems, the Postal Service starts the process of developing a rate case with a virtual mountain of information. In the process of converting that information into support for proposed rates and fees, augmented by whatever other information may need to be obtained from other sources, much work must be done. But it is not necessarily clear at what point a formal study or analysis has been conducted, in contrast to what amounts to nothing more than presenting routinely-collected data in one particular format or another. While there are situations in which it may be of some significance whether information is presented in testimony, in workpapers, in a library reference clearly associated with a particular witness, or in a library reference that is not clearly associated with a particular witness, it is generally of much more significance that the information is promptly

available in some fashion that alerts the parties to its importance, and provides some basis for them to understand it. It is for this reason, as detailed in some of the Postal Service's pleadings in the earlier stages of this controversy, that the practice before the Commission has been to elevate substance over form.<sup>11</sup>

Order No. 1201 focuses only on the Commission's rules, and fails to come to grips with the past Commission practice which provides the necessary backdrop against which those rules must be interpreted. While this oversight might not be of any importance to a forward-oriented analysis, it is certainly relevant to the question of "how did we get here?" There is no clearer example of the fundamental unfairness of failing to consult history before drawing conclusions based on the Postal Service's actions in this docket than the costing study relating to the nonstandard surcharge. As discussed in Order No. 1201 at pages 3-4, it was the reliance by witness Fronk on LR-H-112 to support his proposed increase in the nonstandard surcharge for First-Class letters that sparked this controversy. Yet the reliance by witness Fronk on an unsponsored library reference for this purpose was far from unprecedented. The Postal Service's October 24th response to the NDMS October 16th motion noted the following:

The historical development of First-Class Mail nonstandard surcharge costs can be traced back through Workpaper II of Docket No. R94-1 witness Foster (USPS-T-11), which updates USPS Docket No. R90-1 Library Reference F-160, which updates USPS Docket No. R87-1 Library Reference E-8, which updates USPS Docket No. R84-1 Library Reference D-9, which

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<sup>11</sup> See, for example, "Response of the United States Postal Service to Motions of NDMS and NAA to Strike or Oppose Admission of Specific Portions of Testimony and for Other Relief," October 24, 1997, at 7-15.

updates Workpaper IV.B of Docket No. R80-1 witness Allen (USPS -T-10), which updates the original Docket No. R78-1 analysis of witness Gingrich (USPS-T-1). From case to case, the issue of whether the cost analysis should be presented in testimony, library reference, or workpaper has not surfaced, until now.

*Id.* at 26, n. 28.

The Postal Service is not asserting that every determination it made in structuring the content and format of its filing was unequivocally justified by reliance on past precedent in applying the Commission's rules. At this juncture, there surely is no need to make any such determination. But to the extent that any statements made within Order No. 1201 are based on the suggestion that one can consult the plain language of the Commission's rules and, on that basis alone, conclude that pre-filing choices made by the Postal Service were clearly out of compliance, such statements are based on an incomplete understanding of the complexities of the Commission's rules, the environment in which those rules must be applied, and the manner in which they have been applied in past cases.

**B. The Current Circumstances Cannot Be Explained Without a More Thorough Examination of Events Which Occurred After the Postal Service Filed Its Case**

Pages 3-6 of PRC Order No. 1201 contain a chronology of events which serves as the apparent basis for the Commission's decision to authorize the Presiding Officer to issue Ruling No. R97-1/54. Central to the Presiding Officer's determination to postpone the filing of all intervenors' direct cases is the Commission's reference<sup>12</sup>

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<sup>12</sup> PRC Order No. 1201, at 2 and 11.

to the Postal Service's October 14, 1997, proposal to sponsor 49 different library references.<sup>13</sup> At page 2 of Order No. 1201, the Commission concludes:

*In order to allow participants to prepare to cross-examine on this newly designated evidence, additional time must be allowed for discovery and additional hearing dates must be scheduled. These additional procedural steps will delay subsequent stages of the case, such as dates for submission of intervenor and rebuttal testimony. The Postal Service has thereby caused delay that will jeopardize the Commission's ability to issue a recommended decision within 10 months.*"<sup>14</sup>

In a similar vein, the Commission opines:

*It is evident that the Postal Service decision to provide certain detailed data and information as library references rather than exhibits was the proximate cause of this controversy that has delayed certain procedural events.*

PRC Order No. 1201 at 19. To the extent that the Presiding Officer is of the opinion that the Commission's assessment—that the Postal Service has caused delay or is the "proximate cause" of delay —necessarily serves to compel his decision to postpone the filing of all intervenors direct cases by six weeks, the Postal Service respectfully submits that both the assessment and the revised schedule are flawed and warrant reconsideration.

