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UNITED STATES OF AMERICA  
POSTAL RATE COMMISSION  
OFFICE OF THE SECRETARY  
WASHINGTON, D.C. 20268-0001

Before Commissioners: Edward J. Gleiman, Chairman  
H. Edward Quick, Jr., Vice Chairman  
George W. Haley and W.H. "Trey" LeBlanc III

Special Services Fees and Classifications          Docket No. MC96-3

ORDER DENYING POSTAL SERVICE MOTION TO STRIKE

(December 12, 1996)

Presiding Officer's Ruling MC96-3/30 certified to the full Commission the United States Postal Service Motion to Strike Testimony of Witnesses Bentley and Thompson, or, in the Alternative, for Production of a Commission Witness (Motion). The Motion was filed on November 14, 1996, and supplemented on November 21 and November 22, 1996.<sup>1</sup> The Postal Service seeks to expunge from the record all instances where another party's witness has referred to PRC-LR-1 and PRC-LR-2, library references provided by the Commission to assist parties to understand the scope and impact of the Postal Service Request in this docket. In the alternative, the Service requests that the Commission

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<sup>1</sup> Supplemental Filing of United States Postal Service Concerning November 14 Motion to Strike, filed November 21, 1996; and Second Supplemental Filing of United States Postal Service Concerning November 14 Motion to Strike (Second Supplemental Filing), filed November 22, 1996.

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provide a witness to respond to written and oral questions concerning those library references. The motion is denied.

The Postal Service motion gives rise to several issues which deserve discussion. First, the motion fails to comply with Special Rule 1.C., a circumstance which presented unnecessary difficulties for opposing counsel and could have delayed this case. Second, the arguments presented by the Service in support of its motion are without merit. Finally, and perhaps most importantly, the Postal Service appears to have lost sight of the separate and complementary roles of the proponent and the decision maker in administrative proceedings.

**Procedural issues.** The Special Rules of Practice for this case, adopted in Presiding Officer's Ruling MC96-3/3, include a provision entirely devoted to motions to strike, Special Rule 1.C. That rule establishes two standards. It informs parties that motions to strike are requests for extraordinary relief and should not be used as substitutes for briefs or rebuttal evidence. The rule also sets specific time periods for filing - such motions must be submitted at least 14 days before the scheduled appearance of the affected witness. The Postal Service motion is in conflict with both of these standards.

Motions to strike are to be filed at least two weeks before a witness appears so that issues raised can be addressed by opposing counsel, and the Presiding Officer can make a decision before cross-examination begins. This allows orderly development of the record. The Postal Service filed its motion two working days before the scheduled appearance of a witness. Major Mailers Association (MMA) was able to provide a response before its

witness was scheduled to appear, Major Mailers Association's Opposition to United States Postal Service's Motion to Strike Testimony of MMA Witness Bentley (MMA Opposition),<sup>2</sup> but the need to respond on an expedited basis could have unreasonably disrupted counsel's preparation for hearings.

The Postal Service Motion did not request waiver of the 14 day requirement. In its Second Supplemental Filing the Service argues that it had not received responses to questions asking whether witnesses relied on PRC-LR-1 and PRC-LR-2, and therefore, it was unable to file its motion earlier; and it asks that a waiver be granted. The Service's excuse is without substance. It seeks to strike all responses from witnesses that make reference to PRC-LR-1 and PRC-LR-2, whether the witness relied on those documents (Thompson), or not (Sherman). The content of their answers is immaterial to the Service's motion. Since the Service seeks to exclude any mention of those documents, it could have, and should have, raised the essential issue in a timely fashion. This is especially so with regard to the prefiled prepared testimony of witness Bentley, which directly cites the two documents.

The Postal Service effort to exclude from the record all references to PRC-LR-1 and PRC-LR-2 also violates the instruction in Special Rule 1.C. that motions to strike are not to be used as substitutes for briefs or rebuttal evidence. As discussed more fully in the following section of this order, it has been the

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<sup>2</sup> On November 22, 1996, MMA filed a Motion Requesting Permission to Correct a Page in Its November 18 Opposition to the Postal Service's November 14 Motion to Strike. MMA's Motion is granted.

practice in all Commission proceedings to receive and consider "relevant and material evidence which is not unduly repetitious or cumulative." Rules of Practice 31(a). The Service contends that PRC-LR-1 and PRC-LR-2 are not themselves in evidence, and that the Commission should not base its decision on testimony premised on those documents. This contention is essentially a legal argument on the weight that should be given to certain testimony. It may or may not be valid, but it properly should be made on brief. The attempt to achieve that result through a broad motion to strike every reference to these library references is misguided. Striking testimony because of its questionable probity is unnecessary in administrative proceedings, where decision-makers are able to accord appropriate weight to evidence.

