

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

RESPONSE OF UNITED STATES POSTAL SERVICE
IN SUPPORT OF APMU MOTION TO RECONSIDER
APMU AND POSTAL SERVICE OBJECTIONS
TO THE ADMISSIBILITY INTO EVIDENCE OF
UPS CROSS-EXAMINATION EXHIBIT BY THE COLOGRAPHY GROUP
(September 5, 2000)

On September 1, 2000, The Association of Priority Mail Users, Inc. ("APMU") moved to reconsider the ruling of the Presiding Officer to admit into evidence UPS cross-examination exhibit UPS-XEHaldi-RT-1 together with questioning of witness Haldi by counsel for United Parcel Service ("UPS") at Tr. 45/19611-19631, and to strike this exhibit and related questioning from the record. The Postal Service hereby joins APMU in urging the removal of this unsponsored and untested private document from the evidentiary record of this case.

In its September 1st Motion, APMU has succinctly set out many compelling reasons why surprise cross-examination exhibits such as UPS-XEHaldi-RT-1 should not gain admission to the evidentiary record in this or any other proceeding before the Commission. The Postal Service sees no benefit in reiterating these reasons at this point. The Postal Service, however, does wish to make clear its serious concern regarding any procedure that would allow a party to a ratemaking hearing to set about creating a private document for purposes of litigation, conceal that document's existence until the moment of its use in cross-examination, seek to have a witness unfamiliar with its genesis and contents read from the document, and on that basis alone, make that document a part of the evidentiary record. Allowing such a procedure

would be not only contrary to the letter and spirit of the Commission's Rules of Practice and Procedure, which require testimony and foundational materials such as library references to be attested to by a witness prior to admission as evidence, but would be patently and fundamentally unfair to those parties who have not been granted any opportunity to scrutinize and rebut the representation contained in the exhibit before or after its admission.¹ It would also be unlikely to lead to the creation of an orderly and reliable record.

The document in question illuminates the dangers inherent in such an approach. From what the Postal Service has been able to discern, the "shipments" figure referred to in the exhibit does not refer to pieces shipped, but, at least for shippers other than the Postal Service, may include shipments containing multiple pieces of undetermined amounts. The significance of the exhibit thus is impossible to evaluate, especially given that the preparer of the information has not at any time been made available for questioning. The significance of this exhibit is also called into question due to the inconsistency of its market share revenue percentages with market share information provided elsewhere in this case by the Postal Service, such as in the response to APMU/USPS-T34-48 (See Tr. 7/2728, as well as supplemental response filed on May 2, 2000). Since no knowledgeable witness was made available to attest to the calculation and meaning of the numbers contained in the exhibit, and the document has not other indicia of reliability, no foundation exists for its current evidentiary status.

While the Postal Service recognizes that in administrative proceedings such as omnibus rate cases a certain degree of latitude is permitted with respect to the rules governing admission of documents in evidence, the Postal Service is fearful that, in this

¹ UPS certainly was aware of the potential need for such scrutiny, since its counsel has in the past engaged in extensive cross-examination of Colography, Inc. testimony. See Docket No. R90-1, Tr. 44/23132-194.

case at least, the degree of latitude granted has become so large as to invite abusive conduct in future proceedings. If it appears that the practice which lead to the admission of this exhibit into evidence will be permitted in the future, a strong incentive will be created for all parties to seek the introduction into evidence of surprise documents through unwilling, unrelated witnesses having no knowledge of the documents. The Postal Service urges the Commission to remove this document from the evidentiary record, and thereby avoid encouraging all parties to engage in attempts to create "evidence by ambush."

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

Daniel J. Foucheaux, Jr.
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Richard T. Cooper

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.


Richard T. Cooper

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