

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

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POSTAL RATE AND FEE CHANGES

Docket No. R2001-1

**Joint Reply Of Major Mailers Association, American
Bankers Association, And National Association Of Presort Mailers
Opposing Procedural Mechanisms And Schedule Proposed By APWU**

POR 30, issued January 8, 2002, provided that, by January 22, "participants may offer suggested procedural mechanisms and schedules that provide due process to participants opposing the stipulation." POR 30 at 2. Responses to the proposed mechanisms and procedural schedules were to be filed by January 28. *Id.*

On January 22, the Postal Service,¹ KeySpan Energy, Major Mailers Association ("MMA"), and American Bankers Association and National Association Of Presort Mailers timely filed their suggested procedural mechanisms and schedule in compliance with POR 30. On January 24, two days late, the American Postal Workers Union ("APWU"), the sole opponent of the Settlement, suggested its own, different procedural mechanisms and schedule in what it styled as an "initial reply" to the USPS proposals.

The procedural schedule suggested by APWU would require approximately 40 days longer to complete than the schedule proposed by the USPS. The primary reason for the different processing times is that APWU has built in an additional round of discovery on any rebuttal testimony submitted by supporters of the Settlement and a round of surrebuttal testimony by APWU. Other factors contributing to the lengthier procedural schedule APWU suggests are longer periods allowed for objections and responses to discovery requests and a longer period between the filing of rebuttal testimony and commencement of hearings on that testimony.

¹ Motion Of The United States Postal Service For The Establishment Of A Procedural Mechanism And Schedule Governing Further Proceedings In Light Of Settlement ("USPS Procedures Motion")

For the reasons set out below, APWU's untimely suggestions for different procedures should be rejected.

I. There Is No Legitimate Reason To Add An Additional Layer Of Surrebuttal Testimony Or Additional Written Discovery

APWU insists that the Commission must add to the procedural schedule proposed by the USPS an additional round of discovery on any rebuttal testimony submitted by supporters of the Settlement and a round of surrebuttal testimony by APWU. There is no merit in APWU's proposals. APWU's deviations from the procedural schedule proposed by the USPS and supporting parties is based on misunderstandings regarding the status of the existing evidentiary record and the purpose of these hearings and a misreading of the Commission's Rules Of Practice.

APWU's reasons for requesting an opportunity to file surrebuttal testimony are that "these witnesses of parties other than the Postal Service are not true rebuttal witnesses" and [t]heir testimony would normally have been presented in case-in-chief of intervenors and would have been subject to written cross-examination." APWU Initial Reply at 3-4. APWU is wrong on both counts.

At this time, the evidentiary record consists of, among other things, the direct testimony, exhibits, and sponsored Library References of USPS witnesses and designated written and oral cross-examination of those witnesses. Before the process of examining the Postal Service's case-in-chief had been completed, the Service and all active parties except APWU, decided that they would agree to, or not oppose, the Settlement, most recently revised as of January 17, 2002.

In furtherance of having the Settlement processed expeditiously and recommended by the Commission, the Postal Service and the other signatory parties entered into an important stipulation. As the Settlement states:

For purposes of this proceeding only, the undersigned parties agree that, taken in their entirety, the Request, testimony, and materials filed on behalf of the Postal Service in this docket provide substantial evidence for establishing rates and fees, as agreed to herein and set forth in Attachment B to the Postal Service's Request, as revised, and for establishing the classification changes set forth in Attachment A to the Request, as revised.

In other words, the signatories to the Settlement have agreed to put aside their differences in order to reach mutually agreeable end results that are reflected in the Attachments to the Settlement. This stipulation regarding the existing evidentiary record obviated the need for parties other than the Postal Service to do what they would otherwise do in a litigated proceeding: file full blown cases-in-chief that opposed all relevant aspects of the USPS filing.

What the parties did in the Settlement is fully consistent with the Commission's Rules Of Practice and common sense. For example, Rule 24 provides an opportunity for the parties to reach appropriate stipulations in lieu of contesting each and every issue and fact. Similarly, Rule 25 (b) provides:

Participants are ***encouraged*** to engage in informal discovery whenever possible to clarify exhibits and testimony. The results of these efforts may be introduced into the record by stipulation, by supplementary testimony or exhibit, by presenting selected written interrogatories and answers for adoption by a witness at the hearing, or by other appropriate means.

Rule 25 (b) (emphasis added). In the absence of APWU's challenge, apparently only to one limited aspect of the Settlement, this important stipulation regarding the existing evidentiary record would have provided participants with two of the most important benefits of settlements: eliminating the need to pursue costly, time consuming litigation and avoiding the prolonged uncertainty that goes with litigation.

APWU has every right to challenge the First-Class automation discounts, and it has elected to do so. APWU has the right to due process so that its challenge to the Settlement can be considered by the Commission, and it will receive ample due process under the USPS-sponsored procedural schedule. But APWU does not have the right to expand the scope of the proceeding or unnecessarily delay consideration of and action on the Settlement. And APWU has no right to engraft upon the proceeding additional procedures not contemplated in the original schedule for a fully litigated proceeding.

At this point, the purpose of the proceeding is to permit APWU to air its objections to the First-Class discounts. Under the Postal Service's schedule it

will have an adequate opportunity to do so. It is also fair that parties such as MMA who support the workshare rates included in the Settlement should have an opportunity to rebut APWU's evidence.² So long as the supporters do not affirmatively propose that the Commission recommend discounted rates other than the agreed upon rates contained in the Settlement, there is nothing that would give rise to a right of surrebuttal on APWU's part.

