

BEFORE THE  
POSTAL RATE COMMISSION  
WASHINGTON, DC 20268-0001

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POSTAL RATE COMMISSION  
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Docket No. R2000-1  
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Postal Rate and Fee Changes, 2000  
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**MOTION OF ALLIANCE OF NONPROFIT MAILERS  
TO COMPEL ANSWERS TO ANM/USPS-T9-18(j) & (k), 19(g) & (h),  
22(c), 22(f), AND 23(a); AND T10-4, 7, 8, 10, 11 and 32(d)**

**(March 7, 2000)**

Pursuant to sections 26 and 27 of the Commission's Rules of Practice, the Alliance of Nonprofit Mailers ("ANM") respectfully moves to compel responses to discovery requests ANM/USPS-T9-18(j) & (k), 19(g) & (h), 22(c), 22(f), and 23(a) (filed Feb. 10, 2000); and ANM/USPS-T10-4, 7, 8, 10, 11, and 32(d) (filed Feb. 7, 2000). ANM is authorized to state that American Business Press ("ABP") and Magazine Publishers Association ("MPA") support the motion as well.

These questions (reproduced in Appendix A, *infra*) ask the Postal Service to produce certain management analyses of the flat sorting machines and related equipment that the Service has deployed or plans to deploy. Specifically:

- ANM/USPS-T9-18(j) and (k) and 19(g) and (h) ask for the Decision Analysis Report ("DAR") and supporting documentation for acquisition of the Flat Sorter Machine ("FSM") 1000 (Phase II).
- ANM/USPS-T9-22(c) and (f) seek, *inter alia*, any DAR's and supporting documentation relating to the Postal Service's "Accelerate FSM into 2001" initiative.

- ANM/USPS-T9-23(a) requests, *inter alia*, any DAR's and related documentation for the Carrier Sort Bar Code Sorter ("CSBCS").
- ANM/USPS-T10-4, 7, 8 and 10 seek studies, analyses and similar documents relating to the costs, benefits, productivity, deployment, or financing of the AFSM 100 flat sorting machine.<sup>1</sup>
- ANM/USPS-T10-11 seeks similar information about potential alternatives to the AFSM 100.
- ANM/USPS-T10-32(d) seeks similar information about the TMS tray management system.

The Postal Service objects to production of the requested documents on the theory that they are (1) irrelevant, (2) "pre-decisional," (3) proprietary, or (4) overbroad and burdensome to produce. Objection of the USPS to Interrogatories ANM/USPS-T10-4 *et al.* (filed Feb. 17, 2000); Objection of the USPS to Interrogatory ANM/USPS-T10-32(d) (filed Feb. 22, 2000); Objection of the USPS to Interrogatories of ANM to

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<sup>1</sup> The first of these questions, ANM/USPS-T10-4, requests information on "potential successors or alternatives to the FSM 881," the flat sorting machine most commonly deployed by the Postal Service today. According to the Postal Service, the AFSM is the only successor contemplated for the FSM 881. See Objection of the USPS to Interrogatories ANM/USPS-T10-4 *et al.* (filed Feb. 17, 2000) at 1.

Witness Tayman (ANM/USPs-T9-18(j) *et al.*) (filed Feb. 22, 2000). These objections are wholly unfounded. We respond to each in turn.

**I. THE INTERROGATORIES ARE REASONABLY CALCULATED TO PRODUCE RELEVANT INFORMATION ABOUT THE COSTS OF PROCESSING FLAT-SHAPED MAIL.**

The Postal Service asserts that the requested documents are irrelevant because they consist solely of “preliminary cost-benefit analyses,” and are superseded by “whatever analysis concerning equipment has been built into this case.” In fact, the requested documents are likely to include, or refer to, admissible evidence on two distinct cost issues: (1) the appropriate depreciation lives to use in costing the Postal Service’s flat-sorting equipment, and (2) the size of the Postal Service’s overall revenue requirement, and the reasonableness of the costs attributed by the Postal Service to the processing of flat-shaped mail. That the Postal Service may have chosen to use inconsistent and costlier assumptions in its rate request merely underscores the relevance of the requested studies. We describe each issue in turn.

