

005951 ORIGINAL

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

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SPECIAL SERVICES REFORM, 1996

POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY
Docket No. MC96-3

SECOND SUPPLEMENTAL FILING OF UNITED STATES POSTAL SERVICE
CONCERNING NOVEMBER 14 MOTION TO STRIKE
(November 22, 1996)

The United States Postal Service hereby supplements its Motion to Strike Testimony of Witnesses Bentley and Thompson, or, in the Alternative, for Production of a Commission Witness, filed November 14, 1996. In this supplemental filing, the Postal Service addresses the timeliness of its initial motion and specifies those portions of Major Mailers Association witness Bentley's, and Office of the Consumer Advocate ("OCA") witness Collins's and Sherman's written testimony, interrogatory responses and oral cross-examination which the Postal Service requests stricken from the record, pursuant to the Presiding Officer's ruling contained at Tr. 5/1336-37.¹

I. THE TIMELINESS OF THE MOTION TO STRIKE

Special Rule 1(C) provides that "motions to strike testimony or exhibit materials are to be submitted in writing at least 14 days before the scheduled appearance of the witness." Under this rule, the Postal Service's motions to strike portions of the testimony and interrogatory responses of witnesses Bentley, Thompson, Collins and Sherman would have been due no later than Monday, November 4, 1996. Sufficient information was not available for the Postal Service to make its motion by that date. It was not clear until the receipt of witness

¹ The Postal Service is not moving to strike any materials relating to OCA witness Callow.



Bentley's answers to USPS/MMA-16 - 26 on November 7, 1996, that Mr. Bentley had "made no independent analysis of Library Reference PRC-LR-1 and 2." Tr. 6/1971; *see also* Tr. 6/1972.

It also was not clear to the Postal Service whether OCA witnesses had consulted or relied upon PRC-LR-1 and 2. The Postal Service directed some interrogatories to OCA witness Sherman on October 23, 1996 seeking to determine if and how those library references might have figured into some of the conclusions drawn in his testimony. Those responses were received on November 6, 1996. The Postal Service directed similarly-aimed interrogatories to OCA witness Callow on October 25, 1996, and to OCA witnesses Collins and Sherman on October 30, 1996. Those responses were received on November 8, 1996 and November 13, 1996, respectively.

OCA-LR-5 and 6, which use data from PRC-LR-1 and 2 were not filed until October 31, 1996. They apparently had not been used or relied upon by any OCA witness in written testimony. At that point, without an opportunity to fully examine them, it was not clear whether the library references were what they purported to be, or whether any OCA witness intended to sponsor or rely upon them. The first indication the Postal Service had that any OCA witness might be relying upon information from these library references was witness Thompson's response to USPS/OCA-T400-21, first filed on November 4, 1996 (and subsequently revised two times). Shortly thereafter, on November 7, 1996, the Postal Service filed interrogatories concerning OCA-LR-5 and 6 on witness

Thompson. Responses to those interrogatories, which were redirected to the OCA, were received just yesterday.²

Accordingly, it simply was not possible for the Postal Service to file its motion to strike 14 days before hearings on intervenor testimony began. Such circumstances demonstrate good cause why the Postal Service's motion to strike was not untimely.³

II. SPECIFIC CITATIONS THAT SHOULD BE STRICKEN FROM THE RECORD

The Postal Service moves that the following references relating to the testimony of MMA witness Bentley be stricken from the record:

1. Tr. 6/1893, lines 17-21, beginning, "Thus, as I show later. . ."
2. Tr. 6/1896, lines 4-6
3. Tr. 6/1896, lines 7-13
4. Tr. 6/1896, line 16 - 1897, line 3
5. Tr. 6/1897, lines 5-7, beginning, "If the Postal Service's CRA. . ."
6. Tr. 6/1897, lines 9-10, beginning, "Again, if the CRA Reports. . ."

² Those responses indicate that the OCA "simply executes unmodified Commission cost model programs on unmodified 'before rates' factor files already included in PRC-LR-2 as if it were a 'turn-key' cost model" and that it "has not had the resources to replicate the Commission's cost model." *Answer to USPS/OCA-T200-20, Answers of the Office of the Consumer Advocate to Interrogatories USPS/OCA-T200-18-32, 34-37 Redirected from Witness Thompson*, November 21, 1996.

