

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

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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

POSTAL RATE AND FEE CHANGES, 2000

Docket No. R2000-1

ASSOCIATION FOR POSTAL COMMERCE
COMMENTS ON NOTICE OF INQUIRY NO. 1

The Association for Postal Commerce ("Postcom") submits these comments in response to this Notice of Inquiry, in which the Commission seeks comments "concerning the desirability of utilizing FY1999 data" in this case. Notice of Inquiry No. 1 Concerning Base Year Data, at 5 ("NOI"). As the NOI points out, this issue has arisen because the Postal Service rate filing generally uses FY1998 as its Base Year despite the fact that the filing was made after the completion of FY1999. The only explanation offered by the Postal Service for this choice of Base Year is the statement that "[f]inal, audited FY1999 data were available very shortly prior to the filing" of the case. USPS-T-9 at 11.

Summary of Position

First, we raise an issue concerning the FY1999 data on which the Commission has not invited comment: In Postcom's view, the Postal Service's case may well be subject to dismissal for failure to comply with Commission Rule 54(f) which sets bounds on the Postal Service's choice of a Base and Test Year. In brief, FY1998 was not, at the time of filing, the "most recent year" for which accrued cost data was available as required by Rule 54(f)(1) and the Postal Service has offered no explanation for its decision to base its case on stale data and to then spread the time interval between Base and Test

Years towards the extreme limit. On its face, therefore, the Postal Service filing appears to violate both the terms and purpose of Rule 54, threatening results in this case which are unjust and unreasonable. We submit that a further Notice addressing this issue should be issued.

Second, against the possibility that the Commission may elect to waive the requirements of Rule 54, Postcom will further address the matter that has been raised by the NOI: whether the actual FY1999 data (CRA and billing determinants) should be made available and, if so, how that information is to be used in the conduct of this case? We show that the Administrative Procedures Act, and precedent, requires that the FY1999 data be made available to all parties and that parties be afforded the opportunity to use such data as a "reality-check" on the reasonableness (or lack of reasonableness) of the estimates the Postal Service has used. We think it premature to address the scheduling issues that may or may not arise in this context.

The Postal Service's Filing Does Not Appear to Comply with Rule 54

Rule 54(f) was intended to establish reasonable boundaries on the Postal Service's selection of Base and Test Years. By the terms of the rule, the Base Year must be "the most recent fiscal year" for which "total actual accrued costs . . . are reasonably available." 39 C.F.R. § 3001.54(f)(1). The rule does not require that the formal request (and associated testimony) supply final audited accrued costs for the Base Year. On the contrary, it states specifically that if "final total actual accrued costs" are not yet available . . . "a preliminary or pro forma statement of such actual accrued costs shall be furnished."

The rule recognizes that quarterly or even accounting period reports can be used to develop the Base Year.

On the face of things the Postal Service's rate filing does not comply with Rule 54(f)(1). Plainly, FY1998 was not the "most recent fiscal year" for which accrued cost data was available when this case was filed. FY1999 closed 3 and one half months before the filing. Nor has the Postal Service provided an explanation, responsive to Rule 54(a)(2), as to why it chose to file its rate request using a Base Year which was a year and a quarter old at the time of filing. The only explanation offered is the statement that final *audited* FY1999 data "were available very shortly prior to the filing" of the case. USPS-T-9 at 11.

This is simply not responsive. Rule 54(a)(2) requires an explanation of why it would have been an "undue burden" for the Postal Service to use the unaudited FY1999 data as the Base Year. Postcom does not question the principle that the Board of Governors have both the exclusive authority and responsibility to determine when a rate case is filed. However, it hardly impinges upon that authority to expect a specific explanation, as dictated by Rule 54(a)(2), of why the Postal Service elected to rely on data which may well be "obsolete" (NOI at 3) and why the Postal Service found the use of actual FY1999 data to be an "undue burden" in its January, 2000 filing.

