

UNITED STATES OF AMERICA
POSTAL RATE COMMISSION
WASHINGTON, DC 20268-0001

Postal Rate and Fee Changes

Docket No. R2006-1

PRESIDING OFFICER'S RULING ON POSTCOM MOTION
FOR LATE DESIGNATION OF TESTIMONY FROM PRIOR DOCKETS

(Issued December 13, 2006)

The Association for Postal Commerce and the Mailing and Fulfillment Service Association move to designate certain segments of witness Kingsley's testimony from Docket Nos. R2000-1 and R2001-1 into the evidentiary record of this case, pursuant to Commission rule 31(e).¹

PostCom acknowledges that the deadline for filing such designations has passed, but asserts that the issues in these segments (concerning processing of rigid mailpieces prepared as flats) did not surface until witness McCrery discussed it in his rebuttal testimony (USPS-RT-14 at 10) and during ensuing oral cross-examination on December 1, 2006.² PostCom Motion at 1.³

¹ Motion of PostCom for Leave to File Designations of Witness Kingsley Out of Time, and Association for Postal Commerce and the Mailing and Fulfillment Service Association Designation of Direct Testimony of United States Postal Service Witness Linda A. Kingsley in Docket Nos. R2000-1 (USPS-T-10) and R2001-1 (USPS-T-39), both filed December 4, 2006 (collectively referred to as PostCom Motion). The proposed segments are from docket No. R2000-1, USPS-T-10, page 10, line 1 *through* page 23, line 8) and, from Docket No. R2001-1, USPS-T-39, page 13, line 28 *through* p. 26, line 16.

² Rule 31(e) provides that absent extraordinary justification, designations are due 28 days before the filing of the participant's direct case.

³ At Tr. 34/11492, there is an affirmative statement that PostCom is not interested in designating any of Kingsley's Docket Nos. R2000-1 and R2001-1 testimony. At Tr. 34/11495-96, counsel for PostCom expresses an interest in designating certain (then-unspecified) portions of Kingsley's testimony.

Rule 31(e) provides participants with an opportunity to designate testimony from prior dockets, but limits this opportunity in several respects. Guidelines, among others, call for a strong nexus between issues in the current case and the material being designated; prefer factual evidence over opinion; and disfavor designation of material from dockets more than one case removed and testimony in its entirety (or large portions thereof). See Presiding Officer's Ruling No. R2006-1/75 (October 6, 2006). The rule also provides others with an opportunity to oppose proposed designations and to counter-designate other material.

In this situation, the supporting nexus is not strong. It consists of McCrery's alleged discussion of Kingsley's testimony in his rebuttal testimony and his disclaimer of personal involvement in the deployment or decommissioning of certain equipment. The referenced discussion, however, amounts to only one sentence, and the disclaimer is not necessarily significant, absent a convincing showing that personal involvement is essential to McCrery's expert witness status. Moreover, despite the assertion that the need to designate the proposed material did not become apparent until the rebuttal stage of the proceeding, the Service's proposal with respect to rigid pieces was part of its original filing in this case. Thus, the processing history of these pieces and the Service's institutional attitude toward related rate (and rate design) issues are avenues that could have been explored far in advance of McCrery's rebuttal testimony and his appearance for cross-examination.

Moreover, PostCom did not produce the material that forms the basis for the Joint Motion at the hearing, where the Service and others would have an opportunity to review it, despite the apparent intention to refer to it. Thus, the instant motion comes quite late in the proceeding, leaving others with little time to exercise their rights under the rule to object or to file counter-designations.

While several factors militate against allowing these designations, it is also the case that the Service did not indicate any intent to oppose PostCom's anticipated Motion during the hearing, and has not filed an opposition to date. In addition, the Service will have an adequate opportunity on brief to address the relative strength or

weakness of any arguments PostCom makes with respect to the designated material. Given the lack of opposition, lack of undue or irreparable harm, and an interest in closing the record relatively soon, the PostCom Motion will be granted for the limited purpose of testing the validity of the sentence in McCrery's testimony referred to at the outset of PostCom's cross-examination on December 1, 2006. Tr. 34/11492. PostCom is to file two copies of the designated material with the Commission's Docket Section on or before December 14, 2006.

RULING

1. The Motion of PostCom for Leave to File Designations of Witness Kingsley Out of Time, December 4, 2006, is granted for the limited purpose set out in the body of this ruling.
2. PostCom is directed to file two copies of the designated material with the Commission's Docket Section on or before December 14, 2006.

George Omas
Presiding Officer