**A. Depreciation Lives Of Flat-Sorting Equipment**

Depreciation charges on long-lived capital investment are a legitimate component of the Postal Service’s revenue requirement. The amount of depreciation chargeable to the Test Year (or any other given year), however, depends on the asset lives assumed. Unrealistically short lives overstate the annual revenue requirement for depreciation; unrealistically long lives have the opposite effect.

As in the past, the Postal Service claims to base its assumed asset lives for this rate case on Generally Accepted Accounting Principles (“GAAP”). See Response of USPS witness Tayman to ANM/USPS-T9-7(f) (filed Feb. 10, 2000). To date, however, the Postal Service has produced insufficient data to verify whether its assumed asset

lives in fact comply with GAAP. The requested documents may very well contain relevant information on this issue.

Moreover, asset lives that satisfy GAAP may nonetheless be too short to satisfy regulatory costing principles. Regulatory principles dictate recovery of invested capital over a period that is often far longer than permitted by GAAP. *Shalala v. Guemsey Memorial Hospital*, 115 S.Ct. 1232, 1239 (1995); *Simplification of the Depreciation Prescription Process*, 73 R.R.2d (Pike & Fischer) at 1284 ¶ 46; Financial Accounting Standards Board ("FASB"), *Statement of Financial Accounting Standards No. 71: Accounting for the Effects of Certain Types of Regulation* ¶¶ 3, 4 (issued December 1982).

This divergence is unsurprising, for GAAP and price regulation aim to satisfy very different concerns. GAAP is a codification of financial accounting principles, which are concerned primarily with the protection of investors. The central tenet of financial accounting is "conservatism": when in doubt, GAAP deliberately errs on the side of understating actual corporate earnings. *Shalala, supra*, 115 S.Ct. at 1239; *Simplification of the Depreciation Prescription Process*, 75 R.R.2d 1284-85 ¶ 46.

Rate regulation, by contrast, seeks primarily to protect ratepayers and consumers from exploitation of a regulated firm's monopoly power. *Shalala, supra*. A fundamental policy of rate regulation, known as the matching principle, dictates that long-lived assets must be amortized over the full life of the benefits they are expected to generate. Recovering the capital investment over a shorter period violates the matching principle. It also creates intertemporal or intergenerational discrimination, for it requires today's customers to subsidize the cost of assets used to serve future customers. See *Shalala, supra*, 115 S.Ct. at 1234-35 and 1237-39; *NCNB Corp. v. United States*, 651 F.2d 942, 949 (4th Cir. 1981); *Simplification of the Depreciation Prescription Process*, 73 R.R.2d (Pike & Fischer) 1275, 1284-85 ¶ 46 (1993). In this circumstance, "GAAP does not offer adequate protection for ratepayers." *Id.*

In Docket No. R97-1, the Commission declined to address this issue on the ground that the record lacked evidence "with regard to specific costs" that should be "depreciated over longer periods." R97-1 Op. & Rec. Decis. ¶ 2146 (May 11, 1998). The instant discovery requests are calculated to generate such data. Any analysis of the return on proposed capital investments must make assumptions about the expected economic lives of the investments. If the analysis is well substantiated, the asset life assumptions will be explained and documented as well.

**B. Underinvestment in Equipment for Automated Processing of Flat-Shaped Mail**

The requested documents are also calculated to lead to the production of relevant information on a second and distinct issue: the level of investment in automated flat processing that the Commission should assume in determining (1) the Postal Service's test year revenue requirement and (2) the test year attributable cost of processing flat-shaped mail. There is a widespread belief in the postal community that the Postal Service has significantly underinvested in automated flat sorting equipment in recent years, and that this investment shortfall has needlessly inflated both the overall revenue requirement and the costs attributed to flat processing by the Postal Service in the test year. The data and analyses set forth in the requested documents are likely to shed light on these issues.

These Postal Service's rejoinder that the only "relevant numbers" for the rate case are the "current projections" missing the point.. Intervenors have the right to test the accuracy of those projections. Moreover, the Postal Service may not charge mailers and consumers whatever costs it incurs, regardless of their profligacy or inefficiency. The Service may recover only the revenue needed to cover the costs of providing an appropriate level of service "under honest, efficient, and economical management." 39 U.S.C. § 3621. The standard of "honest, efficient, and economical

management” requires disallowance of needlessly high costs, even if actually incurred by the regulated firm. See, e.g., *D.C. Transit System, Inc. v. Washington Metropolitan Area Transit Commission*, 466 F.2d 394, 407-10 & n. 101 (D.C. Cir.) (citing cases), *cert. denied*, 409 U.S. 1086 (1972); *Democratic Central Committee Of D.C. v. Washington Metropolitan Area Transit Commission*, 485 F.2d 886, 903-08 (D.C.Cir. 1973) (standard of “honest, economical and efficient management” does not entitle regulatee to the revenue of a “high-cost plus company”).

