

ORIGINAL

005311

RECEIVED

ORDER NO. 1134

SEP 20 3 05 PM '96

POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

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

Before Commissioners: Edward J. Gleiman, Chairman
H. Edward Quick, Jr., Vice Chairman
George W. Haley and W.H. "Trey" LeBlanc III

Special Services Fees and Classifications

Docket No. MC96-3

FIRST ORDER SETTING OUT RELIEF FROM
POSTAL SERVICE FAILURE TO COMPLY

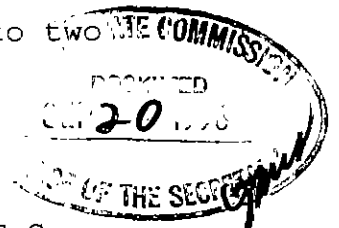
(September 20, 1996)

The Office of the Consumer Advocate (OCA) has requested that the Commission act pursuant to 39 U.S.C. § 3624(c)(2) to suspend all procedural deadlines in this case, including the 10-month period for providing a recommended decision, until the Postal Service complies with Orders No. 1120 and 1126.¹ Section 3624(c)(2) allows day-for-day extensions when the Postal Service unreasonably delays consideration of a rate request by failing to respond within a reasonable time to a lawful order of the Commission.

The Commission finds:

a) That the Postal Service has not responded, and further has announced that it will not respond, to two lawful orders of the Commission.

¹ Office of the Consumer Advocate Motion Under 39 U.S.C. § 3624(c)(2) for Day-For-Day Extensions in the Procedural Schedule and the Ten-Month Decisional Deadline (OCA Motion), August 12, 1996.



b) That the Postal Service failure to respond has hampered, and may unreasonably delay consideration of, this case.

c) That the actual delay that is the proximate result of the Postal Service failure to respond is not readily apparent at this time.

d) That the Commission will take reasonable steps to minimize the delay caused by the Postal Service and withhold issuing a § 3624(c)(2) order until the extent of any actual delay is more clearly evident.

Procedural History. Order No. 1115, issued June 12, 1996, provided notice that the Postal Service had submitted a request for changes in the Domestic Mail Classification Schedule provisions and rates for certain special services. Shortly thereafter, on June 18, 1996, Commission Order No. 1120 directed the Postal Service to provide additional cost presentations to facilitate evaluation of its request by interested members of the public and the Commission. Specifically, the Postal Service was directed to provide actual and projected cost information reflecting the cost attribution methods used to develop the rates recommended by the Commission in Docket No. R94-1. Those rates were accepted by the Governors, and the rate relationships established in that case are currently in effect.

The Postal Service requested reconsideration of Order No. 1120 on June 28, 1996. It argued that although the attribution methods used in preparing the cost exhibits provided in support of its request were different from those approved by the Commission, they should be sufficient to allow interested persons to evaluate its request. The Service contended that for

most of the special services at issue in this case, its methods should produce projections of relative institutional cost contributions which have only inconsequential differences from the contributions which would be computed using Commission-approved attribution methods. The Service also complained that complying with the Commission's order would require from 10 to 15 man days.²

The Major Mailers Association (MMA), an organization which sought similar information in Docket No. R94-1, urged the Commission to reaffirm Order No. 1120,³ and the Office of the Consumer Advocate also submitted a pleading arguing that Order No. 1120 should be affirmed.⁴

Order No. 1126, issued July 19, 1996, affirmed Order No. 1120. The Commission emphasized the importance of using methodologically consistent cost analyses when evaluating the absolute and relative changes in institutional cost contributions that may result from the rate increases requested in this case. Because the Service supports its request with costs developed using methods different from those most recently approved by the Commission, it is necessary to distinguish the impact of the rates proposed by the Service, from the impact of the different costing methods used by the Service. Order No. 1126 reaffirmed that the Service is free to propose changes in attribution

² Motion of the United States Postal Service for Reconsideration of Order No. 1120, and Partial Response, June 28, 1996.

³ Major Mailers Association's Response to the Postal Service Motion for Reconsideration, July 15, 1996.

⁴ Office of the Consumer Advocate Opposition to Motion of the United States Postal Service for Reconsideration of Order No. 1120, July 8, 1996.

methodology, however the Commission found that the Service is in the best position to apply approved attribution and distribution methodologies to its accrued cost data, and that it was neither unduly burdensome nor otherwise unreasonable to direct the Service to submit this information for the use of participants and the Commission. The Postal Service was allowed the full 15 days it indicated it might need to provide the information described in Order No. 1120.

