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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
Docket No. MC96-3

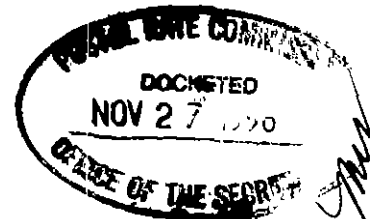
MAJOR MAILERS ASSOCIATION'S RESPONSE
TO UNITED STATES POSTAL SERVICE'S
NOVEMBER 22 SUPPLEMENT FILING CONCERNING
NOVEMBER 14 MOTION TO STRIKE

Major Mailers Association hereby responds to the Postal Service's supplemental pleading, as provided for by the Presiding Officer's Ruling (Tr.5:1337-38).

INTRODUCTION AND SUMMARY

Timeliness. The Postal Service's supposed excuse for its tardiness is not credible. The Service's motion is a repeat of its similar motion, in Docket No. R94-1, to strike Mr. Bentley's testimony about a Commission library reference that Mr. Bentley could not replicate. As soon as the Service read the Bentley testimony in this proceeding, which parallels his R94-1 testimony, the Service knew that it would file another motion to strike.

Moreover, 25 days before he testified in this proceeding, Mr. Bentley answered the Postal Service's first set of interrogatories by confirming that he had not made any independent analyses of PRC-LR-1 and LR-2. The Postal Service did not need to await answers to later interrogatories before filing its motion to strike.



The Merits. Although the Service tries to dispute the admissability of the Bentley testimony, the Service's arguments lack substance. The Service's real goal is to erase the Bentley testimony instead of rebutting it. But the Commission's Special Rules of Practice specify that motions to strike are not to be used as "substitutes for...rebuttal evidence" (Rule 1.C). The Service should not be saved the task of presenting rebuttal testimony that can supply the information requested by Orders No. 1120, 1126 and 1134.

DISCUSSION

I. The Postal Service Has Not Shown Good Cause For Its Late Filing

The Service offers only one purported excuse for its failure to comply with Special Rule 1.C's 14-day requirement. According to the Service, the Service was unaware that Mr. Bentley "had 'made no independent analysis of'" PRC-LR-1 and LR-2 until receipt of Mr. Bentley's answers to the Service's second set of interrogatories (Second Suppl. Filing, pp. 1-2).

The Service's statement is, at best, disingenuous.

1. *The Docket R94-1 Precedent.* When Mr. Bentley filed his testimony in this proceeding, on September 30, the Postal Service knew that Mr. Bentley had not and could not have made such an "independent analysis." That is because this aspect of Docket No. MC96-3--and both Mr. Bentley's testimony and the Service's motion to strike--are a replay of Docket No. R94-1.

In this proceeding, as in Docket No. R94-1, the Commission ordered the Postal Service to produce information showing its costs using the Commission's methodology. In both proceedings,

the Postal Service refused to do so, alleging (among other things) undue burden. In order to refute the Postal Service's contention in Docket No. R94-1, the Commission issued Library References PRC-LR-2 and LR-3. (See POR No. R94-1/38, p. 7.) For the similar reasons, in this proceeding, the Commission issued Library References PRC-LR-1 and LR-2, which are analogous to the R94-1 documents.

In both Docket No. R94-1 and this proceeding, Mr. Bentley sponsored direct testimony that referred to the library references as illustrating his conclusion that the Commission-approved methodology and the Service's methodology are about \$1 billion apart.¹ In Docket No. R94-1, when the Service filed interrogatories asking Mr. Bentley to explain the Commission's library references, Mr. Bentley filed a Statement that he had not performed the necessary computations.

Also, in his R94-1 Statement, Mr. Bentley explained why, with his limited means, he could not make an independent analysis of the Commission's library reference in less than four to seven months.² In this proceeding, Docket No. MC96-3, Mr. Bentley filed his testimony only days after the Commission issued PRC-LR-1 and LR-2. So the Postal Service had to know that Mr. Bentley made no independent analysis of those new library references.

Thus the Service was in a position to file its motion to

¹ Compare e.g. R94-1 Tr. 13A:6082-84 with MC96-3 Tr. 6:1893, 1895-96.

² See Bentley Statement attached to MMA's Objection to USPS' Interrogatories USPS/MMA-T1-19(b), 19(c) and 20, dated July 18, 1994.

strike weeks before Mr. Bentley was scheduled to testify.

The First Set of Interrogatories. If the Service had any lingering doubts, Mr. Bentley resolved them when he answered the Service's first set of interrogatories. Then Mr. Bentley acknowledged that he had "not attempted to make the detailed calculations" that the Service requested about the apportionment of costs (USPS/MMA-6(c); Tr.6:1940) and that he had simply "accept[ed] the Commission's representation" in PRC-LR-1 and LR-2 (USPS-MMA-8(a); Tr.6:1944). Those answers were filed on October 25, 25 days before Mr. Bentley testified and 11 days before the filing deadline for motions to strike.

