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JOINT REPLY BRIEF OF AMERICAN BANKER'S ASSOCIATION AND NATIONAL ASSOCIATION OF PRESORT MAILERS

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Henry A. Hart, Esq.
Reed Smith LLP
1301 K Street N.W.
Suite 1100 - East Tower
Washington, DC 20005
Ph: 202-414-9225
Fax: 202-414-9299

Counsel for
National Association
of Presort Mailers

Irving D. Warden
Assoc. General Counsel
American Bankers Association
1120 Connecticut Ave., NW
Washington, DC 20036
Ph: 202-663-5035
Fax: 202-828-4548

Counsel for
American Bankers Association

Table of Contents

Table of Authorities

Cases

I. The APWU Simply Ignores The Critical Fact That Its Proposal Is Based Upon A Cost Avoidance Measurement Which Has Been Repeatedly Rejected By The Commission.

The critical element which underpins the entire APWU proposal is USPS Witness Miller's measure of cost avoidance. That measure of cost avoidance forms the basis for APWU's claim that the Settlement Proposal FCLM automated discounts exceed actual cost avoidance. It is witness Miller's measure of cost avoidance which, when subjected to APWU's recommended 80 to 100% passthrough levels, results in APWU's proposed draconian reductions in FCLM automated discounts.

One of the most important components of the Miller cost avoidance measurement methodology is his use of less than 100% volume variable labor costs. This method significantly reduces the measure of cost avoidance and has been repeatedly rejected by the Commission, most recently in R2000-1. Furthermore, Mr. Miller in this case has made substantial additional changes to the Commission R2000-1 methodology, including a "refinement" to the delivery cost proxy used for the BMM benchmark, which proxy reduces the cost avoidance measure by 1.89 cents, and the exclusion of two cost pools included by the Commission, and indeed by Mr. Miller, in R2000-1. Surrebuttal witness Bentley demonstrates that Mr. Miller's changes to the Commission R2000-1 methodology reduced his cost avoidance measure by 3.7 cents per piece.[1]

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1 Bentley Surrebuttal Testimony (MMA-SRT-1) at 13 Tr. page 5171, Table 6.

Yet nowhere in its Initial Brief does the APWU acknowledge or deal with this problem. Nor does APWU recognize the fact that there is now (and was when APWU witness Riley testified) substantial evidence in the record in this case of cost avoidance based on the Commission R 2000-1 methodology, which evidence shows that costs avoided by automated FCLM actually exceed the Settlement Proposal discounts.[2] Based on the record in the case, the Commission should not abandon its own preferred method of calculating avoided costs and accept witness Miller's artificially truncated measure of avoided costs.

The APWU Initial Brief is absolutely silent on what the Commission should do with the APWU Proposal if the Commission declines, as it should, to abandon its long-standing precedent of utilizing 100% volume variable labor costs as a basis for calculating worksharing cost avoidance. However, the answer seems clear, which is perhaps why they are so silent. If the Commission measures cost avoidance as it has in the past, it can and should simply ignore the APWU Proposal as irrelevant. For where automated FCLM cost avoidance is measured in a manner consistent with the Commission R2000-1 methodology, cost avoidance actually exceeds the discounts, and the APWU concern that automated FCLM discounts not exceed cost avoidance, totally evaporates.

II. The APWU Approach To Setting Automated FCLM Discounts Which Is Too Mechanistic, And Focuses Solely Upon Passing Through A Specified Percentage Of

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2 Postal Service Institutional Responses to Interrogatories ABA&NAPM/USPS-T22-4 and MMA/USPS-T22-76 at 10A Tr. Pages 2638 and 2862 respectively. See Table 1 of ABA & NAPM Joint Initial Brief at page 6 for a full listing of these Commission R2000-1 methodology derived cost avoidance measures.

Cost Avoidance To The Exclusion Of Any Other 39 U.S.C. § 3622(b) Criteria Should Be Rejected By The Commission.

