

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

RECEIVED

JUL 24 4 17 PM '00

POSTAL MAIL SERVICE  
OFFICE OF THE SECRETARY

POSTAL RATE AND FEE CHANGES

Docket No. R2000-1

**Major Mailers Association's Supplement To Objection To  
Admission Of Postal Service Response In Evidence As Testimony And  
Comments On Related Procedural Matters**

Pursuant to the Presiding Officer's oral ruling at the conclusion of the hearing held on July 21, 2000, Major Mailers Association ("MMA") hereby supplements its objection to the admission of the United States Postal Service's Response to Notice of Inquiry 3<sup>1</sup> ("NOI 3") as the "testimony" of USPS witness David Fronk. In addition, in the interests of administrative economy, MMA will include herein its view on the NOI 3 related procedural matters that the Presiding Officer directed parties to submit comments on by July 27.

**Relief Requested**

For the following reasons, as well as those set forth in MMA's July 17, 2000 comments in response to NOI 3, MMA respectfully requests that, as appropriate, the Presiding Officer and/or the Commission

- Deny formal evidentiary status to the Postal Service's Response to NOI 3;<sup>2</sup> and strike that Response and all argument and cross examination thereon from the record of the July 21 Hearing;
- Deny the OCA's July 18 request to file rebuttal evidence on this subject on August 14 (or on July 31 as OCA counsel suggested at the July 21 Hearing);
- Reject as moot or deny the July 20, 2000 "Motion Of The United States Postal Service Regarding The Office Of The Consumer Advocate

---

<sup>1</sup> Notice Of Inquiry 3, "First-Class Revenue Adjustment Factor (RAF) Error And Additional Ounce Method Change, issued June 30, 2000.

<sup>2</sup> At the July 21 Hearing, MMA counsel sought reconsideration or certification to the full Commission of a Presiding Officer ruling. Tr. 34/16522. It appears there may be some confusion about which ruling MMA counsel was referencing. To clarify, the request is a *conditional* request for reconsideration or certification of the Presiding Officer's July 18, 2000 ruling characterizing the Postal Service's Response as "testimony." MMA counsel was not seeking advance certification of any ruling not yet issued.

Declaration Of Intent To File Testimony 28 Days Out Of Time In Response To Notice Of Inquiry No. 3," in which the Postal Service suggested, *inter alia*, that, if the OCA were permitted to file rebuttal evidence, "the Commission would be required by considerations of due process to allow other parties an opportunity to prepare and file surrebuttal testimony in response to the OCA's August 14<sup>th</sup> 'rebuttal' testimony;"

- Rule that the Postal Service is not permitted to amend its case-in-chief midway through the proceedings, as it effectively did on April 17, 2000 through the artifice of responding to the OCA's Interrogatory OCA/USPS-106 (d);

In addition, as part of the rulings on this matter, the Presiding Officer and the Commission are requested to clarify that when *any party*, including but certainly not limited to the Postal Service, files "corrections" to errors in its case-in-chief, the party may not show the impact of correcting two or more such errors in a combined fashion (as the Postal Service did in its April 17 Response to Interrogatory OCA/USPS-106 (d)) but must calculate and show separately the impact of each such change.

#### **Relevant Milestones**

The relevant timeline is largely set forth in NOI 3 and MMA's Comments. Nevertheless, it bears repeating and emphasis here since the passage of time is central to a proper disposition of the issues presented.

On January 12, 2000, the Postal Service filed its case-in-chief requesting this Commission to recommend proposed rates and fees that would increase revenues by approximately \$3.6 billion annually. That filing triggered the running of a 10-month period during which the Commission is expected to conduct hearings and make reasoned decisions on a myriad of issues.

In POR 4,<sup>3</sup> the Presiding Officer adopted a procedural schedule that established April 11 as the start of hearings on the Postal Service's case-in-chief. This gave intervenors approximately 3 months to examine *all* aspects the Service's case-in-chief, conduct discovery, and prepare for cross examination.

---

<sup>3</sup> Presiding Officer's Ruling No. R2000-1/4, "Presiding Officer Ruling Establishing The Procedural Schedule," issued February 25.

In POR 19,<sup>4</sup> USPS witness Thress, who originally proposed the new methodology for determining the volume of First-Class additional ounces, was scheduled to testify on April 20. USPS witness Fronk was scheduled to testify April 26.

On April 17, 2000, the Postal Service indicated in an institutional response to Interrogatory OCA/USPS-106 (d) that it was correcting an error of omission in not applying Revenue Adjustment Factors ("RAF") and, in addition, would be changing the method for determining the volume of additional ounces; and that the combined results of that change and the RAF correction would be reflected in technical corrections to witness Fronk's testimony and exhibits. No changes were made to the testimony or workpapers of witness Thress.