It is not “economical” or “efficient” to continue relying on obsolete mail processing equipment (or even manual processing) when the incremental savings from deployment of modern automated equipment gains are likely to exceed the incremental capital and operating costs. As Justice Brandeis observed,

Efficiency and economy imply employment of the right instrument and material as well as their use in the right manner. To use a machine, after a much better and more economical one has become available, is as inefficient as to use two men to operate an efficient machine, when the work could be performed equally well by one, at half the labor cost.

*St. Louis & O’Fallon Ry. v. United States*, 279 U.S. 461, 517 (Brandeis, dissenting).

Finally, the Postal Service may not evade discovery of this information on the theory that the Commission “does not scrutinize the wisdom of Postal Service spending plans.”<sup>2</sup> The Commission need not decide, in the threshold posture of this

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<sup>2</sup> See Objection of USPS to Interrogatories ANM/USPS-T9-6(b) and T9-7(a)-(d) (filed Feb. 7, 2000), at 1 (citing R97-1 Op. & Rec. Decis. § 2119 (1998)).

discovery dispute, the ultimate division of responsibility between the Commission and the Governors for enforcing the “honest, economical and efficient management” standard of 39 U.S.C. § 3621.<sup>3</sup> The short answer is that *someone*—whether the Commission or the Governors—must issue a decision reconciling the Postal Service’s rates with this substantive standard.<sup>4</sup> That decision in turn must be supported by reasoned findings and record evidence. 39 U.S.C. § 3628 (incorporating 5 U.S.C. §§ 556 and 706(2)(A) & (E)). Failure to require the Postal Service to produce information relevant to the “honest, economical and efficient management” standard would deprive ANM and other intervenors of any meaningful opportunity to make a record on the issue for *either* the Commission or the Governors.

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<sup>3</sup> ANM notes here only that the precedent customarily cited by the Postal Service against allowing the Commission to consider the “honest, economical and efficient management” standard are *dicta*, not holdings. In Docket No. R97-1, for example, no party proposed that any portion of the Postal Service’s revenue requirement be disallowed as inefficient.

<sup>4</sup> Congress directed *both* the Commission *and* the Governors to act in accordance with Section 3621 when they discharge their ratemaking duties. See 39 U.S.C. §§ 3621 and 3625(d) (directing the Governors to establish rates “in accordance with the provisions of this chapter”); *id.*, § 3622(b) (directing the Commission to establish rates “in accordance with the policies of this title”).

## II. THE POSTAL SERVICE HAS FAILED TO ESTABLISH THE FOUNDATION FOR ASSERTING THE DELIBERATIVE PROCESS PRIVILEGE.

The Postal Service's second objection is that "any preliminary information that served as an input to the decision-making process concerning [the various machinery] is protected from disclosure as pre-decisional." By these objections, the Service appears to be asserting the deliberative process privilege (also known as the executive privilege). The Postal Service has failed to establish the necessary predicates for such an objection, however.

First, the privilege applies only to deliberative documents. It ordinarily does not cover purely factual matters, or factual portions of otherwise deliberative memoranda. See, e.g., *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 868 (D.C.Cir. 1980) (documents were not predecisional because, *inter alia*, they "were not dispositions of a case" or "suggestions or recommendations as to what agency policy should be.") The DARs and other documents at issue herein presumably consist at least in substantial part of factual data. The Postal Service, however, has failed produce any index or listing that would enable the Commission to distinguish between the factual and deliberative matter in the documents.

Second, documents lose their pre-decisional status if their reasoning is adopted by the agency in its decision. *Coastal States*, 617 F.2d at 866; *American Society of Pension Actuaries v. IRS*, 746 F. Supp. 188, 192 (D.D.C. 1990) (requiring disclosure of IRS budget assumptions and calculations that were "relied upon by the government" in



making final estimate for President's budget).<sup>5</sup> With the possible exception of the AFSM 100, the Postal Service appears to have reached a procurement decision on all of the equipment and assets covered by the DARs at issue.

