

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

RECEIVED
MAR 22 4 30 PM '00
POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

POSTAL RATE AND FEE CHANGES, 2000

Docket No. R2000-1

COMMENTS OF THE UNITED STATES POSTAL SERVICE
IN RESPONSE TO PRESIDING OFFICER'S RULING NO. R2000-1/13
(March 22, 2000)

In Presiding Officer's Ruling No. R2000-1/13, issued March 14, 2000, the Presiding Officer directed that the Postal Service's Category 2 library references, the foundational material supplied by Postal Service witnesses to support their testimonies, be sponsored by witnesses and entered into evidence. The Ruling set today's date as that by which parties wishing to object to the Ruling should file their objections. While the Postal Service does not specifically object to the procedures established by the Ruling, it does submit the following comments.

First, on page 7, the Ruling states (in reference to the Prehearing Conference) that "[p]arties expressing a view agreed that foundational material, if it is to be relied upon by the Commission, should be received into evidence," citing Tr. 1/60-62. In fact, however, the Postal Service did not express that view. Rather, the Postal Service agreed with a suggestion, tentatively made by the Presiding Officer, that Category 2 library references should be treated as the functional equivalent of workpapers, which have not in the past been formally admitted into evidence. Tr. 1/59. The Postal Service still maintains that such treatment would be appropriate for Category 2 library references. This is consistent with Federal Rule of Evidence 703, which allows expert witnesses to rely on certain materials even though they have not been admitted into evidence. Moreover, it is consistent with the provisions of the Commission's rules which distinguish between studies or analyses entered into evidence, and those merely relied upon as support (i.e., foundational material not entered into evidence).

The Ruling next states that parties "noted the need for notice and an opportunity to cross-examine the person responsible for developing the materials." Of course, that is exactly the purpose of designating a library reference as Category 2: it puts parties on notice as to the testimony for which it provides a foundation, and identifies the witness providing that testimony as the appropriate witness to be cross-examined on its contents. This function is fulfilled entirely independent of whether the witness identified is additionally required to formally sponsor the material into evidence. And, it is the availability of the opportunity for adequate analysis and cross-examination, not whether material has been formally sponsored on the record, which determines whether the material can be relied upon consistently with due process. Newsweek v. United States Postal Service, 663 F2d 1186, 1208-09 (2d Cir 1981).¹ To the extent that the Ruling relies upon a need to have adequate notice and the opportunity for cross-examination as indicative of a need to require witnesses to sponsor Category 2 library references into evidence, that reliance may be misplaced.

The Ruling offers three reasons why the inclusion of Category 2 references as evidence has salutary effects. Ruling at 8-9. The first reason given is that rate cases are complex, and the "public interest is not served if materials directly related to a participant's case are unnecessarily unavailable as record evidence." It is unclear how library reference material becomes more available to the public (or anyone else, for that

^{1/} It perhaps warrants mention that, in the most recent instance in which a court concluded that due process had not been provided (the single subclass issue in Docket No. R90-1), the entire focus of the dispute was on the untested methodologies and assumptions applied by the Commission. Even in the context of a vigorous (and ultimately successful) challenge to the Commission's actions, the debate was limited to the methodologies used, not the formal evidentiary status of the underlying data to which those methodologies were applied. The distinction is significant because the underlying data in that case were no more formally sponsored "on the record" than Category 2 materials would be in this case under the approach favored by the Postal Service. See MOAA at 2 F3d 427-430.

matter) merely by virtue of being submitted to the process of formal evidentiary sponsorship. In the instant proceeding, the material was included with the filing on January 12, a notice was served, copies are on file with the Commission and in the Postal Service's library, the individual testimonies involved further identify the associated Category 2 material, and the Postal Service's witnesses have already answered scores of interrogatories relating to this material.

The second reason given is that "the Commission's practice favors the inclusion of relevant and material information, particularly when that result is consistent with procedural fairness and participants' due process rights." Ruling at 8 (footnote omitted). On the previous page, however, the Ruling acknowledges the functional equivalence of workpapers and Category 2 library references, and correctly notes that the Commission practice is not to receive workpapers into evidence. Therefore, one could just as easily contend that Commission practice does not favor the inclusion into evidence of information which is every bit as relevant and material as that included within Category 2 library references. Moreover, as noted above, the practice with regard to Rule 31(k) foundational materials, consistent with the language of that portion of the Rules, has likewise been not to enter such materials into evidence.

The third reason given is that receipt of Category 2 materials into evidence serves an orderly administrative process. Ruling at 8. At this particular point in time, however, the Postal Service does not necessarily agree. If the intent in adopting the new rules on library references was to require sponsorship into evidence of all Category 2 materials, an orderly administrative process would have been served by adopting rules which did that explicitly. The new rules do not. If the Commission intends to apply the practices set forth in the Ruling in subsequent rate cases, the Postal Service suggests that yet another rulemaking would be in order. Under those circumstances, perhaps Category 2 material should be removed entirely from the portion of the rules on

library references. It might be more beneficial to create rules dividing evidence sponsored by witnesses into two categories, testimony and supporting documentation, including workpapers. It is, however, unnecessary to reach any firm conclusions on such issues now.

On a purely practical level, the Postal Service also notes that the procedures established by the Ruling will apparently inject into the evidentiary record massive amounts of material in non-hardcopy format. As discussed repeatedly in the Postal Service's pleadings in the recently-completed library reference rulemaking, the Postal Service files machine-readable material as library references specifically to avoid this dilemma. Section 2112(c) of title 28 ("Record on review and enforcement of agency orders"), which is incorporated by reference into section 3628 of title 39, speaks of the "papers" comprising the administrative record. It is unclear how material such as, for example, machine-readable files or code for a mainframe computer, would be handled under that section, or how a court could be expected to determine their contents or their significance. Admittedly, these types of problems are endemic to the computer age, and may ultimately need to be confronted regardless of the formal evidentiary status of Category 2 materials. Nevertheless, continuing to treat such materials as foundational material that does not need to be entered into evidence allows avoidance of a whole host of problems that do not appear to be contemplated by the instant Ruling.

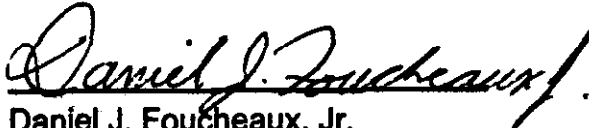
In summary, while the Postal Service does not object to the procedures established by Presiding Officer's Ruling No. R2000-1/13, the purpose of these comments is to make clear its views that those procedures may be unnecessary. The Postal Service maintains that the parties' due process rights would be equally served by procedures which treat workpapers and Category 2 materials congruently, without the

need for formal sponsorship of either.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:


Daniel J. Foucheaux, Jr.
Chief Counsel, Ratemaking


Eric P. Koetting

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.


Eric P. Koetting

475 L'Enfant Plaza West, S.W.
Washington, D.C. 20260-1137
(202) 268-2992, Fax -5402
March 22, 2000