Finally, in POR 4, the Presiding Officer set May 22, 2000 as the date for the filing of intervenor testimony.

### **ARGUMENT**

NOI 3 frames what the Commission characterizes as the "central issue" as follows:

The central issue for evaluating the forecasting methods is the significance of the newly available data. If there has been a fundamental change and the average weight of 0-11 ounce single-piece letters has ceased its upward climb, then the revised forecasting method better reflects this new reality. On the other hand, if the recent data is anomalous, reflecting either unexplained variation around the long-term trend or the one-time effects of increasing the maximum weight allowance, then the initial forecasting method more accurately projects a continuation of the trend

However, the Commission also highlights the following other important facts and considerations:

- The Postal Service's impact analysis, which showed a relatively modest overall increase in the Postal Service's Net Surplus of \$47 million actually consisted of much larger, offsetting amounts that (1) increased the Postal Service's Net Surplus by \$219 million for correction of the RAF omission, and (2) reduced the Net Surplus by \$172 million. NOI at 2.

---

<sup>4</sup> Presiding Officer's Ruling No. R2000-1/19, "Presiding Officer's Ruling Scheduling Witnesses," issued March 24, 2000.

- The Postal Service's "revised calculation of the number of single-piece additional ounces in the test year reflects a change from the initial or "as-filed" forecasting method, *as opposed to a simple error correction.*" NOI 3 at 3 (emphasis added).
- "The long-term upward trend in both the weight and additional ounces per piece of single-piece lend support to the reasoning behind [USPS witness Thress'] initial forecasting method. Also, the initial method assumes that additional ounces per piece for the subclass as a whole remain constant from the base year to the test year. In light of the historical upward trend in average weight for the subclass, this assumption makes the initial forecast conservative." NOI at 4.
- The "Postal Service's [institutional] response does not offer an explanation supporting its premise that the long-term upward trend in weight per piece has ended. *Id.*

As the Presiding Officer noted at the beginning of the July 21 Hearing, ABA&NAPM and MMA requested that the Commission bar the Postal Service from amending its case-in-chief on policy, fairness, and due process grounds (Tr. 34/16420-21):

I notice that a number of participants have filed requests for procedural relief related to the general issues raised in Notice of Inquiry Number 3. In particular, [ABA&NAPM] American Bankers Association, National Association of Presort Mailers have asked the Commission to essentially reject the Postal Service presentation in response to NOI 3 and prohibit the Service from relying on it in its other filings.

\* \* \*

And, finally, the Major Mailers Association included in its comments, in response to NOI 3, a suggestion that due process considerations should bar treatment of the Postal Service response to NOI Number 3 as amending the Service's request in this case.

Accordingly, the Presiding Officer set July 27 as the date for parties to file further comments on the ABA&NAPM and MMA requests as well as requests by the OCA and the Postal Service for more or fewer evidentiary procedures.

MMA's objection to admission of the Postal Service's Response to NOI 3 as testimony was intended to preserve its basic position on the appropriate disposition of the issues for consideration *by the Commission at the earliest possible moment* and to avoid the burdensome consequences of having to participate in what MMA views as further, unnecessary evidentiary proceedings.

The Presiding Officer's ruling that witness Fronk's new "testimony" would be admitted "subject to motions to strike"<sup>5</sup> adequately balanced the competing considerations under the circumstances and preserved MMA's position, at least temporarily. *Before proceeding down the road to gathering more evidence from the OCA and possibly affording the Postal Service a final "bite" at this apple*, it is necessary and entirely appropriate for the Commission to rule on the important threshold issues raised by MMA and others.

As discussed more fully in its July 17 Comments, MMA believes that the issue before the Commission can and should be resolved primarily on policy grounds, based on such considerations as notice and due process. First, the Commission's Rules Of Practice have extensive, detailed provisions concerning the form and content of the Postal Service's case-in-chief. Of particular relevance to the issue at hand, Rule 53 requires that "[s]imultaneously with the filing of the formal request . . . the Postal Service shall file *all* of the prepared direct evidence upon which it proposes to rely in the proceeding on the record before the Commission to establish that the proposed changes or adjustments in rates or fees are in the public interest and are in accordance with the policies and the applicable criteria of the Act." Second, Rules 26-28 of the Commission's Rules Of Practice permit affected mailers to conduct necessary discovery so that they can inform themselves about the reasons for, and impacts of, the invariably numerous changes proposed by the Postal Service. Third, the procedural schedule adopted by the Presiding Officer provided the parties almost 3 months to conduct discovery before commencement of the hearings on the Postal Service's case-in-chief. Taken together, these rules and procedures were intended for the commonsense purpose of affording parties like MMA adequate notice of the Postal Service's proposals and a reasonable opportunity to discover the basic facts they need to test the Service's case and present cases-in-chief of their own.