**III. AN APPROPRIATE PROTECTIVE ORDER IS SUFFICIENT TO AVOID DISCLOSURE OF SENSITIVE INFORMATION.**

The Postal Service further objects that many of the requested documents "would reveal information about the Postal Service procurement process that may be proprietary to the Postal Service and its contractors, and likely would be of value to competing bidders and/or competitors." This objection provides no basis for denying discovery, however.

When the Postal Service asserts an objection of this kind, the Commission's task is to balance

the potential competitive harm of disclosure against the strong public interest in favor of empowering each participant to obtain all the evidence needed to prove its case. As the Commission has recognized in past controversies, in accordance with long-established principles governing discovery in civil litigation, evidential privileges are exceptions to the general rule that proceedings must be conducted in public view.

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<sup>5</sup> See also *FBI v. Abramson*, 456 U.S. 615 (1982); *Niemeier v. Watergate Special Prosecution Force*, 565 F.2d 967 (7<sup>th</sup> Cir. 1977); *United States v. J.B. Williams Co.*, 402 F. Supp. 796 (S.D.N.Y. 1975); *Cliff v. IRS*, 496 F. Supp. 568 (S.D.N.Y. 1980).

Docket No. C99-1, *Complaint on Post E.C.S.*, Order No. 1283 (Jan. 28, 2000) at 3 (citing Docket No. R97-1, Presiding Officer's Ruling No. R97-1/62 (Nov. 17, 1997) at 8).

The fairest balance between the parties' interests here is to order disclosure, subject to a protective order comparable to the one attached to Order No. 1283 in Docket No. C99-1. The Postal Service has identified no reason why such an order would be inadequate to protect the Service's legitimate interests.

#### **IV. THE INTERROGATORIES ARE NOT OVERBROAD OR UNDULY BURDENSOME.**

The Postal Service objects to certain subparts of ANM/USPS-T9-22 and T10-7 and 8 as overbroad and unduly burdensome. ANM/USPS-T9-22(f) requests "any correspondence, memoranda or other documents relating to the DAR" for a mail sorting initiative). ANM/USPS-T10-7 and 10-8 request "all documents submitted to or generated by the Board of Governors or senior Postal Service management relating to" the first and second phase deployments of AFSM 100 flat sorting machines). These requests, the Postal Service asserts, could "cover anything from an official Headquarters memo to a scrawled post-it note from an engineer to any high-level manager in the field."

These claims cannot be credited. The Postal Service, with over \$60 billion in annual revenue—one percent of the gross domestic product of the United States—is perhaps the largest and most complex monopoly subject to cost-of-service rate regulation in America. The Postal Service is also unique among regulated industries in the extent of its monopoly over the relevant data. Unlike railroads, telephone companies, electric utilities, or energy pipelines, the Service is, in many respects, the only entity of its kind in the United States. Literally no other firms exist that could offer a benchmark for most of the data submitted by the Service. Under the circumstances, it is not unreasonable to ask the Postal Service to expand a reasonable amount of effort in

searching for documents in its sole control that are needed by intervenors to make their cases.

The amount of work requested by ANM is hardly excessive under these standards. The first page of each set of ANM interrogatories specifically “incorporates by reference the instructions in OCA interrogatories OCA/USPS-1-14 (Jan. 24, 2000).” The OCA instructions in turn limit the scope of any requests for “all documents” to those documents “that can be located, discovered or obtained by reasonably diligent efforts.” *Id.* It is not unreasonable to ask the Postal Service to identify and search the files of the individuals and departments involved in preparation or review of a DAR for each project, or otherwise involved in analysis, review or oversight of the proposed acquisition. Significantly, the Postal Service did *not* interpose any objection of burden to other similar questions in the same set of ANM interrogatories containing identical language to that in the ANM/USPS-T10-7 and 8.<sup>6</sup>

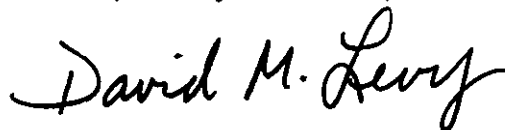
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<sup>6</sup> For example, the Postal Service did not object to ANM/USPS-T10-9 which requests “all documents submitted to or generated by the Board of Governors or senior Postal Service management relating to further deployment of AFSM 100 flat sorting machines after the second phase.”