In addition to relying upon a cost avoidance measurement methodology which has been repeatedly rejected by the Commission, the APWU in its Initial Brief focuses myopically upon passing through a specified percentage of cost avoidance. An accurate measure of cost avoidance is a very important part of setting discounts, and to achieve efficient component pricing, worksharing discounts should be set equal to at least 100% of accurately measured cost avoidance; but discounts should not be set by a rigid rule which would prohibit discounts from exceeding 100% of cost avoidance. APWU's suggestion that discounts should be limited to 80 to 100% of measured cost avoidances is arbitrary and capricious and unsupported by any reasoned analysis or economic principal.

Such a mechanistic rule would make meaningless 39 U.S.C. § 3622(b) and would deny the Commission the discretion which it needs to establish discounts which are in the public interest and in accordance with the pricing criteria of 39 U.S.C. § 3622(b).

An excellent example of the additional factors which should be considered by the Commission, but which would be ignored under the APWU Proposal, are those factors identified by USPS witness Robinson in her testimony as supporting automated FCLM discounts which pass through approximately 120% of witness Miller's artificially reduced measure of cost avoidance. These considerations included: (i) achieving the cost coverage target provided by USPS witness Moeller, (ii) recognizing the value of mailer worksharing, (iii) avoiding disruptive changes in discount levels, (iv) acknowledging the importance of mailer barcoding and presortation and overall postal operations, (v) recognizing that overall automated letters are a low

cost, high contribution mail stream, and (vi) recognizing the unfairness of sharply reversing discounts for workshare mailers who have invested significantly in the workshare program.[3]

Similarly, the presort and automated FCLM extra ounce rates in this case present a situation where the Commission should have the flexibility to pass through more than 100% of the measured cost avoidance before it, since there is strong indication that such cost avoidance is understated. ABA&NAPM witness Clifton provided substantial evidence demonstrating that the extra ounce costs for First Class presort are materially lower than for single piece, and that the cost studies for presort appear to be flawed and biased upwards.[4] Indeed, in this case even the Postal Service has acknowledged that the extra ounce cost studies are flawed.[5] The Commission should have the discretion to pass through more than the understated cost avoidance produced by the Postal Service for presort and automated FCLM extra ounce in this case, particularly where to do so would mitigate the disproportionate institutional cost burden borne by automated FCLM.

In short, the mechanistic approach of the APWU which focuses solely on a specified percentage passthrough of cost avoidance, to the exclusion of all other factors, is too restrictive on the Commission's discretion, is contrary to 39 U.S.C. § 3622(b), and should be rejected by the Commission in this case.

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3 Robinson Direct Testimony (USPS-T29) at pages 20 and 21.

4 Clifton Surrebuttal Testimony (ABA&NAPM-SRT-1 at 13 Tr. page 5296, line 9-5297, Figure 4).

5 Postal Service Initial Brief herein at page V-35.

III. **The APWU Concern For The "Dire Financial Straits" Of The Postal Service Is Not A Reason To Impose Arbitrary And Punitive Discount Reductions Which Single Out Automated And Presort FCLM.**

The APWU discusses at length in its Initial Brief its concern over the dire financial straits of the Postal Service. Putting aside the fact that this discussion represents an effort by the APWU to present through its legal counsel economic testimony not in the record, concern for the financial condition of the Postal Service can in no way justify arbitrary application of punitive discounts to only a few rate categories within First Class Mail, particularly where the APWU's own witness admits that his discount strategy should apply equally to Standard automated mail.[6] Without doubt, the APWU would cry foul if its members were singled out to take a 20% wage cut in order to help the Postal Service through difficult financial times; yet this is effectively what the APWU is proposing for automated FCLM mailers.

All of the parties, not just APWU, are concerned with the financial well-being of the Postal Service. It is certainly the case that the NAPM and its members are as concerned about the economic well being of the USPS as the APWU and its members. Moreover, in this case, it was the considered judgment of 56 of the parties, including the Postal Services itself, that early implementation of the Settlement Proposal would be the most beneficial way to address the financial straits of the Postal Service.