The due process safeguards embodied in this carefully constructed set of processes and procedures can be vitiated if the Postal Service is not held to the requirements of the Rules Of Practice. MMA believes that is exactly what will happen if

---

<sup>5</sup> Tr. 34/16531.

the Presiding Officer and the Commission continue down the road of entertaining new, Postal Service "testimony" at this late date. F

From the recitation of facts set forth in NOI 3 and MMA's own review of the record, it appears that the Postal Service did not even consider changing witness Thress' method until it was confronted by the obvious need to correct its error of omission relating to application of the RAFs. That is, we believe, a reasonable inference that the Commission can draw from all the facts and pleadings (including the Postal Service's July 17 Response) already before it.

Moreover, when the Postal Service did decide to make a change to the Thress method, it did not do so in a manner that was calculated to inform the parties and place them on notice regarding the particulars and separate impacts of the two modifications made in the April 17 institutional response to OCA/USPS-106-(d).<sup>6</sup> Instead, it disclosed only the *combined* impact of the two changes. Further, it did not offer any testimony to support its about-face on the Thress method. The entire "justification" such as it was is reflected in a few unsupported assertions contained in the institutional response to Interrogatory OCA/USPS-106 (d), as the Commission noted in NOI 3. Once again, the existing record, including the Postal Service's July 17 Response to NOI 3, contains enough information for the Commission to draw the necessary conclusions and resolve this matter without resort to more evidentiary procedures.

The basic relief MMA is requesting on this issue – a ruling denying the Postal Service's attempt to amend its case-in-chief at an advanced stage of the proceedings – is not an unreasonable result given all the facts and circumstances. First, the Commission must remember that the Postal Service has an overwhelming advantage over all other parties to these proceedings because the Service has access to all of the underlying data and the time to analyze such data prior to even initiating its request for an opinion and recommended decision. Second, the Postal Service is well versed in

---

<sup>6</sup> At the July 21 Hearing, Postal Service counsel stated "[w]e were surprised that the matter drew very little attention during his appearance here on the 26th and were even further surprised when the issue drew less attention in the testimony the parties filed in May." Tr. 34/16529. MMA submits that there is no logical or factual basis for the Postal Service's surprise. The true extent to which First-Class Net Revenues were being impacted by the Service's April 17 "corrections" did not become apparent until the Commission isolated the offsetting impacts of the two separate changes in NOI 3.

the development of evidence which meets the minimum due process requirements embodied in the Commission's Rules Of Practice. The Postal Service had several opportunities to make the methodological change in question and did not avail itself of any of them. At a minimum, the Postal Service could have and should have come directly to the Commission with a motion stating that it was making a change to its case-in-chief, explaining why good cause existed for the Postal Service to amend its case-in-chief at that time, and supporting the proposed revision through the testimony of a witness who could be cross examined by the parties.

MMA is certain that the procedural course chosen by the Presiding Officer in reaction to the Postal Service's July 17 Response –treat it as testimony and give parties an opportunity to cross examine—was well intentioned. However, MMA believes that this course is fraught with peril to the other parties' legitimate interests in the short term and to the integrity of the Commission's rules, policies, and procedures in the long term.

In terms of the parties' short term interest, MMA and other affected First-Class mailers should have had adequate notice of the methodological change and an opportunity to conduct discovery. That is the essence of the Commission's rules and the procedural schedule that applied in this case. Assuming, *arguendo*, that the Postal Service should have been allowed to amend its case-in-chief as late as April 17 when it indirectly gave notice of that change, the parties clearly would have had an opportunity to conduct discovery, cross examine Mr. Fronk or any other USPS witness who submitted testimony supporting such change, and, *indisputably*, the right to file testimony in opposition to the Postal Service's position on May 22. The passage of time does not diminish the need to observe these basic requirements of due process.<sup>7</sup>

The Postal Service must not be allowed to profit from the fact that it was less than forthcoming on April 17. Nor can the Postal Service be heard to complain now, as it has in its July 20 Motion, that the OCA's motion to file further testimony should be denied

---

<sup>7</sup> As recently as POR 94, issued July 20, 2000, the Presiding Officer observed "focused written discovery will help the participants and the Commission to develop a cogent and complete record for the evaluation of the Postal Service's rate proposals." Moreover, in other instances during this proceeding, the Presiding Officer has changed the appearance date of Postal Service witnesses and extended the time for intervenor parties to file their cases in order to permit the orderly conduct of discovery and the formulation of testimony. See e.g. POR

due to the shortness of time in the procedural schedule, the press of other important business, or the need for the Postal Service to be afforded the right to file surrebuttal evidence in the interests of due process.