In particular, the Postal Service respectfully submits that Order No. 1201 fails to account for the fact that the library reference sponsorship controversy was significantly expanded by the Presiding Officer's determination, during the evidentiary

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<sup>13</sup> October 14, 1997, USPS Response To Presiding Officer's Ruling No. R97-1/42.

<sup>14</sup> This passage appears to overlook the fact that the mere expression of intent to sponsor a library reference, by itself, does not transform that library reference into "evidence" of any variety. Moreover, although characterized as "newly designated evidence," all of these materials, with rare exception (H-247, H-254, and H-289, which were produced in response to discovery), are the same library references which the parties have had every opportunity to examine through written discovery since the beginning of this proceeding.

hearings, to broaden its scope beyond the very short list of library references identified in response to the September 17, 1997, Notice Of Inquiry (NOI). That NOI directed the parties to identify specific unsponsored library references (relied upon by postal witnesses) which might be subject to challenge on an evidentiary basis. Issuance of the NOI offered a highly commendable opportunity to flush out potential problems and take swift action to resolve them. As acknowledged at page 5, fn. 5 of Order No. 1201, however, the NOI respondents (ANM, NAA, NDMS, OCA, and PSA) identified only six specific library references (H-106, H-108, H-109, H-112, H-114 and H-182) as presenting evidentiary sponsorship issues. It is the Postal Service's view that, by offering the parties this opportunity to specifically identify the library references believed to be the subject of evidentiary uncertainty, the Commission extended to them the full measure of due process necessary to raise the evidentiary issues they wanted resolved.<sup>15</sup>

Exercising his discretion, the Presiding Officer nevertheless determined to permit the expansion of the controversy beyond the discrete library references identified in response to the NOI. *See, for example*, Tr. 4/1376-77, where the issue of witness Nelson's sponsorship of library references (H-151 through H-159) not identified in any response to the NOI was raised *sua sponte* by the Presiding Officer. *See also*, Tr. 4/1782-84, at which the Postal Service responded to a request by the Presiding Officer to report on the sponsorship of the library references relied upon by witness Hatfield, USPS-T-25 (H-77, H-106, H-113, H-130, H-146, H-185).

It was during the course of hearings that the Presiding Officer directed the Postal Service to prepare a list of all library references it was prepared to sponsor or

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<sup>15</sup> In his comments at the hearings on October 6, 1997, the Presiding Officer expressed his disappointment that so few intervenors responded to the NOI. Docket No. R97-1, Tr. 2/91-92.

might sponsor and directed the parties to file responsive pleadings on October 16, 1997. Presiding Officer's Ruling No. R97-1/42 (October 10, 1997). In faithful compliance with that directive, the Postal Service submitted a list of 26 library references which its witnesses were prepared to sponsor and 23 others which would be sponsored, if it were determined by the Commission or the Presiding Officer to be necessary, or if requested by a party. Response of USPS To Presiding Officer's Ruling No. R97-1/42 (October 14, 1997).<sup>16</sup> The contents of that list were highly influenced by the types of inquiries made by the Presiding Officer at hearings on the Nelson and Hatfield testimonies.

The Postal Service believes that if the controversy had been confined to only the specific library references the parties identified in response to the NOI, an opportunity could have existed for the expeditious provision of supplemental testimony adopting the short list of disputed library references. The specific due process concerns raised by the parties' responses to the NOI could thereby have been addressed without any material delay in the proceedings. Any due process concerns not raised in response to the NOI in connection with specific library references could have appropriately been deemed to have been waived. Instead, the decision to raise library reference sponsorship issues beyond any identified by the NOI respondents can quite fairly be said to have contributed to the complexity which has since developed.

The Postal Service recognizes that the management of an omnibus rate case docket is not an enviable undertaking. Just as the Postal Service must exercise its best judgment in deciding how to structure the format of its case, the Presiding Officer ultimately must exercise his best judgment concerning how much process the

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<sup>16</sup> See also, Presiding Officer's Ruling No. R97-1/49 (October 17, 1997) which certified to the full Commission the intervenor motions filed in response to Presiding Officer' Ruling No. R97-1/42.

parties are due in any given instance. Nevertheless, the Postal Service submits that, despite the fact that it was pre-filing decisions of the Postal Service that created the initial circumstances under which this controversy has arisen, there was also substantial opportunity to confine that controversy in a manner which was limited to the specific issues raised by the parties in response to the NOI. Instead, as it stands now, a delay of up to six weeks is proposed to allow additional discovery and cross-examination on a body of material that is significantly larger than it need have been. Moreover, notwithstanding all previous chances to lay such issues to rest, Order No. 1201, at page 18, offers the parties yet another opportunity to “review their analysis of the Postal Service direct case to ascertain if other library references fit into” the category “of requiring sponsorship and designation as evidence.”