**Substantive issues.** The Postal Service identifies portions of the testimony of four witnesses as the subject of its motion to strike as supplemented. It explains that it requests that "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" (PRC-LR-1 and PRC-LR-2) not be admitted into evidence. Motion at 5. It explains that the library references in question have not been admitted into evidence or sponsored by a witness subject to written or oral cross-examination. It contends that as the library references are not evidence, statements which refer to them or rely on them also may not be considered evidence, and thus should be excluded from the record. Second Supplemental Filing at 6.

The Postal Service argument misapprehends the nature of evidence in administrative proceedings before expert regulatory bodies. The Commission's rules provide for the admission of that which is relevant and material to issues before the Commission for decision. Rules of Practice 31(a). In this, the Commission is completely consistent with the longstanding custom of administrative agencies, and with the purposes of, and practices under, the Administrative Procedure Act, 5 U.S.C. § 556. See the discussion in Davis, *Administrative Law Treatise*, § 14.05, "The APA and Legislative History" tracing the specific Congressional intent to allow as evidence in administrative proceedings items which might not be admissible in criminal or civil court proceedings. MMA points out that this concept has been extended in the Federal Rules of Evidence to opinion testimony from expert witnesses and that reviewing appellate courts have accepted this principle. MMA Opposition at 3.

The Postal Service seeks to exclude from the record questions it asked Office of the Consumer Advocate (OCA) witnesses Thompson, Collins, and Sherman during discovery, and their answers to those questions. The Service's Motion extends to answers where the witness has used PRC-LR-1 and PRC-LR-2, and to answers where the witness has not used those documents.

The Postal Service position that the evidentiary record may not contain any question or answer which refers to a document or item of information not admitted into evidence or sponsored by a witness must be rejected. Expert witnesses often rely on their broad body of professional knowledge. That knowledge, frequently developed over many years, is what makes them qualified as expert

witnesses, and it is normal and appropriate to question such witnesses on matters which are not part of the evidentiary record to ascertain the breadth and depth of their expertise. This information is essential to enable an administrative agency such as this Commission to evaluate testimony and determine whether proposed findings are supported by reliable, probative, and substantial evidence. The Postal Service offers no applicable authorities to support its position, nor any persuasive reason why it should be followed in the particular circumstances of this case.

The Postal Service Motion as supplemented also contends that those portions of the direct testimony, written cross-examination, and oral cross-examination of MMA witness Bentley which mention PRC-LR-1 and PRC-LR-2 should be stricken from the record. A review of witness Bentley's direct testimony shows that the witness does not purport to vouch for the accuracy of PRC-LR-1 and PRC-LR-2, but merely advises the Commission on the impact of its potential actions on the assumption that the library references show what attributable costs would be if estimated by established procedures. Tr 6/1914, 1934. In this situation, a motion to strike is not appropriate. The Postal Service may challenge Bentley's assumption or the conclusions which flow from it with rebuttal testimony, or it may explain on brief why the Commission should not, either for legal or technical reasons, accord any weight to Bentley's views. However, it may not exclude the opinions of an opposing witness because they are premised in part on an assumption, where it has not shown that the assumption is so unlikely to be true as to be

of no possible relevance. This is particularly true where, as here, the witness is an expert capable of explaining why the assumption is considered reasonable. See Tr. 6/1901-02.

As Bentley's direct testimony is admissible, there is no valid ground for striking written or oral cross-examination concerning that testimony. Postal Service counsel cross-examined witness Bentley on his contentions. See in particular Tr. 6/2005-07. It may not now expunge from the record its own cross-examination. Similarly, the Postal Service designated for incorporation as written cross-examination, questions and answers dealing with the library references in question. The Service identifies no new circumstance which might justify its seeking to expunge from the record written cross-examination it designated for admission.

**The request for alternative relief.** The Postal Service requests that if the Commission does not exclude from the record all testimony relying on PRC-LR-1 and PRC-LR-2, in the alternative, it should 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. Motion at 5. This request indicates a lack of understanding of the proper role of the decision maker in an administrative proceeding.

Over the 25 year history of Postal Rate Commission cases, significant efforts have been spent to understand Postal Service costs and to identify what types of costs should be attributed to the classes of mail and services. The attribution of postal costs involves the analysis of large amounts of data using

sophisticated models supplemented with special studies, and the Commission's knowledge has evolved over that time.

