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

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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

SPECIAL SERVICES REFORM, 1996

Docket No. MC96-3

ANSWER IN OPPOSITION TO MOTION OF DAVID B. POPKIN TO COMPEL
RESPONSE TO DBP/USPS-T8-16[D] AND TO MOTION OF DAVID B. POPKIN
TO MODIFY THE COMMISSION'S RULES OF PRACTICE

The United States Postal Service hereby responds to the Motion of David B. Popkin to compel a response to DBP/USPS-T8-16(d) and the Motion of David B. Popkin to Modify the Commission's Rules of Practice, both filed on October 4, 1996.

MOTION TO COMPEL

Interrogatory DBP/USPS-T8-16(d) requests that witness Needham supply Mr. Popkin with a copy of Postal Service Library Reference SSR-137. Mr. Popkin uses as a pretext for this discovery request the "instructions" preceding his initial set of interrogatories directed to postal witnesses and filed on August 9, 1996.

Mr. Popkin's belief that he is entitled to receive copies of library references is clearly the product of his own imagination, for the Commission's Rules of Practice and Procedure and the Special Rules of Practice impose no such burden. Specifically, Commission Rule of Practice and Procedure 31(b) and Special Rule of Practice 5 authorize parties to file library references "when documentation or materials are too voluminous reasonably to be distributed." Library Reference SSR-137 fits within this category, as it consists of 67 pages of copies of public documents and an engineering study. The Postal Service is, therefore, under no legal obligation to comply with Mr. Popkin's demand that he be sent a copy of this library reference.

The Postal Service submits, moreover, that the instant motion is unreasonable.

POSTAL RATE COMMISSION
DOCKETED
OCT 11 1996
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- 2 -

and frivolous, since Mr. Popkin could have undertaken some self-help steps to avert this conflict. Specifically, Mr. Popkin had ample opportunity to review and copy Library Reference SSR-137, filed on August 23, 1996 and available for inspection and duplication at the Commission and the Postal Service Headquarters Library, during his visit to Washington from September 9 to September 11, 1996, when he appeared at the Commission to conduct extensive cross-examination of Postal Service witnesses. He therefore cannot deny that he had access to this library reference and the opportunity to make his own copy of it. It appears that Mr. Popkin would simply prefer to have the Postal Service photocopy the library reference on his behalf, if for no other reason than to save himself a few dollars on duplication costs.

The Postal Service takes offense at Mr. Popkin's apparent attempt to use motion practice to achieve that objective. Nonetheless, for the Presiding Officer's benefit and in the interest of cooperation, the Postal Service has this day undertaken steps to moot this controversy by sending Mr. Popkin a copy of Library Reference SSR-137 for inspection, with a request that he return the document to the undersigned counsel within a reasonable period of time. See Letter from Anthony Alverno, Attorney, to David B. Popkin (August 11, 1996) (attached). This measure permits Mr. Popkin to review and photocopy the contents of that library reference as he deems appropriate. As Mr. Popkin has been sent a copy of the library reference for his inspection, the Postal Service submits that this matter is moot and requests that the Presiding Officer deny the instant motion on that basis.

MOTION TO MODIFY RULES OF PRACTICE

Mr. Popkin proposes a modification to the "Commission's Rules of Practice" so that "if a response filed to an Interrogatory utilizes a Library Reference and all of the Intervenors receiving the response are located 50 or more miles from Washington,

then the party responding must provide a copy of the Library Reference with the response." The proposed modification is more properly the subject of a rulemaking and is of little practical value in the instant docket.

First, Mr. Popkin has proposed a modification to the "Commission's Rules of Practice," which the Postal Service understands to be the Commission's Rules of Practice and Procedure at 39 C.F.R. Part 3001. Changes to such rules are generally proposed in the form of a rulemaking published in the *Federal Register*, so as to enable all interested persons to be apprised of the proposed changes and offer comments thereon. The need for publication in the *Federal Register* is particularly compelling here, since a number of regular participants in rate filings have opted not to take part in this proceeding, and therefore have no notice of this proposed change.