The Postal Service's unexplained departure from the terms of Rule 54(f) threatens the purpose of that rule as well. The process of forecasting volumes, revenues and costs in an enterprise of this magnitude and complexity is, at best, an imprecise undertaking. The core purpose of Rule 54(f)(1) is to minimize the problem of forecast error and the corresponding need for contingency reserves and other "adjustments" to offset these

errors. The rule thus sets an inner and an outer boundary on the time interval through which the forecast process -- the roll-forwards -- can occur. The inner boundary is the Base Year which is supposed to be the most "recent" fiscal year preceding the filing; the outer boundary is the Test Year which, by the terms of the rule, may not begin more than 24 months after the year in which the filing is made. The Postal Service filing pushes the inner boundary back to 1998. That the outer boundary -- the 2001 Test Year -- is within the limit of the rule does not help. The fact is that, by pushing the Base Year back to FY1998, the case entails estimating three intermediate years. This is itself a formidable (and not common) undertaking, one that is compounded by the changes in rates, mix of mail and classification changes that took effect in January, 1999, after the end of the FY1998 Base Year. While we may understand the Postal Service's reluctance to use FY2000 as the Test Year, its decision to push the time interval toward the extreme (at the outer boundary) and beyond (at the inner boundary) very substantially compounds the already difficult task of assessing and validating the reliability of the Postal Service's roll-forward estimates. The Postal Service's unexplained decision to depart from both the terms and purpose of Rule 54 intensifies the very risk of forecast error and affecting adjustments the rule is designed to control. The chosen Base Year creates the possibility, if not the probability, of results that do not comport with the ratemaking standards of the Postal Reorganization Act.

We recognize that there may be some reason, in conformance with the dictates of Rule 54(a)(2), that explains the Postal Service departure from the terms of Rule 54(f)(1) and its purposes. Also, the Commission has some power to waive the requirements of its

rules if it concludes that the public interest so requires. See, e.g., Turro v. FCC, 859 F.2d 1498, 1499 (D.C. Cir. 1988). Nonetheless, the Commission's responsibilities under the Act as well as basic fairness to all interested parties -- including the Postal Service -- require that the Commission issue a separate Notice of Inquiry addressing the question of the apparent non-compliance with Rule 54 and the consequences which flow from that. We respectfully request that the Commission issue such a Notice of Inquiry at the earliest possible time.

Utilization of FY1999 Actual Audited Data

On the assumption that the Commission either concludes that our analysis of Rule 54 is mistaken or it otherwise determines to proceed with the case as filed, the question that is raised by the NOI is whether, and if so how, the FY1999 actual data can and should be used in the case. NOI at 5. In our view, the response to this question entails three basic propositions:

First, there is no question that the FY1999 actual audited data must be made available by the Postal Service as expeditiously as possible. This is a matter of basic fairness. The dispute in this case is not between contesting estimates as to the Postal Service's revenues, costs, volumes and billing deterrments in a future fiscal year. In this case, the contest is between the estimates the Postal Service used in one of its two intermediate years and the known and certain changes that occurred in that year as reflected in the final FY1999 data. The courts are invarying in their insistence that data regarding "known and certain" changes must, as a matter of basic fairness, be taken into account in the rate setting process to avoid unreasonable results. See, e.g., Southwestern

Public Service Company v. FERC, 952 F.2d 555 (D.C. Cir. 1992); Potomac Elec. Power Co. v. Pub. Serv. Comm'n, 380 A.2d 126, 134 (D.C. App. 1977). Section 556(d) of the Administrative Procedures Act ("APA") -- under which this case is to be conducted -- requires no less. 5 U.S.C. § 556(d). The data for one of the two roll-forward years being available, it cannot be withheld.

Second, we submit that, although the FY1999 actual audited data cannot be used as a substitute or surrogate Base Year, the Commission can and must permit parties to use that data -- through supplemental testimony if need be -- as a reality check against the estimates which the Postal Service has incorporated into the first of its two intermediate roll-forward years. 5 U.S.C. § 556(d). It bears emphasis that we are not proposing a wholesale substitution -- in the words of the Chairman "up and down the line" (Tr. 1/55) -- of FY1999 data for the FY1998 data the Postal Service used in its Base Year. As the Commission has pointed out (and as the Postal Service quickly re-emphasizes), this type of substitution would pose formidable, almost certainly insurmountable, practical obstacles. NOI at 4; Status Report of the United States Postal Service to Notice of Inquiry No. 1 at 2 (February 14, 2000) ("Status Report"). Moreover, even if such a substitution were possible within the time constraints of this case, there is a legal objection to such a wholesale substitution: If the Commission concludes (for whatever reason) that the Postal Service is in compliance with Rule 54(f) or that it is prepared to waive the requirements of that Rule, the necessary effect of that conclusion is that FY1998 is the -- the only -- Base Year. Thus, actual FY1999 data can be used only with respect to an examination of the reliability of the estimated FY1999 intermediate year and the reliability of the Postal

Service's roll-forwards to the Test Year.