³ If the Postal Service should have filed a request for waiver of Special Rule 1(C), then it asks that this pleading be treated as such a request.

7. Tr. 6/1897, lines 11-17
8. Tr. 6/1929-1933
9. Tr. 6/1947-1948
10. Tr. 6/1950-1952
11. Tr. 6/1966-1970
12. Tr. 6/1972-1976
13. Tr. 6/1980
14. Tr. 6/2005, lines 15-25
15. Tr. 6/2006, line 9 - 2007, line 16, beginning, "The Commission doesn't normally. . . ."
16. Tr. 6/2008, line 18 - 2009, line 5⁴
17. Tr. 6/2022, line 6 - line 15, beginning, "If you raise the level. . . ."

The Postal Service moves that the following references relating to the testimony of OCA witness Collins be stricken from the record:

Tr. 5/1773-1775

The Postal Service moves that the following references relating to the testimony of OCA witness Sherman be stricken from the record:

Tr. 7/2383-2384

⁴ The Postal Service also has moved to strike Tr. 6/2009, line 6 - 2010, line 3, relating to MMA witness Bentley's new analysis. *See Supplemental Comments of United States Postal Service to Motion to Strike Major Mailers Association Witness Bentley's New Analysis*, November 21, 1996.

The Presiding Officer also ruled that the Postal Service should provide "sufficient explanation" of "the link between the witness's testimony and the grounds for exclusion...." Tr. 5/1337. The references cited above refer to results from PRC-LR-1 and 2, in terms of overall attributable cost levels, specific attributable costs for specific mail categories, shifts between attributable and institutional costs, and cost coverages.⁵ PRC-LR-1 and 2 are library references, which under Special Rule 5 are "not evidence unless and until . . . designated and sponsored by a witness." PRC-LR-1 and 2 contain a costing methodology which has not been sponsored by a witness and has not been subject to full scrutiny on the record as is required by due process.

The position of the various witnesses, who cited to or relied upon PRC-LR-1 and 2, is best summarized in the following exchange between Commissioner Haley and MMA witness Bentley:

COMMISSIONER HALEY: I take it from the discussions that we have been having today that you do understand of course the Commission's cost methodology?

THE WITNESS: I would not say that I understand everything about the Commission's methodology and I am the first to admit that.

COMMISSIONER HALEY: But you have been able to use it from your --

THE WITNESS: I am able to use the results. I am not able to replicate it.

⁵ In fact, some of the specified materials consist of interrogatories directed to the witnesses by the Postal Service and oral cross-examination conducted by the Postal Service. The Postal Service pursued these matters in order to protect its due process rights at the time, but now moves that they be stricken from the record.

COMMISSIONER HALEY: Okay. Okay --

THE WITNESS: Nor have I ever tried.

Tr. 6/2026-2027. The participants who use the results can neither replicate, verify, or explain the costing methodology which produced the results.

It is true that witnesses in proceedings before the Commission often rely on exogenous sources. For example, both the Postal Service and the Commission use DRI information for forecasting purposes without that information being sponsored or questioned. Use of DRI information, which is widely accepted and used for a variety of purposes other than postal ratemaking, as an input for forecasting purposes is quite different from using the results of a detailed and complex costing methodology concerning attributable and institutional cost issues at the heart of this and other Commission proceedings. If participants are allowed to use results in this fashion, then it would be an easy task for any participant in these proceedings to shield much of its case from examination simply by hiring two experts -- one to perform the study and another to use the results -- and only presenting the expert who uses the results.

It is also true that witnesses in Commission proceedings often use material presented in library references. Normally, however, either these witnesses, another witness or the institutional sponsor of the witness will respond to discovery on the calculations and assumptions contained in the library references. Again, this is not comparable to the instant situation where participants are relying

on results of a detailed and complex costing methodology which has escaped record scrutiny.

Moreover, in this situation, the extra-record material has been prepared by the Commission -- tasked with being the impartial trier of fact in these proceedings -- making it all the more critical that such material be subject to full review and testing on the record. The very analysts who prepared the material presumably will be advising the Commission on its deliberations in this docket. The Commission has not indicated that such individuals will be recused from participation in its deliberations in the event these library references are treated as evidence. Further, the Commission has not established any procedures whereby this material might be used or relied upon consistent with due process.

Accordingly, the Postal Service's November 14 motion to strike or, in the alternative, for production of a Commission witness must be granted.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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November 22, 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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