To attempt to obtain needed revenue for the Postal Service from only a few rate categories of First Class Mail, indeed, from the most valuable mail stream to the Postal Service

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6 Riley Cross Examination at 12 Tr. 4921, lines 6-8.

in light of its high volume and high contribution towards institutional costs, is not only arbitrary and unfair, but is also short-sided and likely to worsen the financial situation of the Postal Service.

IV. The APWU Has Been Afforded Due Process In This Case

In an apparent effort to pressure the Commission to give favorable consideration to the flawed APWU proposals, the APWU devotes a substantial portion of its Initial Brief to a claim that it was denied due process in this proceeding. In particular, APWU complains that it did not have as much time as it would have liked to review the surrebuttal testimony of other intervenors, that it was not allowed to direct written cross-examination to such surrebuttal testimony, and that the surrebuttal testimony filed by other intervenors was in fact "case-in-chief" testimony. These arguments amount to an attempt by APWU to reargue its unsuccessful motion on the procedural schedule and its unsuccessful motion to strike significant portions of the surrebuttal testimony of other intervenors, and these arguments have no more merit than they did when the Commission rejected them by denying APWU's motions.

In establishing a procedural schedule for this rate-making proceeding, the Commission is required to provide the parties due process in accordance with the Administrative Procedures Act. 39 U.S.C. 3624. Cases under the Administrative Procedures Act make it clear that an agency such as the Commission has very broad discretion to fashion rules which are fundamentally fair, including rules which may limit time periods or the right to conduct written examinations as was the case with the Commission procedural schedule in question:

> "Agency is afforded broad discretion to fashion its own administrative procedure, including authority to establish and enforce time limits concerning submission of written information and data." Union Camp Corp. v. United States, 53 F.Supp. 2d 1310, 1327 (Ct. Intl. Trade 1999).

> "Agencies are free to fashion their own rules of procedure, so long as these rules satisfy the fundamental requirements of fairness and notice." Katzon Brothers, Inc. v. United States Environmental Protection Agency, 839 F.2d 1396, 1399 (10th Cir. 1988).
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> "The APA grants ALJ's broad discretion to exclude excessive evidence which lacks significant probative value and, by implication, to limit examinations, evaluations, and consultations by experts when such events will, in the ALJ's judgment, merely give rise to evidence so unduly repetitious as to be lacking in probative value." Underwood v. Elkay Mining, Inc., 105 F.3d 946, 950 (4th Cir. 1997).

The Commission in this case took remarkable steps to accommodate the interests of the only party which contested the settlement agreement which was supported by no less than 56 parties. Time limits are part of postal rate proceedings, as there is a ten month statutory limit on the duration of rate cases. We respectfully submit that any time problem which the APWU had was not due to the procedural schedule established by the Commission, but rather to the fact that the APWU, for reasons known only to it, waited until very late in this proceeding to become actively involved. This is evidenced by the fact that the APWU conducted absolutely no discovery upon any postal service witnesses. Nor apparently was the APWU witness aware of the fact, when he incorrectly testified that the only cost avoidance in the record was the Miller methodology, that there was in fact in the record substantial evidence of cost avoidance measured under the Commission R2000-1 methodology.[7] Had the APWU chosen to get involved actively in this case at an earlier stage, it would have had less difficulty dealing with the surrebuttal testimony within the timeframe allowed by the procedural schedule established by the Commission.

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7 Riley Cross examination at 12 Tr. Page 4904, lines 12 and 13. Postal Service institutional responses to interrogatories ABA & NAPM/USPS-T22-4 and MMA/USPS-T22-76 at 10 A Tr. Pages 2638 and 2862 respectively.

Nor is there merit to the APWU claim that the surrebuttal witnesses were in fact case-in-chief witnesses. In his testimony, APWU witness Riley asserted, without foundation, that cost avoidance measured by the Postal Service was overstated and that it was declining, and that major mailers were not concerned with reductions in automated FCLM discounts. With one exception noted below[8], all of the testimony of ABA & NAPM witness Clifton, NAPM witness Gillotte, MMA witness Bentley and MMA witness Crider was directly responsive to these claims in the Riley testimony and was therefore perfectly proper rebuttal testimony. There is simply no rule of law, and the APWU doesn't cite one, which says that testimony that could have been introduced or included as part of a case-in-chief can not be introduced as rebuttal testimony once a witness for another party puts the issue to which the testimony is relevant at issue.