When a new case is filed by the Postal Service it often suggests modifications to the existing attribution process. Other participants also may suggest modifications, and occasionally the Commission will elicit participant comments on a potential modification. The Commission evaluates the evidentiary record developed on proposals to change cost attribution principles, and makes a determination on whether or not to adjust its past practice to incorporate changes. Where no modification is found justified, under accepted principles of administrative law, the existing process is retained.

In this case, the Postal Service filing did not use all of the cost attribution principles most recently approved by the Commission in the attributable cost estimates it presented to show the impact of its rate and classification proposals. As a result, participants could not distinguish the impact of the proposed fee changes from the impact of the proposed attribution principles changes. In Order 1120, issued June 18, 1996, the Commission determined that cost estimates using the established attribution principles were needed to give the public adequate notice of the impact of the proposed fee changes. When the Postal Service refused to provide this information, the Commission directed its staff to make that information available as a library reference.<sup>3</sup> See Order No. 1134 at 16.

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<sup>3</sup> The Commission took this step in preference to granting an OCA request that the case be suspended until the Postal Service provided this information. Suspending the case would have denied the Postal



It is well settled that the decision maker in an administrative proceeding has a more active role than that of "an umpire blandly calling balls and strikes." *Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F.2d 608, 620 (2d Cir. 1965). This role may include supplementing the notice the Postal Service provides to the public on the impact of a request for changes in rates and fees. However, the decision maker is not a party, and it need not present witnesses arguing that it should continue to follow established practices; quite the contrary, it is understood that the decision maker will follow established practices unless and until it is persuaded by record evidence that a change is appropriate.

In Postal Rate Commission cases participants should expect that the Commission will apply established cost attribution principles to evaluate the impact of rate and fee proposals offered by the Postal Service and other participants.<sup>4</sup> PRC-LR-1 and PRC-LR-2 were provided to help participants to evaluate the impact of the Postal Service's request for classification and fee changes. They have no independent evidentiary status, and

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Service and mailers the potential benefits of reformed special service classifications. The Service claims to support actions which avoid delaying the Commission's recommended decision. Supplemental Comments of United States Postal Service to Motion to Strike Major Mailers Association Witness Bentley's New Analysis, November 21, 1996, at 2, n.2.

<sup>4</sup> The Commission also will evaluate all proposals either to change established cost attribution principles, or to refine the procedures by which established attribution principles are implemented.

they do not constitute a proposal to change established cost attribution methods.

The Commission most frequently is asked to evaluate proposals to alter the established cost attribution principles in omnibus rate cases, although such proposals occasionally are presented in classification cases. The Commission will consider the evidence on such proposals and explain the reasons for its conclusions, and their record basis. If a change in the cost attribution process is implemented, the revision will be described in the Commission Opinion and its Appendices, and set out in workpapers if necessary.

The Postal Service alternative request for a witness to testify on PRC-LR-1 and PRC-LR-2 apparently is intended to establish a procedure whereby this material might become evidence and be used or relied upon in the Commission's deliberations. Second Supplemental Filing at 7. However these documents have not been offered as evidence and thus will not be used as a basis for changing or retaining cost attribution principles. As described above, cost attribution has been litigated in past proceedings, and the numerous decisions taken in developing the established principles have been separately explained in previous opinions.<sup>5</sup> Participants suggesting changes to those principles have the burden of showing change is appropriate. There is no

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<sup>5</sup> The Postal Service Motion does not contend that it cannot follow how the existing cost attribution process is applied, and in fact, it is evident from the Service's presentations in recent cases that it can follow what was done.

burden on the Commission to sponsor witnesses to present evidence to justify retaining established cost attribution principles.

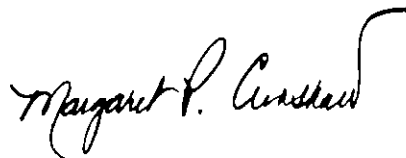
It is ordered:

1. The United States Postal Service Motion to Strike Testimony of Witnesses Bentley and Thompson, or, in the Alternative, for Production of a Commission Witness, filed November 14, 1996, is denied.

2. The Major Mailers Association's Motion Requesting Permission to Correct a Page in its November 18 Opposition to the Postal Service's November 14 Motion to Strike, filed November 22, 1996, is granted.

By the Commission.

(S E A L)



Margaret P. Crenshaw  
Secretary