On August 2, 1996, the Statement of the United States Postal Service Concerning Order No. 1126 (Statement) was submitted. It announces that the Service will not comply with Orders No. 1120 and 1126. The Statement says that while the costs used in the Service's request in most instances adhere to the attribution methodologies approved by the Commission, "certain methodologies are not employed, because the Postal Service believes they are fundamentally flawed." Statement at 1. The Statement continues that while the Postal Service might provide some additional categories of costs attributed according to approved methodologies "if the Commission so requests" the Postal Service "must respectfully decline to provide any costing presentation which incorporates the Commission's single subclass costing analysis" Id. at 5.

Participant Reaction to the Postal Service Statement.

The OCA Motion focuses on the importance of the information the Postal Service has declined to provide. It points out that rates should be based on informed evaluations of relative cost coverages. To evaluate the merits of changing some of the rates established in R94-1, the Commission and the parties must have access to cost projections developed using the cost analysis

applied in R94-1. OCA labels the Postal Service's position as willful and deliberate defiance, which warrants delaying all procedural steps in this case until the Postal Service complies with Orders No. 1120 and 1126 and provides costs developed using these methods. OCA Motion at 6.

On August 13, 1996, the American Bankers Association and the Newspaper Association of America submitted comments sharply criticizing the Postal Service Statement.⁵ The ABA/NAA Comments review the Service's arguments and conclude that they present no valid justification for refusing to provide the information requested in Orders No. 1120 and 1126. It points out that those orders seek costs developed using methods supported by substantial record evidence presented in extensive testimony and hearings in the two most recent general rate cases. It concludes that since the statement offers no legitimate rationale for the Service's continued defiance of legitimate Commission orders, the Commission can find that sanctions under § 3624(c)(2) are appropriate. ABA/NAA Comments at 6-8.

Major Mailers Association's Answer in Support of OCA's Motion for Extensions in the Procedural Schedule and Other Procedural Relief was filed August 21, 1996. MMA asserts that in requiring the Postal Service to demonstrate the effect of using the established cost attribution methodologies, the Commission's orders were reasonable and consistent with the practice of other rate setting agencies. MMA contends that the Commission should

⁵ Comments of American Bankers Association and the Newspaper Association of America on "Statement of the United States Postal Service Concerning Order No. 1126" (ABA/NAA Comments).

exercise the authority provided it by Congress and grant the requested relief.

On August 22, 1996, the Postal Service filed its opposition to the OCA Motion.⁶ The Postal Service claims it has provided sufficient cost information to enable participants to evaluate its request adequately. It contends that since due process requires a proponent of any costing approach to explain and justify that approach, it cannot present costs incorporating a method it is unwilling to defend. Furthermore, the Service argues that there has been no showing made that its refusal to comply with Orders No. 1120 and 1126 has delayed consideration of this case. Opposition at 9.

Commission Analysis. A major part of evaluating Postal Service requests to increase rates is to review how the proposed rates will alter the relative contributions to institutional costs of the classes and services. How proposed rates will alter relative institutional cost contributions is unclear if the methods used to estimate the underlying attributable costs are altered as well.

The Postal Service contends that the mix of previously approved and previously rejected attribution methods contained in its filing should provide interested persons with a reasonable approximation of the impact of its proposals on relative contributions to institutional costs. This contention does not excuse compliance with lawful and reasonable Commission orders absent exceptional circumstances.

⁶ Opposition of the United States Postal Service to Office of the Consumer Advocate Motion Under 39 U.S.C. § 3624(c)(2) for Day-For-Day Extensions (Opposition).

It would be directly contrary to sound administrative practice for the Commission to excuse the Postal Service from providing correct information when the Service simply states that available incorrect information "isn't too far off." Commission proceedings are conducted under the Administrative Procedure Act, 5 U.S.C. §§ 556-557. The Service offers no authority to support its position that in Commission cases inquiry into a relevant and material issue can be foreclosed merely by an assertion that the information already available is probably indicative of the correct answer.

In this instance, the Postal Service identifies no extenuating circumstances that might justify its refusal to comply. Moreover, it admits that its refusal to incorporate approved costing methods has a material impact on the contribution level of one of the services that would be significantly affected by its request. Statement at 2, n.2. But even without this admission, the Service would have had to present a valid justification in order to be excused from providing information which is so obviously both relevant and material to any decision on its request to change rates to generate an additional \$340 million.