Lastly, we note that there is no reason why the Commission should have to amend its rules to allow the APWU to present written cross-examination of surrebuttal witnesses, when APWU should have been fully aware of the Commission rules which do not allow such written cross examination, when it chose to become actively involved in this case.

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8 The testimony of witness Clifton providing rates which would result from an equal dollar contribution to institutional costs by all categories of mail was directly responsive to a most reasonable interpretation of another argument in Mr. Riley's testimony that each piece of first-class discounted mail should contribute at least as much absolute dollar contribution as each piece of comparable non-discounted mail. (Contrary to the assertion by APWU at page 7 of its Initial Brief that Mr. Riley was referring to "identical" pieces of mail making the same contribution to institutional costs, nowhere in Mr. Riley's discussion of absolute dollar contributions does he use the word "identical"). Mr. Clifton's interpretation of Mr. Riley's testimony in this regard was clearly reasonable and as such his response was clearly rebuttal testimony. However, we do note that if for any reason the Commission chooses not to rely on this portion of Dr. Clifton's testimony concerning Mr. Riley's absolute dollar contribution, there are ample other reasons set forth in this brief and in our Initial Brief for rejecting Mr. Riley's testimony.

In summary, the procedural schedule established by the Commission in this case was clearly a proper exercise of the broad discretion which the Commission has under the Postal Statutes and the Administrative Procedures Act, and case law thereunder, to fashion rules which are fair to all parties concerned.

V. The Surrebuttal Testimony Is Fully Consistent With The Settlement Agreement And Supports The Settlement Proposal.

ABA&NAPM also take issue with the puzzling suggestion of the Postal Service in its Initial Brief at pages V-40 and V-41 that the Commission should not consider witness Clifton's and witness Bentley's evidence which conflicts with USPS witness Miller's measure of cost avoidance.

ABA&NAPM agreed, and still agree, as part of the settlement that the Postal Service testimony "and materials" filed on behalf of the Postal Service in this case provide substantial evidence in support of the Settlement Proposal rates.[9] Of course those "materials" include, *inter alia*, Library Reference USPS-LR-J-84, as revised 11-15-01, which shows cost avoidance measured by the Commission R2000-1 methodology. ABA&NAPM were able to join the settlement because they recognized that this Library Reference would allow the Commission to apply to the costs put in the record by the Postal Service in this case, the same cost avoidance measurement methodology which the Commission used in R2000-1, and the Commission would

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9 Nothing in the Settlement Agreement which both NAPM and ABA signed, prohibits or limits the evidence which they can introduce to defend the rates included in the Settlement Agreement. While NAPM and ABA believe that the evidence in this case could support discounts considerably larger than those in the Settlement Agreement, both the NAPM and the ABA are asking this Commission to recommend the settlement rates and we submit that they are supported by the record.

derive cost avoidance for automated FCLM which fully supports the Settlement Proposal discounts. This became particularly clear when we discovered that Mr. Miller's "refinement" of the delivery proxy used to measure delivery costs of the benchmark BMM, reduced cost avoidance 1.89 cents below the level the Commission would derive if it used the same delivery cost proxy utilized by Mr. Miller and by the Commission in R2000-1.

ABA&NAPM provided further support for the Settlement Proposal discounts by obtaining Institutional Response of the Postal Service to Interrogatory ABA&NAPM/USPS-T22-4[10] which simply shows the cost avoidance derived by adding back this 1.89 cents to the USPS-LR-J-84 PRC R2000-1 method-derived cost avoidance. MMA then provided further support for the Settlement Proposal discounts by obtaining the Postal Service Institutional Response to Interrogatory MMA/USPS-T22-76,[11] which merely adds to the USPS-LR-J-84 PRC R2000-1 method-derived cost avoidance, this 1.89 cents to reflect use of the PRC R2000-1 delivery cost proxy for BMM, and which adds back two cost pools included by the Commission in R2000-1, but excluded by Mr. Miller in this case.