Under these circumstances, the Postal Service believes that it is unfair and inaccurate to attempt to identify as the cause of the decision to adjust the procedural schedule—either the Postal Service's provision of the list of 49 library references on October 14, 1997, or its designation of some materials on July 10, 1997, as “library references,” as opposed to “workpapers” or “exhibits,” or “testimony.”

**C. A Review of the Actual List of Material At Issue Provides Additional Perspective**

At first blush, the list of 49 library references provided in response to Ruling No. R97–1/42 might appear overwhelming. However, the parties have had the opportunity to conduct discovery on all of the materials filed in support of the request in this proceeding (with very rare exceptions) since July 10, 1997. The parties have been on notice concerning each of these library references and the reliance upon them by various Postal Service witnesses since the beginning of this case. Given the

numerous citations to these library references in the testimonies of the Postal Service's witnesses and the long-standing practice of testimonial reliance upon them, there is no basis for any implication that the reliance by postal witnesses upon library references adversely affected any party's understanding of which testimonies, exhibits, workpapers, or library references filed on July 10, 1997, were being relied upon by the Postal Service to support its request in this proceeding, or what materials these parties should have been examining from the moment of their intervention.

Upon closer scrutiny, it is apparent that, of the 26 library references in the first group, all but one (H-132) has already either been entered into the evidentiary record,<sup>17</sup> incorporated into existing direct testimony,<sup>18</sup> or incorporated into proposed supplemental testimony.<sup>19</sup>

Of the 23 library references in the second group, one (H-199) merely consists of an electronic version of a witness' workpapers and three (H-247, H-254, and H-287) consist of information provided in response to intervenor interrogatories. This leaves 19 which pertain to a small cluster of fairly discrete subject areas. It is noteworthy that a majority consist of documents which are unambiguously associated with the testimony of specific witnesses. They generally consist of supporting documentation which reflects the development of inputs relied upon by the witness in his testimony

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<sup>17</sup> See Appendix A.

<sup>18</sup> H-108 was incorporated as Exhibit K in USPS-T-28.

<sup>19</sup> H-112 has been incorporated into USPS-ST-43; H-109 and H-182 have been incorporated into USPS-ST-44; and H-77, H-106, H-128 and H-129 have been incorporated into USPS-ST-45.

and were designated as library references primarily because they were in machine-readable format. For all practical purposes, they are the functional equivalent of workpapers.<sup>20</sup> None of these documents is likely to raise concerns about evidentiary foundation of the sort which prompted the issuance of NOI 1.

Collectively, these library references have been the subject of very little discovery to-date, raising the possibility that they also will be the subject of a corresponding level of oral cross-examination.<sup>21</sup>

#### IV. ORDER NO. 1021 PRESENTS NO BASIS FOR INVOKING, OR EVEN CONTEMPLATING INVOKING, SECTION 3624(C)(2)

In Order No. 1201, in the context of a very short discussion regarding the possible extension of the case pursuant to § 3624(c)(2) of the Act, the Commission concludes with the following observations:

It is evident that the Postal Service decision to provide certain detailed data and information as library references rather than as exhibits, was the proximate cause of this controversy that has delayed certain procedural events. However, it is not clear to what extent this action has unreasonably

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<sup>20</sup> See, for instance H-183, H-184, and H-198, developed in support of witness Takis' incremental cost testimony (USPS-T-41); see also, H-188 which contains support for witness Lion's post office box analysis (USPS-T-24). In addition, witness Baron prepared library references H-136 through H-143 to show the development of various elements of his carrier cost analysis (USPS-T-17). Among the library references identified in Appendix A which have already been admitted into evidence, these are some which also could be considered the functional equivalent of workpapers prepared by or for the witness to document the development of testimonial inputs: witness Nelson's H-151 through H-159 and witness Degen's H-146.

<sup>21</sup> Ironically, many of these library reference materials could easily have been filed as workpapers with the apparent consequence that they might have been deemed by the parties as immune from the current controversy, despite the fact that the distinction between "workpapers" and "library references" often proves to be little more than semantic.