The only justification offered by the Service for its failure to comply is that the Governors consider one of the approved costing methods omitted from the Service's presentation to be flawed. This circumstance would certainly justify the submission of evidence urging that this particular method be changed, but it does not justify a refusal to recognize the existence and precedential effect of several methods that have been found proper and used in the last two or more omnibus rate

case decisions.⁷ The Service's claim that it is willing to incorporate several additional approved cost attribution methods into its presentations "if the Commission so requests" (Statement at 5) is neither adequate nor timely, since it is made in a statement announcing the Service's refusal to comply with two orders which direct precisely that action.

The Postal Service now claims that there are "uncertainties and unexplained inconsistencies" surrounding certain approved costing approaches, Statement at 2, yet it previously volunteered that it could perform the requested work in 10 to 15 days. The method used to attribute city carrier costs in Docket No. R94-1 is not new or untested. Its theory and application were presented on the record of that case by United Parcel Service witness Kolbe, and its theoretical basis was also the subject of evidence tested in Docket No. R90-1 (Remand). Commission opinions have discussed at length both the theoretical basis for this method and how it is applied.⁸

The Service's main reason for noncompliance, as it has evolved in the many pleadings on this subject, is that the Service believes that it is being directed to create the evidence establishing a methodology with which it disagrees. Statement at 2. That is not the case. The current, established method for attributing city carrier costs is the method used to develop the

⁷ It is settled law that the Commission establishes the methods for identifying what costs are causally linked to the classes of mail. *National Association of Greeting Card Publishers v. United States Postal Service*, 462 U.S. 810, 832 (1983).

⁸ In Docket No. MC93-1 the Postal Service provided costs which incorporated the disputed methodology for attributing city carrier costs.

rates recommended by the Commission and accepted by the Governors in Docket R94-1. No new or additional testimony is necessary for the Commission to continue to rely on an existing cost methodology.

The Service has not been directed to create a method, it has been directed to provide information on the effect of its proposals measured using the current, established methods. While the Governors disagreed with the wisdom of the Commission's use of this method, and have instructed the Service to explore alternatives, this method has been established and stands as the accepted method until changed.

In its Opposition, the Postal Service purports to volunteer to provide certain cost information in a library reference, without a witness to sponsor the theoretical validity of methods used to develop those costs. Opposition at 5, n.8. Thus it recognizes that it can provide information without sponsoring the method used to derive that information.

Finally, the Postal Service contends that it has not delayed this case since the costing presentations underlying its request in this docket comply with the specific requirements of the Commission's Rules of Practice and Procedure. Opposition at 6. That point is not dispositive. The Rules of Practice were never intended to describe all of the material information which might assist the public and the Commission to evaluate a Postal Service request. Discovery and information requests have always played a vital part in developing a full evidentiary record in Administrative Procedure Act cases such as those before this Commission. Orders No. 1120 and 1126 are independent of the Rules of Practice.

It may be that the Rules of Practice should be amended to require the Postal Service to support every rate request with costs which reflect approved attribution methods, as well as costs incorporating changes the Service may wish to propose. The Commission will shortly issue a Notice of Proposed Rulemaking to develop a record on the pros and cons of adding such an explicit requirement to its rules, but the absence of such a rule in no way obviates the obvious relevance of cost attributions reflecting currently applicable standards.

The Postal Service states that it considers certain approved costing methodologies flawed. The Service is free to propose improvements to existing procedures, and it has frequently offered testimony suggesting new or modified attribution theories. During the twenty-plus years history of postal rate cases conducted pursuant to the Administrative Procedure Act, the approved methods for attributing costs to the classes and services have evolved. Methods have been refined, or even abandoned, following consideration of new theoretical concepts or new data developed in engineering or statistical studies. However, in the absence of substantial, persuasive evidence, the methods the Commission uses to attribute costs remain unchanged from one case to the next.

Thus a reasonable starting point for analysis of the Postal Service request in this case is a display of before change and after change revenues and costs reflecting approved attribution methods. This is particularly so since it does not appear that the Service is sponsoring testimony explaining why current attribution methods should be changed.

In this case, the Postal Service has chosen to ignore a number of past Commission decisions on cost attribution in its filing. In its Statement, it expresses particular concern with the treatment of certain city carrier out of office costs. After consideration of extensive evidence and argument in Docket R94-1, the Commission concluded that the cost of accessing a delivery point for the purpose of delivering a single subclass of mail should be attributable to that subclass. The Postal Service does not concur.