The Second Set of Interrogatories. The Service was not justified in delaying its motion until after November 7, the date on which it received answers to its second set of interrogatories. Although these interrogatories asked Mr. Bentley if he had performed any analysis of PRC-LR-1 and LR-2 (Tr. 6:1971-72), those questions could have been asked as part of the Postal Service's first set of interrogatories, filed October 11. Had the Service done so, it would have received the answers long ago. The Service cannot rely upon its delay in filing interrogatories as an excuse for the delay in filing its motion.

Conclusion. The Commission should strictly enforce the filing deadline that is specified in its regulations. *Cf. Milton and Morris Zack*, 21 FERC ¶ 61, 123 (1982) (rejecting notice of intent that was filed two days late).

**II. The Postal Service's Arguments On the
Merits Are Premised Upon A Misunderstanding
Of The Legal Rules Regarding Expert Testimony**

The Service's November 22 pleading also attempts to parry MMA's arguments on the merits. (See MMA's November 18 Opposition, pp. 2-7.)

First the Service continues to complain (Second Suppl. Filing, pp. 6-7) that PRC-LR-1 and LR-2 "has escaped record scrutiny." But, even if that library reference itself is hearsay, Mr. Bentley's testimony about the study is not hearsay. Mr. Bentley testified under oath, and the Postal Service's written and oral cross-examination explored the limits of his knowledge about the Commission study. Those limits go to the weight that is to be given to Mr. Bentley's testimony, not to its admissability.

Secondly, the Service tries to blunt MMA's citation of court decisions under Federal Rule of Evidence 703, which permits experts to base their testimony upon reliable hearsay that is not itself admissible in evidence. The Postal Service argues that such a rule would permit a participant "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" (Second Suppl. Filing, p. 6).

The Postal Service need not have this fear. The Federal Rule of Evidence allows experts to rely on nonrecord material only "if" it is "of a type reasonably relied upon by experts in the particular field." (See 28 U.S.C. Fed. R. of Evid. Rule 703.) In the Postal Service's far-fetched hypothetical case, the

manufactured study would not qualify.

Lastly, the Service's evidentiary arguments ignore that this Commission's own Rules of Practice direct that "relevant and material evidence which is not unduly repetitious or cumulative shall be admitted." (Rules of Practice §31(a). Italics supplied.) (See also authorities collected in MMA's November 25 Response to USPS' Suppl. Comments, pp. 9-10.)

III. By the Weakness of Its Argument, the Service Shows That The True Purpose Of Its Motion Is Contrary To Special Rule 1.C

By filing its motion, the Service hopes to erase Mr. Bentley's testimony instead of rebutting it.³ But that would circumvent the Commission's warning, in its Special Rules of Practice (§1.C), that "motions to strike...are not substitutes

³ In its latest filing, the Service demonstrates once again its aversion to filing rebuttal to Mr. Bentley's testimony. (See Comments of USPS Concerning Rebuttal Testimony of MMA Witness Bentley's New Analysis, dated November 25.) There the Service claims first that its "problem" with Mr. Bentley's testimony is "compound[ed]" by MMA's action in providing the Service with "copies of the documents that Mr. Bentley had with him on the witness stand, with additional footnotes to sources added" (Id. at 2. USPS' emphasis). But the three footnotes that Mr. Bentley added to a workpaper will help--not hinder--the Postal Service's understanding of that document. Identifying the sources of numbers, the first footnote cited pages in a Postal Service exhibit as the source; the second footnote identified a schedule in a Commission Opinion as the source; and the third footnote stated that a number in the workpaper was derived by dividing a number in one column of the workpaper by a number in another column, multiplied by a number in a third column. Second the Service attaches copies of Mr. Bentley's documentation to its pleading, as though those documents support the Service's contention that it has "insufficient time" to prepare rebuttal. But the Service has never taken advantage of MMA's offer--made at the November 19 hearing (Tr. 6:2011-13, 2042-43) and repeated in MMA's November 22 letter to the Service--to have Mr. Bentley answer any questions about these (essentially self-explanatory) documents. Plainly, the Service professes uncertainty about Mr. Bentley's analysis only in order to excuse its unwillingness to submit rebuttal.

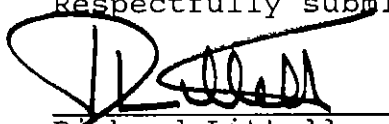
for...rebuttal evidence."

If the Service really disagrees with Mr. Bentley's testimony that the dollar difference between the two methodologies is about \$1 billion, it should present rebuttal evidence. Of necessity, such rebuttal evidence must disclose the Service's own estimate of its costs according to the Commission's methodology, as well as the Service's own. That is precisely the information that the Commission has been ordering the Service to provide (Orders Nos. 1120, 1126, 1134).

FOR THE FOREGOING REASONS, MMA asks that the Postal Service's Motion to Strike, dated November 14, 1996, be:

- (A) Denied on the merits as to MMA witness Bentley's testimony; or
- (B) Dismissed as untimely.

Respectfully submitted,



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November 27, 1996

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document (1) upon the U.S. Postal Service by facsimile (2) upon the Office of the Consumer Advocate by hand delivery and (3) upon the other parties by First-Class Mail.



Jeffrey Plummer

November 27, 1996