Secondly, the modification proposed by Mr. Popkin would be of little practical value. As described in Mr. Popkin's Motion, the respondent to a discovery request would send library references that have been cross-referenced in discovery responses to intervenors that are to receive the response only when *all* such intervenors receiving the response are located outside Washington, D.C. The chance of this occurring is quite slim, since, in past dockets, numerous intervenors located within a 50 mile radius of Washington have opted to receive all discovery responses. Indeed, in the instant proceeding, the proposed modification is of no consequence, since intervenors located within a 50 mile radius of Washington have opted to receive discovery requests and objections and answers thereto pursuant to Special Rule of Practice 3(c). See, e.g., *Direct Marketing Association, Inc. Request for Service of Discovery Requests, Objections and Answers Thereto* (July 9, 1996).

Assuming, however, that Mr. Popkin intended to propose a modification to the Special Rules of Practice in this docket so as to require that all participants filing

- 4 -

discovery responses containing cross-references to library references be required to serve copies of any such library references to participants that have opted to receive discovery responses and are located 50 miles outside Washington, D.C., his proposal must still fail. First, pursuant to Order No. 1115, Mr. Popkin's opportunity to comment on the special rules of practice in this docket has long expired. That he opted not to raise such a proposal at the commencement of this case is inexplicable, particularly given his longstanding participation and presumed familiarity with customary practices in rate and classification proceedings. In addition, such a proposal would defeat the purpose of permitting parties to file library references altogether. In past dockets, the Commission has permitted participants to submit library references when documentation or materials are "too voluminous reasonably to be distributed." See, e.g., Special Rule of Practice 5, Docket No. MC96-3. To require that respondents to discovery distribute them to even a subset of participants would be unreasonable, since, by definition, library reference materials are "too voluminous reasonably to be distributed."

The Postal Service does not, however, wish to leave the impression that it is unwilling to accommodate reasonable requests for inspection of library reference materials. Should participants located outside the Washington metropolitan area wish to inspect library reference materials, Postal Service counsel responsible for the subject matter related to the library reference are willing to work informally with them to facilitate inspection when it is apparent that such participants will not otherwise have the opportunity to inspect them.¹

¹ Here, the undersigned counsel determined it was unnecessary to contact Mr. Popkin and attempt to accommodate his request, since, simultaneously with the filing of DBP/USPS-T8-16(d), Mr. Popkin gave notice of his intent to conduct oral cross-examination of postal witnesses, thereby signaling that he would be physically present in Washington, (continued...)

- 5 -

For these reasons, Mr. Popkin's motion to modify the Commission's rules should be denied.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

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October 11, 1996

¹ (...continued)

D.C. where Library Reference SSR-137 is available for public inspection and duplication.



October 11, 1996

Mr. David B. Popkin
P.O. Box 528
Englewood, NJ 07631-0528

Dear Mr. Popkin:

This is in reference to your motion to compel a response to interrogatory DBP/USPS-T8-16(d). Interrogatory DBP/USPS-T8-16(d) requests that the Postal Service supply you with a copy of Postal Service Library Reference SSR-137, filed on August 23, 1996 in Postal Rate Commission Docket No. MC96-3. Given that you were in Washington, D.C. for hearings at the Commission on the Postal Service's direct case in mid-September and had ample opportunity to inspect Library Reference SSR-137 at that time, we do not believe your request has any merit. Nonetheless, in the spirit of cooperation, I have enclosed my copy of Library Reference SSR-137 for your inspection.

Once you have completed your review of this document, I would appreciate it if you would kindly return it to me at the address below within a reasonable time, but no later than the end of November 1996.

Thank you for your cooperation.

Best regards,

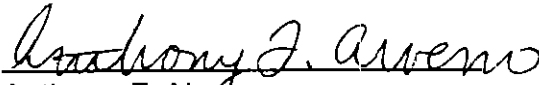
A handwritten signature in cursive script that reads "Anthony Alverno".

Anthony Alverno
Attorney

Enclosure

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.


Anthony F. Alverno

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Washington, D.C. 20260-1137
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