APWU argues (Initial Reply at 3) that Rule 30 of the Commissions Rules Of Practice gives APWU a right to file surrebuttal testimony. APWU is wrong. Rule 30 (e) (1) provides, in pertinent part,

The case-in-chief of participants other than the proponent shall be in writing and shall include the participant's direct case and rebuttal, if any, to the initial proponent's case-in-chief. . . . There will be an opportunity for participants to rebut presentations of other participants and for the initial proponent to present surrebuttal evidence.

In the present context of considering whether the Settlement should be approved, the USPS **and supporting participants** are, collectively, properly considered the "initial proponent" of the Settlement. The testimony submitted by APWU may include its direct case and rebuttal to the initial proponent's case-in-chief. In effect, the testimony, if any, that the USPS and supporting participants may elect to file will constitute the participants' rebuttal to APWU and the USPS surrebuttal to the rebuttal filed by APWU. Thus, read correctly Rule 30 does not provide any basis for building in an additional round of surrebuttal testimony by APWU.

For these reasons, the Commission should reject APWU's proposal to engraft additional procedures onto the procedural schedule suggested by the USPS. For similar reasons, the Commission should reject APWU's related proposals for written discovery on the rebuttal testimony, if any, that Settlement

² That evidence, if any is necessary, may refute the testimonial assertions of APWU's witness; for example, it may entail an explication of the reasons why the USPS's mail processing models understate cost avoidance.

supporters may file and, consequently, a delay in the hearing on the supporters' testimony.³

II. APWU's Proposed Discovery Mechanisms Are Not Reasonable

The USPS' timely suggestions regarding the procedural schedule proposed a cutoff of February 8 for discovery requests, 3 days for objections and interrogatory responses within 5 days. APWU adopts the February 8 cutoff but claims that it needs 10 days to file responses **and objections**⁴ to interrogatories, which, according to APWU, requires delaying the hearing on its case until February 19.

There is no reason to delay the hearing beyond the February 12 date suggested by the USPS. APWU (Initial Reply at _) is right that there might not be enough time to file all of its discovery responses prior to the February 12 hearing. But that "fact" is irrelevant. The Settlement supporters have proposed discovery procedures that put a great deal of pressure on them to expedite review of APWU's testimony and generate written discovery requests at the earliest possible date. Accordingly, we fully expect that we will be able to file any necessary written discovery in time to have responses ready before the hearing.

But even if some of discovery requests are filed on February 8, the fact that they may not be answered before the hearing begins is not crucial. The USPS and supporting participants will have the option of asking the questions and receiving answers during oral cross, a common practice, or, alternatively, awaiting the filing of a response after the hearing and then moving admission of the response as written cross-examination, an equally common practice. In either event, it is the Settlement supporters, **not APWU**, that will be at risk. That

³ As APWU recognizes (Initial Reply at 3), "there is no written cross-examination of rebuttal witnesses." Moreover, the six days allowed between the filing of rebuttal testimony and the hearing under the USPS procedural schedule is entirely reasonable in light of the fact that the existing procedural schedule in this case provides 9 days between the anticipated filing of rebuttal testimony by witnesses for the USPS and possibly other participants.

⁴ APWU apparently proposes to wait the full period until its discovery responses are due to file objections to discovery requests. Such a proposal is nonsensical and contrary to accepted practice. Under current circumstances where the scope of the case

is a risk that they are willing to shoulder. They are not willing to assume the risk that delaying commencement of the hearing on the USPS schedule might pose to prompt consideration and approval of the Settlement.⁵

APWU's related complaint that 5 days is too short a time to answer interrogatories is also flawed. The Commission's standard allowance of 14 days for responses to interrogatories is designed to deal with situations where up to 100 parties are simultaneously submitting numerous interrogatories directed to perhaps 40 Postal Service witnesses and/or dozens of attorneys for the USPS and intervenors are simultaneously submitting numerous interrogatories to one or more witnesses for 40-50 intervenors. That is nothing like the much more limited situation presented here where at most 3 or 4 parties will submit interrogatories to one APWU witness on a very narrow issue. Moreover, a key element of the procedural mechanisms suggested by the USPS is the requirement that "all testimony, exhibits, workpapers, and library references shall clearly set forth all calculations involved in deriving outputs and the record sources for all inputs to such calculations." See USPS Procedures Motion at 4. That requirement, to which APWU has not objected, should go a long way toward minimizing the number of interrogatories submitted by supporters of the Settlement.⁶

has been narrowed significantly and parties will be exchanging documents by email, 3 days for objections is more than adequate.

⁵ As APWU recognizes (Initial Reply at 3) that can be cured by moving back the discovery cutoff. Accordingly, in the event the Commission does not adopt the USPS suggestion for a 5-day response period, KeySpan and MMA request that the cutoff date for discovery on APWU's filed testimony be moved back from February 8.

⁶ If APWU's witness still cannot respond within the 5-day time limit, APWU can always seek an extension for good cause shown.

For these reasons, the procedural mechanisms proposed by the USPS are reasonable and should be adopted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document in compliance with Rules 12 of the Commission's Rules of Practice.

Dated this 28th day of January 2002.

Michael W. Hall