

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

UNITED STATES POSTAL SERVICE
MOTION TO STRIKE TESTIMONY OF WITNESSES
BENTLEY AND THOMPSON,
OR, IN THE ALTERNATIVE, FOR PRODUCTION
OF A COMMISSION WITNESS
(November 14, 1996)

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On September 20, 1996, the Commission gave notice that it had placed two library references, PRC LR-1 and LR-2, in the Docket Section for public use. According to the Commission, these workpapers provided "cost information described in the Commission's Order No. 1134," which was also issued on September 20, 1996. Notice of Filing of Workpapers (September 20, 1996).¹ In Order No. 1134, the Commission indicated that the two library references were produced pursuant to the Commission's instruction to 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," and "showing the base year costs attributed to the classes and service using approved methods, and the established test year attributions employing, to the extent possible, the roll-forward procedure used by Postal Service witness Patelunas." Order No. 1134 at 16.

Following issuance of the two Commission library references, various parties to this proceeding have made reference to, and relied upon, those library references in written

¹ The Commission revised these library references on September 30, 1996. Notice of Filing of Revised Workpapers (September 30, 1996).

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testimony and in interrogatory responses. For example, MMA witness Bentley has used PRC LR-1 and LR-2 to derive his own library reference, MMA-LR-1, and to support his conclusion that "the Commission-approved methodology attributes \$1.1 billion more costs than the [Postal] Service's methodology." Bentley testimony, page 2, lines 18-19. The OCA likewise has used PRC LR-1 and LR-2 to produce OCA-LR-5 and LR-6, filed on October 31, 1996. OCA witness Thompson cites to OCA-LR-6 and cost coverages derived therefrom in her response to USPS/OCA-T400-2 (revised November 13, 1996).

As yet, none of this written testimony and responses have been moved and admitted into evidence in this case. However, if, as seems quite likely, common practice at the Commission is followed, and designations and/or motions for admission soon are made, the issue of the evidentiary status of the Commission's library references, and of all testimony relying upon them, will be squarely before the Commission. As set out below, the Postal Service disputes the evidentiary status of such materials. In order to further an orderly resolution of such a dispute, the Postal Service now hereby moves to strike all testimony and interrogatory responses relying on PRC LR-1 or PRC LR-2, on the ground that no competent witness has been made available to answer questions regarding these references, thereby denying the due process rights of the Postal Service and all other participants.²

Under the Commission's rules, library references are not evidence. "Designation of a document as a library reference is a procedure for facilitating reference to the

² In order to preserve its due process rights, the Postal Service will designate interrogatory responses and will conduct oral cross-examination on documents and information covered by this motion, pending final disposition of the matters at issue. In the event the motion to strike is granted, the affected testimony, interrogatory responses and oral cross-examination can be stricken from the record.

document in Commission proceedings and does not, by itself, confer any particular evidentiary status upon the document.” Rule 31(b), 39 CFR § 3001.31(b). The Commission’s rules provide that “witnesses whose testimony is to be taken shall be sworn, or shall affirm, before their testimony shall be deemed evidence in the proceeding or any questions are put to them.” Rule 31(a).

In lodging PRC LR-1 and LR-2 in the Docket Section, the Commission did not designate a witness who would authenticate and testify to the reliability and veracity of information contained in these library references, nor did it establish any procedure whereby such questions could be answered on the record.³ Thus, no party has had an opportunity to test, through questioning on the record, under oath, the extent to which the library references reflect a particular methodology, the consistency of that methodology with methods used in prior Commission proceedings, the rationale underlying that methodology, and the reliability and validity of that methodology.

Since the Commission’s staff prepared the material in question, it is not surprising that, in the course of discovery, the Postal Service has established that no other witness is capable of sponsoring and explaining the Commission’s library references. Consider, for example, the testimony of Major Mailers Association witness Richard Bentley. Witness Bentley recently has confirmed in interrogatory responses that he has not performed any independent analysis of the Commission’s library references, and

³ This lack of procedure contrasts with previous occasions in which the Commission produced its own cost analyses as library references. In Docket No. R94-1, for example, the Commission explicitly required that, in order for Commission Library references to be relied upon as record evidence, a witness would need to be produced to sponsor the library references in question. See Docket No. R94-1, Presiding Officer’s Ruling No. R94-1/38 at 8 (June 20, 1994). In citing this precedent, the Postal Service does not concede that sponsorship of a Commission analysis by a non-Commission witness unfamiliar with the development of the analysis would be sufficient to satisfy due process requirements.

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that he relies exclusively on the Commission's representations regarding the contents and validity of the analyses contained in those library references. See Response of Major Mailers Association Witness Richard Bentley to Second Set of Requests For Production of Documents and Interrogatories of United States Postal Service (USPS/MMA-16-26)(November 7, 1996). It appears that the other witnesses similarly lack sufficient knowledge to answer questions regarding the creation and validity of the Commission's work. See Answers of the Office of the Consumer Advocate to Interrogatories of United States Postal Service, Witness: Sheryda C. Collins (USPS/OCA-T400-39-48)(November 13, 1996), Answers of the Office of the Consumer Advocate to Interrogatories of United States Postal Service, Witness: Roger Sherman (USPS/OCA-T100-38-60)(November 13, 1996). Note also that on November 7, 1996, the Postal Service filed interrogatories on witness Thompson seeking to determine the extent of the OCA's knowledge of PRC LR-1 and LR-2. If, as expected, witness Thompson confirms that she has insufficient familiarity with the analyses contained therein, her reliance on the extra-record analysis would share the same infirmities as witness Bentley's, and would be subject to the same objections.

It has been firmly established that if the Commission seeks to inject into its decision-making process any analysis not sponsored by any participant, it must subject that analysis to the same adversarial testing on the record to which party-sponsored testimony is subjected. See *MOAA et al. v. USPS*, 2 F.3d 408 (D.C. Cir. 1993). To date, the Commission has yet to sponsor for record review any of its various methodologies for attributing city carrier costs.

The fact that witnesses representing parties in this proceeding have made reference to the Commission's most recent extra-record city carrier and roll-forward analyses does nothing to cure the foundational and due process shortcomings

associated with those analyses. To the extent the Commission's library references are not, and, under applicable legal standards and Commission rules, may not be relied upon as evidence, all testimony and responses of witnesses Bentley and Thompson, (and, if applicable, of witnesses Collins and Sherman), which make reference to and rely upon, these library references, may not be admitted into evidence.⁴ The Postal Service hereby objects to any such admission.

In the event that the Commission chooses not to exclude from the record all testimony relying on PRC LR-1 and LR-2, the Postal Service requests, in the alternative, that the Commission produce a witness competent to testify regarding the analyses contained in those library references, and make that witness available for written and oral questioning under oath. Furthermore, in the event that such a witness were to be produced, the Postal Service moves that this witness be recused from any

⁴ Since not all answers to pending interrogatories have been received as of the drafting of this motion, the Postal Service reserves the right to object to admission of answers of other witnesses which rely upon PRC LR-1 and LR-2.

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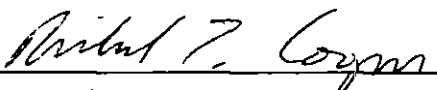
further role in the decision-making functions of the Commission for the remainder of this proceeding.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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November 14, 1996

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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