*delayed consideration of the R97-1 Request. Therefore it is premature to make a finding that the prerequisites for invoking § 3624(c)(2) have been satisfied.*

These conclusions were not accompanied by a finding that the Postal Service has failed to comply with specific orders or rules, or by any analysis of how, and by how much, particular actions of the Postal Service might be thought to have delayed any aspect of this proceeding or how any such delay might be considered to be unreasonable in the circumstances of this proceeding.

It is unclear whether the Commission intended by these limited statements to suggest that the actions of the Postal Service so far in this docket were such that they might be considered, at a later date, to have triggered the extraordinary procedural mechanism set out in § 3624(c)(2) of the Postal Reorganization Act. However, because the quoted statements could, under one interpretation, arguably be thought to carry such import, because the consequences of such suggestions could be very significant to the interests of the public and the Postal Service, and because rulings and orders issued at this stage in the proceeding may affect the ultimate outcome of the case both substantively and procedurally, the Postal Service considers it prudent to set out briefly its position regarding the relation of § 3624(c)(2) to the current circumstances.

It is clear that the prerequisites for invoking § 3624(c)(2) have not arisen in this case, and will not arise in the future, in connection with any actions (or inaction) on the part of the Postal Service in the initial stages of this case. Section 3624(c)(2) states that “[i]n any case in which the Commission determines that the Postal Service has unreasonably delayed consideration of a request made by the Postal Service under section 3622 by failing to respond within a reasonable time to any lawful order of the Commission, the Commission may extend the 10-month period....” It is

apparent that the initial triggering event required by this section, failure to respond within a reasonable time to a lawful order of the Commission, has not occurred, for the Postal Service has responded to all Commission orders issued in this case.

The parties who sought an extension of the case, lacking any such instance of a failure to respond, instead suggested broadly that the Postal Service's initial filing in this case was not in compliance with the Commission's rules, and that this was tantamount to a failure to respond for purposes of the Act. As demonstrated in the responsive pleadings filed by the Postal Service, however, the initial filing did comply with both the Commission's rules and the Commission's longstanding practice which implemented those rules.<sup>22</sup> See, e.g., *Response of the United States Postal Service to Motions of NDMS and NAA to Strike or Oppose Admission of Specific Portions of Testimony and for Other Relief (October 24, 1997)*.

More importantly, a technical failure to comply with particular filing requirements established by rule, even if it had occurred, would not be sufficient to trigger § 3624(c)(2). The plain language of the provision refers to "any lawful order of the Commission," not to "any lawfully promulgated rule" of the Commission. Under fundamental axioms of statutory construction, it is logical and reasonable to conclude that Congress knew the meaning of the words "rule"<sup>23</sup> and "order," and deliberately chose the word "order".

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<sup>22</sup> Significantly, In Order No. 1201, the Commission did not find that the Postal Service had failed to conform to Commission practice and procedure in designating certain materials as library references. Despite many assertions by various parties that the Postal Service failed to comply there has yet to be any specific allegation of such failure, let alone a specific finding.

<sup>23</sup> Consider, for example, that the Act contains a provision specifically authorizing the Commission to promulgate rules and regulations. See 39 U.S.C. § 3603.

The limited legislative history supports the view that violations of the Commission's rules were not intended to be included within the meaning of the word "order" as employed in § 3624(c)(2). According to the House Conference Report, the Commission was to be "granted the additional authority to suspend implementation of proposed temporary rates [on] a day for day basis when it determines that the Postal Service has engaged in undue delays *during consideration of rate cases.*" *H.R. Conf. Rep. No. 94-1444* at 17 (1976) (emphasis supplied). The House Report similarly limits its discussion of Postal Service delays to delays which would occur only during the course of a proceeding. See *H.R. Rep. No. 8603* at 59 (1976). Given that the only legislative history available supports a literal construction of the plain language of the statute, this language must be given effect. The delay contemplated by this section was seen as occurring after the initiation of a case, in circumstances where the Postal Service had been lawfully ordered to take an action, had unreasonably failed to take such action, had been conclusively shown to have caused a delay of a specific number of days, and had been put on notice that its actions could lead to an extension of the case by that many days.