In the instant case, the public interest will not be served by “upgrading” the Postal Service’s July 17 Response to an evidentiary status never even intended by the Postal Service itself<sup>8</sup> or conducting the further evidentiary proceedings suggested by the OCA and the Postal Service. Once loose it will be very difficult for the Commission to put that procedural genie back in the bottle in an orderly fashion, as the arguments and counter arguments of OCA and the Postal Service amply demonstrate.

It is not necessary that the Commission engage in such time consuming and costly ventures. MMA and others have raised fundamental threshold arguments that challenge the Postal Service’s implicit assertion that it is free to change this and presumably any other aspect of its case-in-chief whenever the Service’s case will benefit by such a change. MMA also believes that it has raised important questions about the importance of due process and the timing of any changes to the Postal Service’s case. At a minimum, the Commission can and should consider and rule upon these threshold issues *before* the parties are put to the additional time and expense of further evidentiary proceedings.

In addition, MMA is confident that the Commission can make a reasoned decision on the merits of the Postal Service’s proposed change in methodology without entertaining additional evidence from the Postal Service or any other party. The Postal Service obviously has provided an expanded version, from a few to 24 pages, of its April 17 institutional response to OCA/USPS-106 (d). However, it does not appear that the Postal Service’s July 17 Response provide any meaningful response to the core concerns expressed by the Commission in NOI 3.

In sum, this is a case likely to generate more heat than light if the Commission proceeds down the track of accepting more evidence from the Postal Service and the parties. The Commission will do a service to all involved and the integrity of its processes and procedures if it rules on the record already before it.

---

54, “Presiding Officer Ruling Rescheduling The Appearance Of Postal Service Witnesses Baron And Raymond,” issued April 27, 2000.



### Conclusion

For all the foregoing reasons, as well as those set forth in MMA's July 17, 2000 comments in response to NOI 3, MMA respectfully requests that the Presiding Officer and/or the Commission

- Deny formal evidentiary status to the Postal Service's Response to NOI 3;<sup>9</sup> and strike that Response and all argument and cross examination thereon from the record of the July 21 Hearing;
- Deny the OCA's July 18 request to file rebuttal evidence on this subject on August 14 (or on July 31 as OCA counsel suggested at the July 21 Hearing);
- Reject as moot or deny the July 20, 2000 "Motion Of The United States Postal Service Regarding The Office Of The Consumer Advocate Declaration Of Intent To File Testimony 28 Days Out Of Time In Response To Notice Of Inquiry No. 3," in which the Postal Service suggested, *inter alia*, that, if the OCA were permitted to file rebuttal evidence, "the Commission would be required by considerations of due process to allow other parties an opportunity to prepare and file surrebuttal testimony in response to the OCA's August 14<sup>th</sup> "rebuttal" testimony;"
- Rule that the Postal Service is not permitted to amend its case-in chief midway through the proceedings, as it effectively did on April 17, 2000 through the artifice of responding to the OCA's Interrogatory OCA/USPS-106 (d);

In addition, as part of the rulings on this matter, the Presiding Officer and the Commission are requested to clarify that when *any party*, including but certainly not limited to the Postal Service, files "corrections" to errors in its case-in-chief, the party may not show the impact of correcting two or more such errors in a combined fashion

---

<sup>8</sup> The Postal Service's Response is not even in the form of testimony.

<sup>9</sup> At the July 21 Hearing, MMA counsel sought reconsideration or certification to the full Commission of a Presiding Officer ruling. Tr. 34/ 16522. It appears there may be some confusion about which ruling MMA counsel was referring to. To clarify, this request is a conditional request for reconsideration or certification of the Presiding Officer's July 18, 2000 ruling characterizing the Postal Service's Response as "testimony." MMA counsel was not seeking advance certification of a ruling not yet issued.

(as the Postal Service did in its April 17 Response to Interrogatory OCA/USPS-106 (d))  
but must calculate and show separately the impact of each such change.

Respectfully submitted,  
Major Mailers Association

By: Michael W. Hall / MWH

Michael W. Hall  
34693 Bloomfield Road  
Round Hill, Virginia 20141  
540-554-8880  
Counsel for  
Major Mailers Association

Dated: Round Hill, VA  
July 24, 2000

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing document upon all participants in this proceeding, in compliance with Rule 12 of the Commission's Rules of Practice.

Dated this 24th day of July 2000.

Michael W. Hall / MWH