The dictates of the APA are reconciled with these practical and legal constraints on the use of the FY1999 data by limiting the use of that data as a reality check on the Postal Service's FY1999 and Test Year estimates. Southwestern Public Service Company, 952 F.2d at 560. The Commission itself suggests this approach in its footnoted comment to the effect that actual FY1999 data "may confirm" the appropriateness of adjustments putatively made by the Postal Service witnesses in recognition of classification changes that occurred in Docket R97-1 but that do not reflect themselves in the 1998 Base Year. NOI at 3, fn. 3. We urge that exactly the same principle be applied with respect to any other issue that bears upon revenues, costs, volumes and billing deterrents in which the FY1999 actual data -- once disclosed -- either confirms or negates the estimate the Postal Service has made in its development of the intermediate FY1999 year.

We recognize the problem, identified squarely by the Chairman at the prehearing conference, that costs change from year-to-year and that the FY1999 data may well show a number of changes -- in both directions -- from the estimates advanced by the Postal Service. Nonetheless, it is our belief, that the reality-check approach we have advanced can serve to define the way in which actual 1999 data is used without either rebuilding the case in its entirety or depriving parties of their rights to processes that yield a "full and true disclosure of the facts." 5 U.S.C. § 556(d). Testimony from parties (other than the Postal Service) with respect to FY1999 actual accrued costs should be accepted by the Commission only if that testimony shows, on its face, that (i) the actual FY1999 data materially departs from the estimates the Postal Service used and (ii) that the departure

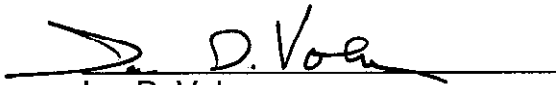
in the intermediate year is likely to materially affect the outcome on that subject in the Test Year.

There is an important corollary to this limiting principle. The record that binds the parties also binds this Commission. See, MOAA et al. v. USPS, 2 F.3d 408, 427-30 (D.C. Cir. 1993). To the extent that the Commission believes that the parties have failed to identify and explore outcome-determinative issues concerning deviations between the estimated and actual FY1999 data, it is within the Commission's purview to address such issues through Notices of Inquiry and Presiding Officer Information Requests. However, the Commission cannot do what is, of practical and legal necessity, denied to the parties -- the Commission cannot rebuild the case up and down the line in reaching its final determination.

Third, it is premature to consider the specifics of scheduling of discovery on the FY1999 actual data, of the timing of supplemental testimony and of the even more uncertain issues whether the 10-month time limit on the conduct of such cases can and should be tolled or whether, with or without tolling, the Board of Governors should be asked to refrain from the implementation of temporary rates. It is highly probable that some provision will have to be made for a period of discovery and the filing of supplemental testimony by parties who wish to use that data under the limiting principle we have articulated above. However, the length of necessary discovery and the time within which to prepare and file supplemental testimony cannot be determined until the data is actually made available. The Postal Service asserts that parties and the Commission "may not fully appreciate" the extent to which "certain" FY1999 data "are already reflected" in the

testimony of its witnesses. Status Report at 1. Interrogatories on that subject have already been filed. If the Postal Service is correct, the scheduling issues may, in fact, resolve themselves. If not, some readjustment of the normal schedule may be required. However, the extent of such an adjustment and its broader implications to the 10-month time limitation cannot, in our view, be resolved at this point in the case.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D. Volner", is written over a horizontal line.

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CERTIFICATION

I hereby certify that I have this day served the foregoing document upon all participants of record in this proceeding having requested service of discovery documents in accordance with Section 12 of the rules of practice.


Ian D. Volner

Dated: February 23, 2000