The Commission is aware that the Service does not embrace every aspect of currently approved cost attribution methodologies. In recognition of this difference of opinion, Order No. 1126 specifically stated that the Postal Service would not be expected to affirm the theoretical soundness or the practical wisdom of the established attribution methods. Order No. 1126 at 12. The Commission emphasized that it was directing the Postal Service only to provide the consequences of its proposed changes as measured by currently established costing principles, and that the Service remained free to extol the benefits of measuring the impact of its proposals by alternative methods. Id. at 12-13.

The Postal Service refusal to provide this information is antithetical to the cooperative and open process envisioned by the Postal Reorganization Act. The Service has shown itself capable of preparing this type of analysis, Order No. 1126 at 15-16, and due to its ready access to accrued cost data, it can perform this analysis far more easily than other participants. For example, in this case, where essential data provided in library references were inaccurate and incomplete, the Commission

had to convene a technical conference to get access to the needed carrier cost data in the Service's possession, a process that added more than a month to the development of an accurate statement of base year costs reflecting accepted methodology. Had the Postal Service undertaken to perform these computations, it would have been able to correct these problems much more quickly.

The Postal Service Statement recites Governors' comments critical of the method used for attributing certain city carrier costs in the last two rate cases. It notes that the Governors have stated that they "expect that the Postal Service would continue to question single subclass costing in future proceedings."⁹ Questioning an approved cost attribution method is proper practice; in contrast, refusing to acknowledge a lawful decision to use a particular method, is not.¹⁰ The Postal Service cannot obviate past Commission decisions by refusing to acknowledge that those decisions were made.

In sum, the Service has presented no consistent rationale or persuasive explanation for its refusal to provide the information sought by Orders No. 1120 and 1126. OCA, in its Motion, has suggested that deadlines in this case should be suspended until the Postal Service complies with Orders No. 1120 and 1126.

⁹ Postal Service Statement at 4, quoting the Decision of the Governors of the United States Postal Service on the Recommended Decision on Remand of the Postal Rate Commission on Postal Rate and Fee Changes, Docket No. R90-1, February 21, 1995, at 22.

¹⁰ The Governors did not exercise the option of seeking judicial review of the Commission decision on single subclass stop costs. While their disagreement with that decision is plain, the Governors did not challenge the Commission's rate recommendations resulting from its use.

The Delay Resulting from Postal Service Refusal to Comply.

The question of the extent of any delay is not yet resolved. The pleadings before the Commission focus on the Postal Service's failure to comply with reasonable orders, rather than on the resultant delay. In recent cases, the Commission has acted in less than the 10-month period allowed for in section 3624. Delay in this case may mean a decision in 10 months instead of 8½ months.

Title 39, section 3624, directs the Commission to transmit recommended decisions on requests for changes in rates and fees within 10 months. That section further provides that the 10-month period may be extended by one day for each day the Postal Service unreasonably delays consideration of its request by failing to respond within a reasonable time to a lawful Commission order.

The Postal Service argues that its failure to comply with Orders 1120 and 1126 has not delayed consideration of this case. It contends that the Commission completed its work in recent cases without similar Postal Service presentations, Opposition at 8, and that no participant has made a credible showing that procedural events have been delayed, or case preparation slowed, as a result of its inaction. *Id.* at 6.

The timeliness of decisions in other cases is affected by the factual situations in those cases. In its Request in Docket No. MC95-1, the Postal Service did not utilize the Commission method for attribution of carrier street time costs, but it claimed that the effect of the difference between cost methodologies was minimized, if not eliminated, by its method of implementing contribution neutrality. As the Service stated:

This contribution neutrality goal was established **because this Request is not intended to be a revenue case**, nor an opportunity to challenge, change, or improve on the Commission's conclusions drawn from the record in Docket No. R94-1. . . . The Postal Service is also hopeful that, by using a contribution neutral approach, the Postal Service, the Commission and the parties to this case can avoid the inter-class cost coverage disputes that generally occur in omnibus revenue cases.

Request of March 24, 1995, at 5 (emphasis added).

The Postal Service adopted the same overall approach – with the addition of compliance with statutory requirements applicable to preferred rate mail – in its Request in Docket No. MC96-2. The Service stated that:

The statutory target cost coverage goal and the contribution neutrality goal were established **because this Request is not intended to be a revenue case, nor an opportunity to challenge, change, or improve on the Commission's conclusions drawn from the record in Docket No. R94-1. . . .**

Request of April 4, 1996, at 3-5 (emphasis added).