Such circumstances have not arisen in this proceeding. The Commission certainly did not make any finding that even a single day of delay was attributable to any specific action of the Postal Service,<sup>24</sup> let alone a failure to comply with a lawful

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<sup>24</sup> The Postal Service's actions in this proceeding have been designed to facilitate a prompt resolution of this case. In an effort to meet or exceed the Commission's extensive and growing list of filing requirements, the Postal Service filed extensive documentation with its request. This effort not only was in conformance with the Commission's rules, it was generally consistent with prior Commission practice. When questions arose regarding particular library references, the Postal Service responded to discovery regarding those library references, and, in response to overtures by the Commission, demonstrated its willingness to admit library references into the record and provide witnesses to sponsor or adopt them, and testify regarding  
(continued...)

Commission order. The Commission did, however, suggest that it may revisit this issue toward the end of the proceeding, and then, based on Postal Service actions which occurred much earlier in the case, issue a finding that those earlier actions caused a delay of a certain number of days.

Such an interpretation would be at odds with any reasonable reading of the statute. In recognition of its strong intent that rate proceedings must be conducted expeditiously and not exceed ten months in duration, the Congress severely limited the Commission's extension authority, and provided that it can only be exercised on a "day for day" basis, that is, one day of extension is authorized for each day of delay caused by unreasonable Postal Service action or inaction. The logical purpose of this provision, consistent with the desire for expedition of the proceeding, is to enable the Commission to put the Postal Service on notice, during the proceeding, that the Commission is considering invoking its authority under § 3624(c)(2), thus providing the Postal Service a tangible incentive to correct its conduct. No such purpose would be served by the Commission deferring the requisite finding of unreasonable delay. Additionally, if the Postal Service has caused a specific, quantifiable delay in this proceeding within the meaning of § 3624(c)(2), that delay should be as susceptible to quantification at this point as at any later date. Thus it is inappropriate for any conclusion to be drawn from this controversy, or suggestion made, other than that this case may not be extended under § 3624(c)(2) as a result of the actions of the

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<sup>24</sup> (...continued)

them. Far from engaging in tactics of delay, the Postal Service has facilitated the creation of a record which is far more inclusive than in prior cases. Moreover, as the Commission recognizes, the very small number of library references called into question by intervenors have been available to the parties since the filing of the Request, in a format similar to those filed in prior cases. Thus not a single day of delay can be shown to have resulted from the Postal Service's practice of filing certain materials as library references.

Postal Service in its filing nor in its subsequent response to concerns regarding the adequacy of documentation.

## V. CONCLUSION

Stated most succinctly, Order No. 1201 observes that parties have sought relief that makes it prudent to adjust the schedule to allow further discovery and hearings on the Postal Service's case, but concludes that it should be possible to accommodate the necessary adjustments within the 10-month period allotted to the Commission by statute. The Postal Service does not disagree with this disposition of the matters addressed in the Order. There are, however, certain statements and positions offered in the Order with which the Postal Service does not agree. The Postal Service has addressed these matters at some length in this pleading.

Order No. 1201 specifically requests that the Presiding Officer revise the schedule "so as to continue these proceedings with the utmost expedition consistent with procedural fairness for the parties." On that basis, the Postal Service moves for the Presiding Officer to reconsider the schedule promulgated in Presiding Officer's Ruling No. R97-1/54. For reasons discussed above, the Postal Service believes that a schedule reflecting less adjustment would still be consistent with fairness to the parties, and would therefore better comport with the stated preference of Order No. 1201 for the "utmost expedition."

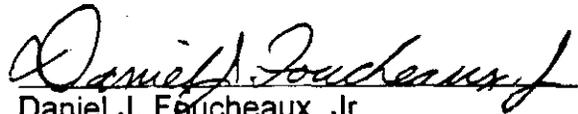
To the extent that the Presiding Officer is willing to make such compensating further adjustments in the schedule, the Postal Service believes that, having had the opportunity to articulate the portions of Order No. 1201 to which it takes exception,

reconsideration of the Order itself might be too abstract to be useful. But if the schedule remains as set forth in the November 4th Ruling, the Postal Service submits that the areas of concern it has identified may be the basis for controversy in the future with very tangible consequences. Under those circumstances, it would request reconsideration of Order No. 1201. As part of any such reconsideration, the Postal Service would expressly request that the Commission consider whether the schedule promulgated by the Presiding Officer is consistent with the "utmost expedition" direction contained within the Order.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

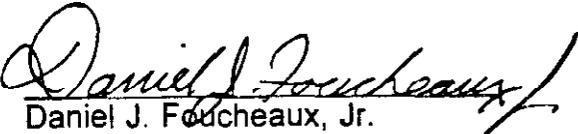


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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing document upon all participants of record in this proceeding in accordance with section 12 of the Rules of Practice.

  
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