## CONCLUSION

The objections raised by the Postal Service to ANM/USPS-T10-4, 7, 8, 10, 11, and 32(d) are baseless. Accordingly, the Postal Service should be compelled to respond to those interrogatories.

Respectfully Submitted,

A handwritten signature in black ink that reads "David M. Levy". The signature is written in a cursive style with a large, looped "L" and "y".

David M. Levy  
Christopher T. Shenk  
Sidley & Austin  
1722 Eye Street, N.W.  
Washington, DC 20006-3704  
(202) 736-8214

*Counsel for Alliance of Nonprofit Mailers*

March 7, 2000

## APPENDIX A

**ANM/USPS-T9-18.**<sup>7</sup> Please refer to LR-I-126, page 6, paragraph on “Flat Sorter Machine (FSM) 1000 (Phase II)”.

- a. Before issuing a purchase order for the 240 FSM 1000s, Phase II, was a Decision Analysis report (“DAR”) prepared for Postal Service management or the Governors?
  - b. If your answer to preceding part (a) is negative, please explain why a DAR was not prepared.
  - c. If your answer to preceding part (a) is affirmative, provide the estimated workhour savings projected for clerks in the DAR .
  - d. If the projected workhour savings for clerks in the DAR differs from the projected workhour savings shown in LR-I-126, please explain why they differ.
  - e. If your answer to preceding part (a) is affirmative, provide the estimated increase in workhours projected for maintenance in the DAR.
  - f. If the projected increase in maintenance workhours in the DAR differs from the projected increase shown in LR-I-126, please explain the difference.
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<sup>7</sup> USPS objection is limited to parts 18(j) and 18(k).

- g. Confirm that for FY 1999 the net savings per FSM 1000 is estimated to be 3,787.5 hours (4,150 hours for clerks less 362.5 hours for maintenance). If you do not confirm, please explain fully.
- h. Do the estimated workhour savings for clerks and the workhour increases for maintenance represent (i) direct workhours only, or (ii) direct workhours plus indirect supervisory and administrative time which are normally piggybacked on direct workhours? If piggybacks are excluded, please explain why it is not appropriate to include them in the savings estimates which you provide for the roll-forward model.
- i. In FY 1999, what was the effective average hourly wage rate for (i) clerks and (ii) maintenance personnel?
- j. Please produce any DAR identified in response to part (a) of this question.
- k. Please produce documentation sufficient to verify your responses to parts (b) through (i) of this question.

**ANM/USPS-T9-19.**<sup>8</sup> Please refer to LR-I-126, page 6, paragraph on Advanced Flat Sorter Machine (AFSM) 100.

- a. Before issuing a purchase order for the AFSM 100s, was a Decision Analysis report ("DAR") prepared for management or the Governors?
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<sup>8</sup> USPS objection is limited to parts 19(g) and 19(h).

- b. If your answer to preceding part (a) is negative, please explain why a DAR was not prepared.
- c. If your answer to preceding part (a) is affirmative, provide the estimated workhour savings projected for clerks in the DAR.
- d. If the projected workhour savings for clerks in the DAR differ from the projected workhour savings shown in LR-I-126, please reconcile the difference.
- e. If your answer to preceding part (a) is affirmative, provide the estimated increase in workhours projected for maintenance in the DAR.
- f. If the projected increase in maintenance workhours in the DAR differs from the projected increase shown in LR-I-126, please reconcile the difference.
- g. Please produce any DAR identified in response to part (a) of this question.
- h. Please produce documentation sufficient to verify your responses to parts (b) through (f) of this question.

**ANM/USPS-T9-22.**<sup>9</sup> Please refer to LR-I-126, page 18.

- a. Please explain why the section "Accelerate FSM Into 2001" shows a
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<sup>9</sup> Objection is limited to parts 22(c) and 22(f).

projected savings of 29,727.3 hours per machine, while the initial buy discussed on page 6 shows a projected savings of only 2,618.8 clerk hours per machine (see ANM/USPS-T9-20a).