By contrast, in this docket the Postal Service proposes to re-price certain special services, and thereby depart from the pricing recommendations made by the Commission in Docket No. R94-1. Cumulatively, the proposed changes in fees would have the effect of increasing net Postal Service revenues by approximately \$340 million, which represents a new burden to be imposed on users of the affected services. The Postal Service's Request reflects this departure from the two previous reclassification proposals:

This filing is unusual in that it would have the effect of increasing net revenue for the Postal Service, outside of an omnibus rate proceeding. The Postal Service is providing revenue and cost information projected for FY 1996, using FY 1995 as the base year. . . . While these estimates are by their nature hypothetical, any net revenue resulting from these proposals will be helpful in meeting the Postal Service's goals for recovery of Prior Years' Loss amounts.

Request of June 7, 1996, at 3 (emphasis added).

As Order No. 1120 observes (at 1), the Commission is obliged in this case to evaluate the consistency of the cost coverages which will result from the rates proposed by the Postal Service with the policies and criteria of the Act. In this case the Postal Service has requested changes in the rates for a limited number of categories of mail. However, the Service has acknowledged that its proposals also will alter the institutional cost contributions of other mail categories. The Commission and the participants must be able to understand and evaluate the direct and indirect impacts of the Service's proposal on all classes and categories to see if they are sufficiently important to affect the Commission decision. *See for example* PRC Op. MC93-1, para. 428. For this reason, the Commission does not limit its review to those services for which rate changes are requested. Moreover, the Postal Service has further severed the connection to the findings and recommendations in R94-1 by projecting costs and revenues for a different test year. Under these circumstances, the Postal Service refusal to provide information may result in a delayed recommended decision.

The Commission has determined that it is not necessary to invoke section 3624(c)(2), or suspend all procedural dates in the case at this time. It is clear that the Service has failed to comply with lawful Commission orders, but the extent to which this has caused a delay in the consideration of its request is not currently clear. It is the Commission's intent to provide a decision in this case promptly, and if at all possible, within the 10-month period described in the statute. At the same time, the Commission gives notice that if its decision is delayed beyond 10 months as a result of the Postal Service failure to comply with Orders No. 1120 and 1126, it will invoke § 3624(c)(2).

To minimize any delay, the Commission has instructed its staff to prepare documents showing the base year 1995 calculation of the direct and indirect city carrier costs using the established methodology of single subclass stops. These workpapers follow, as closely as possible, Postal Service witness Patelunas' WP-B, Base Year cost segment spreadsheets. That information has been developed and will be provided to participants in Library Reference MC96-3, PRC-LR-1. The Commission also has prepared documents showing the base year costs attributed to the classes and services using approved methods, and the established test year attributions employing, to the extent possible, the roll-forward procedure used by Postal Service witness Patelunas. This information will be provided in Library Reference MC96-3, PRC-LR-2. This estimate of test year attributable costs will enable participants to calculate the relative contributions to institutional costs which would result if other aspects of the Postal Service direct case are assumed as

given. These documents will allow participants and the Commission to better evaluate the Postal Service request.

The Commission is dismayed by the Service's refusal to comply with its lawful order. The framers of the Postal Reorganization Act no doubt believed that institutional comity between two federal agencies would obviate the need for subpoena power in rate proceedings. The Commission found that procedural fairness in this case requires that the parties have notice of the effects of the Service's rate proposals. The Service simply refuses to furnish what is required. The parties to this case are thereby deprived of important and relevant information. In order to prevent the ratesetting mechanism established by Congress from simply breaking down, the Commission will attempt to minimize the consequence of the Service's refusal so that this case can proceed. Although the Commission has acted to mitigate the Service's noncompliance in this instance, it may still have to impose sanctions in this proceeding if the Service's refusal to comply with lawful orders extends this case beyond 10 months.

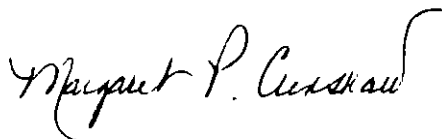
The Postal Service should not assume that the Commission's actions in this fairly limited case are an indication that in future cases it may refuse to comply with lawful Commission orders with impunity. It should be clear to the Service that when it disputes existing approaches to attribution, it must present, explain, and justify variances from the norm. Failure to do so invites conflict and controversy which could easily delay subsequent decisions on more complex or controversial rate requests.

It is ordered:

The Office of the Consumer Advocate Motion Under 39 U.S.C. § 3624(c)(2) for Day-For-Day Extensions in the Procedural Schedule and the Ten-Month Decisional Deadline, filed August 12, 1996, is denied without prejudice. The Commission will not impose day-for-day extensions in the procedural schedule and the 10-month decisional deadline at this time.

Issued by the Commission

(S E A L)



Margaret P. Crenshaw
Secretary