In the same vein, the surrebuttal testimony of ABA&NAPM, MMA, and Keyspan witnesses all support the Settlement Proposal by demonstrating to the Commission that it can take the cost information placed into the record by the Postal Service in this case, and apply the Commission R2000-1 methodology, with or without refinements suggested by witnesses Clifton

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10 10A Tr. page 2638.

11 10A Tr. page 2862.

and Bentley, to derive automated FCLM cost avoidance which fully supports the Settlement Proposal discounts for automated FCLM.[12]

In short, the record contains ample evidence to support the discounts proposed under the Settlement Proposal. The testimony of witnesses Clifton and Bentley clearly demonstrates that when cost avoidances are properly measured using Commission-approved methodology the proposed discounts are shown to be quite modest compared to the costs avoided. The testimony of these two witnesses and the presentations of ABA, MMA, and NAPM, support the settlement rates by demonstrating that properly calculated cost avoidances easily support the proposed First-Class Mail discounts.

VI. The Commission Should Reject The APWU Proposed Rates Which Are Arbitrary, Unsupported By Substantial Evidence, And Contrary To 39 U.S.C. 3622(b), And Should Recommend The Settlement Rates Which Are Supported By Substantial Evidence And Consistent With 39 USC 3622(b); To Do So Would Be In The Best Interests Of The Postal Service And The Mailing Public, And Would Encourage Settlement Of Rate Cases In The Future.

The Commission has substantial discretion in recommending rates which comply with 39 U.S.C. § 3622(b). Mail Order Association Of America v. United States Postal Service, 2 F.3d 408,422 (D.C. Cir. 1993). For the reasons explained herein and in our Initial Brief, the APWU

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12 The surrebtutal testimony of Dr. Clifton and Mr. Gillotte and Mr. Crider also demonstrate that Mr. Miller's cost avoidance fails to reflect important cost savings activities of workshare mailers, and that the CRA costs suggest that workshare mail savings are increasing, and such testimony is therefore also fully consistent with the Settlement Agreement in that it helps the Commission realize that the Settlement Proposal discounts are supported by more than the cost avoidance measured by Mr. Miller.

Proposal is irrelevant, arbitrary and inconsistent with 39 U.S.C. § 3622(b) and should not be recommended by the Commission.

The settlement parties in this case, at the urging of the Commission, have forgone the opportunity to fully litigate this case and have instead agreed to a settlement which is much less favorable to them than the result they would have expected to obtain from a fully litigated case. This is particularly true of the automated FCLM mailers who would have advocated substantially higher discounts, fully supported by fair and accurate cost avoidance measures .We submit that in this situation the Commission should defer to the settlement process and recommend the Settlement Proposal rates, since they are fully supported by substantial evidence in the record and are consistent with Commission precedent and statutory criteria.

Respectfully submitted,

AMERICAN BANKERS ASSOCIATION

NATIONAL ASSOCIATION OF PRESORT MAILERS

By:_____

Henry A. Hart, Esq.
Reed Smith LLP
1301 K Street N.W.
Suite 1100 - East Tower
Washington, DC 20005
Ph: 202-414-9225
Fax: 202-414-9299

Counsel for
National Association
of Presort Mailers

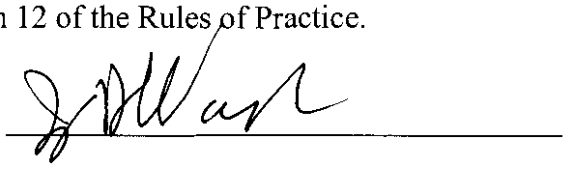
Irving D. Warden
Assoc. General Counsel
American Bankers Association
1120 Connecticut Ave., NW
Washington, DC 20036
Ph: 202-663-5035
Fax: 202-828-4548

Counsel for
American Bankers Association

Date: March 8, 2002

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the instant document on all participants of record in this proceeding in accordance with Section 12 of the Rules of Practice.



Irving D. Warden

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