- b. Have the additional 44 machines discussed in preceding part (a) been approved for purchase by the Governors?
- c. Are any of the projected savings discussed in preceding part (a) contained in a Decision Analysis report ("DAR") that has been submitted to management or the Governors? If so, please produce the DAR, along with any correspondence, memoranda or other documents relating to the DAR.
- d. Please explain why the section "Additional Advanced Flat Sorter Machine (AFSM) to Upper Bound" projects savings of 43,181.8 hours per machine, while the initial buy discussed on page 6 shows a projected savings of only 2,618.8 clerk hours per machine.
- e. Have the additional 44 machines discussed in preceding part (d) been approved for purchase by the Governors?
- f. Are any of the projected savings discussed in preceding part (d) contained in a Decision Analysis report ("DAR") that has been submitted to management or the Governors? If so, please produce the DAR, along with any correspondence, memoranda or other documents relating to the DAR.
- g. Explain why a second buy of an additional 44 machines should save 45 percent more work hours ( $43,181.8/29,727.3$ ) than the immediately preceding buy.



**ANM/USPS-T9-23.**<sup>10</sup> Please refer to LR-I-126, page 6, paragraph on “Carrier Sort Bar Code Sorter (CSBCS)-3,144.”

- a. Before issuing a purchase order for the 3,144 CSBCSs, was a Decision Analysis report (“DAR”) prepared and submitted to management and to the Governors for their review? If so, please produce the DAR, along with any correspondence, memoranda or other documents relating to the DAR.
- b. If your answer to preceding part (a) is negative, please explain why a DAR was not prepared.
- c. If your answer to preceding part (a) is affirmative, provide the estimated workhour savings projected for clerks in the DAR.
- d. If the projected workhour savings for clerks in the DAR differ from the projected workhour savings shown in LR-I-126, please reconcile the difference.
- e. If your answer to preceding part (a) is affirmative, provide the estimated increase in workhours projected for maintenance in the DAR.
- f. If the projected increase in maintenance workhours in the DAR differs from the projected increase shown in LR-I-126, please reconcile the difference.

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<sup>10</sup> Objection is limited to part 23(a).

**ANM/USPS-T10-4.** Please produce all studies, analyses and similar documents created since January 1, 1998, concerning the costs, benefits, productivity, deployment, or financing of potential successors or alternatives to the FSM 881.

**ANM/USPS-T10-7.** Please produce all documents submitted to or generated by the Board of Governors or senior Postal Service management relating to the first phase deployment of AFSM 100 flat sorting machines.

**ANM/USPS-T10-8.** Please produce all documents submitted to or generated by the Board of Governors or senior Postal Service management relating to the second phase deployment of AFSM 100 flat sorting machines.

**ANM/USPS-T10-10.** Please produce all studies, analyses, reports or similar documents generated by or for the Postal Service concerning the costs, benefits, productivity, performance limitations, financing, or appropriate deployment rate of the AFSM 100.

**ANM/USPS-T10-11.** Please produce all studies, analyses, reports or similar documents generated by or for the Postal Service concerning the costs, benefits, productivity, performance limitations, financing, or appropriate deployment rate of potential alternatives to the AFSM 100.

**ANM/USPS-T10-32.** In your testimony at page 24, lines 20-22, you state that "The TMS system has been deployed to 17 facilities, with 15 more plants to come on-line by FY 2001. Plans are to extend the system to most large and medium facilities."

a. Aside from the 32 facilities that will have a TMS system by FY 2001, how many large facilities will NOT have a TMS system

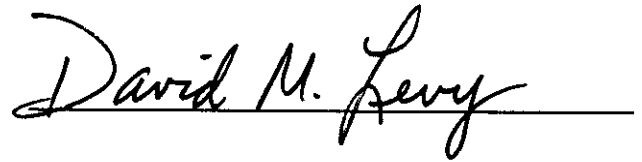
b. Aside from the 32 facilities that will have a TMS system by FY 2001, how many medium facilities will NOT have a TMS system?

c. How many years will the Postal Service require to extend the TMS system to most large and medium facilities under the plans that you mention in your testimony?

d. Please produce all studies, analyses and similar documents produced by or for the Postal Service concerning the costs, benefits, and appropriate deployment rate of the TMS system.

## CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document on all participants of record in this proceeding in accordance with section 12 of the Rules of Practice.

A handwritten signature in cursive script, reading "David M. Levy", is written over a solid horizontal line.

March 7, 2000