

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

RECEIVED
DEC 5 4 33 PM '96

SPECIAL SERVICES REFORM, 1996

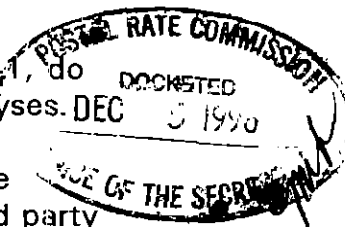
POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY
Docket No. MC96-3

MOTION OF UNITED STATES POSTAL SERVICE FOR RECONSIDERATION OF
PRESIDING OFFICER'S RULING NO. MC96-3/28
(December 5, 1996)

The United States Postal Service hereby moves for reconsideration of Presiding Officer's Ruling No. MC96-3/28, which allowed Major Mailers Association ("MMA") witness Bentley's new analysis to be admitted into evidence and which established a truncated discovery schedule for that analysis.¹ The admission of this new analysis into evidence is a denial of the Postal Service's rights to due process, and the truncated discovery schedule established by the ruling is insufficient to remedy the due process violation.

A major underpinning of Presiding Officer's Ruling No. MC96-3/28 appears to be that due process will not be denied because witness Bentley's new analysis is easily understandable. The Ruling states:

First, the three tables provided by witness Bentley, Tr. 6/2039-41, do not present new, particularly innovative, or particularly complex analyses. While a participant might have questions about the source of some figures, or about computations used to develop other figures in these tables, there appears to be nothing likely to confound a sophisticated party such as the Postal Service.



Ruling No. MC96-3/28 at 4. This finding prejudices the issue. The real question is whether the analysis is reliable, not whether it is "new" or "innovative."

¹ *Presiding Officer's Ruling Denying Motion to Strike, Allowing Discovery, and Adjusting the Procedural Schedule, Presiding Officer's Ruling No. MC96-3/28, November 27, 1996 ("Ruling No. MC96-3/28").*

- 2 -

Futhermore, the Ruling classifies the analysis as easily understandable at a mere first blush. This simply is not the case. As can be seen from the discovery filed by the Postal Service on witness Bentley, the three tables have raised a host of questions. *See United States Postal Service Interrogatories and Requests for Production of Documents to MMA Witness Bentley (USPS/MMA-27-41), December 5, 1996.*² First, witness Bentley has not provided electronic files (USPS/MMA-27), which would make verification of his calculations simpler and less time consuming. Second, it appears that witness Bentley performed certain analyses with the R94-1 data that he did not perform in MMA-LR-1 and vice versa (USPS/MMA-29, 40 and 41).³ Third, there may be errors in either witness

² The Postal Service does not intend the filing of this discovery to waive its argument that there is insufficient time to fully examine witness Bentley's new analysis. Rather, this first round of questions merely demonstrates that point, and, moreover, is necessitated by the Presiding Officer's Ruling. Furthermore, the Postal Service takes issue with the suggestion in the Ruling that the Postal Service might be held to have waived its objection to admission of witness Bentley's new analysis by its refusal to question him on this analysis at the hearing. *Presiding Officer's Ruling No. MC96-3/28 at 5*. As the Postal Service clearly stated at the hearing, there was insufficient time to examine the documents and conduct oral cross-examination:

MS. DUCHEK: I have absolutely no inclination to have Mr. Bentley explain these documents. It does me absolutely no good since I have not had an opportunity, nor will I in the short period of time available today, to examine these documents and see what they are all about.

Any examination I might want to do on those documents, I'm really effectively precluded from doing by just getting them today. So I don't see any purpose that would be served by Mr. Bentley doing anything with those documents.

Tr. 6/2043.

³ Of course, to the extent that witness Bentley *did* perform such analyses and they are supplied in response to the Postal Service's discovery request, additional time would be needed to examine those documents.

Bentley's calculations or in his documentation of them (USPS/MMA-38 and 39(g)). Finally, in addition to understanding and attempting to verify witness Bentley's calculations, there are issues of the meaning and significance of those calculations (USPS/MMA-30(c), 31(c), 35, 39(c) and (d)). These latter questions, in particular, are likely to generate follow-up questions.

The truncated discovery schedule established by the Ruling is clearly inadequate to allow for full examination of witness Bentley's new analysis. Given the press of preparing rebuttal testimony, the Postal Service barely had the time or resources to propound its initial written discovery. Moreover, the discovery schedule does not allow time for follow-up written discovery, nor does it provide for oral cross-examination of witness Bentley. Instead, it offers the Postal Service a "take it or leave it" proposition -- the Postal Service must hastily prepare rebuttal to witness Bentley or risk having its case extended. This does not extend adequate due process protections to the Postal Service.⁴

Presiding Officer's Ruling No. MC96-3/28 also appears to rest on the false assumption that the OCA's due process rights will be denied if it is not allowed to ask questions about prior analyses. The Ruling states, "It is reasonable and proper to ask a witness about his previous efforts to analyze an issue, and comparisons of analyses using data from previous periods often have significant probative value." *Presiding Officer's Ruling No. MC96-3/28 at 4*. Taken literally, if this is the standard to be applied, then proceedings before the Commission will be endless.

⁴ Until responses to its recently-propounded discovery are received, the Postal Service is unable to ascertain with certainty whether it will have follow-up written discovery, whether it will have oral cross-examination for witness Bentley, or whether it will file rebuttal testimony. What the Postal Service is able to ascertain with certainty, however, is that this whole process is taking time and resources away from other activities in the case, and that the Postal Service has been prejudiced accordingly.

- 4 -

Any and all prior analyses would be allowed into the record at any time, and any and all comparisons using earlier data -- whether stale or not -- would be deemed worthy of examination. Certainly, this cannot be what was intended. The value of prior analyses should be established on a case-by-case basis, and must be weighed against other parties rights to have adequate opportunity to subject those analyses to full record scrutiny.

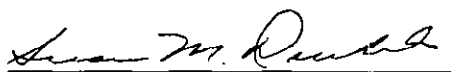
For all of the foregoing reasons, the Postal Service requests that its motion for reconsideration be granted.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

Daniel J. Foucheaux, Jr.
Chief Counsel, Ratemaking


Susan M. Duchek

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.


Susan M. Duchek

475 L'Enfant Plaza West, S.W.
Washington, D.C. 20260-1137
(202) 268-2990; Fax -5402
December 5, 1996