

# DOCKET SECTION

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

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OFFICE OF THE SECRETARY

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POSTAL RATE AND FEE CHANGES, 1997

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Docket No. R97-1

## RESPONSE OF THE UNITED STATES POSTAL SERVICE TO NOTICE OF INQUIRY NO. 1 (October 6, 1997)

Notice of Inquiry No. 1<sup>1</sup> arose out of several contentious disputes in this docket pertaining to the status of certain library references. In a number of instances, Postal Service witnesses have referred to, used, or relied upon the results of studies, analyses, or materials that have been designated library references, rather than testimony, exhibits, or workpapers. Such designations follow a long practice in Commission proceedings of filing and identifying documentary materials in this fashion. Questions and disagreements relating to the status and use of such materials, furthermore, are not new. Over the years, a number of controversies have surrounded the library reference designation.<sup>2</sup> Partly in response to some of these disputes, the Commission has attempted in its permanent and special rules to qualify the library reference practice by clarifying that the documentary status of library references in the administration of its proceedings does not confer evidentiary status.<sup>3</sup>

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<sup>1</sup> Notice of Inquiry No. 1 On Interpretation Of Commission Rules Authorizing The Use Of Library References, Docket No. R97-1 (September 17, 1997) (hereinafter "NOI 1")

<sup>2</sup> See, e.g., *Newsweek v. United States Postal Service*, 663 F2d 1186, 1208-09 (2d Cir 1981); Order Directing Production of Postal Service Witness, PRC Order No. 772, Docket No. R87-1 (Aug. 14, 1987).

<sup>3</sup> Rule 31(b); Special Rule 5.

In the instant docket, several intervenors and the Office of the Consumer Advocate (OCA) have submitted numerous interrogatories to Postal Service witnesses seeking a variety of types of information about certain library references. While many of the inquiries have concerned the substance of the studies, analyses, or information embodied in library references, many of the questions also have focused on the issue of "sponsorship" and on the identities of persons involved in producing the documents. The Postal Service has reacted to some of these inquiries by objecting or resisting provision of details about authorship or individual involvement. Furthermore, some Postal Service witnesses have been reluctant or cautious to "sponsor" or adopt studies in which they were not involved, or in which they were at least not principal participants. In many instances, the Postal Service has responded to requests for substantive information about the materials by redirecting interrogatories and providing "institutional" responses. This practice also has a considerable history in Commission proceedings.

In a few instances, the disputes over inquiries into sponsorship and identities have led to motions to compel and to strike testimony.<sup>4</sup> One of these resulted in a Presiding Officer's Ruling that called into question the motives of the Postal Service and the positions it has taken regarding the use of such materials and their status.<sup>5</sup>

NOI 1 inquires further about the bases for these controversies, and seeks to explore their potential effect on the evidentiary record. It basically asks two categories

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<sup>4</sup>NDMS Motion To Strike Portion Of Testimony Of USPS Witness Fronk (August 29, 1997); Reply Of USPS To Motion Of NDMS To Strike Testimony Of Witness Fronk (September 8, 1997); Similar issues have arisen with respect to witnesses Crum and Moeller, and different library references.

<sup>5</sup>Presiding Officer's Ruling No. R97-1/20 (September 20, 1997).

of questions: (1) which library references create problems as potential evidentiary support for the Postal Service's proposals, and to which proposals do they relate; and (2) should the Commission revise its rules in light of this situation? NOI 1 also invites other comments or legal memoranda relating to these issues.

Notwithstanding the rhetoric of its own pleadings in these disputes, the Postal Service does not believe that NOI 1 is unreasonable in its focus or approach, although it appears to be based on a misapprehension of the Postal Service's intent. The reliability of the information offered to support Postal Service proposals is of paramount importance to the Commission, the intervenors, and the Postal Service. Furthermore, it is difficult to overemphasize the importance of due process to the interests of the intervenors and the Postal Service, and to the integrity of the Commission's recommended decisions and ultimately of the Postal Service Governors' decisions. As the Postal Service has often emphasized, particularly with regard to the Commission's own analyses, the ability to explore, understand, and challenge the sources of change in rates and classifications is essential to the fairness of Commission proceedings and the reliability of its recommendations.

The following will address NOI 1 in three parts. First, it will briefly comment on the invitation to propose revisions in the Commission's rules. Second, it will discuss the issue of "sponsorship." Third, it will attempt to clarify what the Postal Service believes is an unfortunate misunderstanding regarding its motives in these disputes.

### **(1) Rule Revisions**

The experience of this docket may well justify clarifying or revising the library reference practice. Whether consideration of existing rules will warrant modifying them is, however, uncertain at this time. Furthermore, some of the discovery disputes that underlie the controversy over the Postal Service's use of library references in this case

pertain to specific requests for the creation of additional documentation, organization, indexing, and cross-referencing that could lead to filing requirements that would create considerable additional burden and complexity for the Postal Service in preparing its rate case filings. While the Postal Service does not contend that these matters should not be addressed, it does not believe they should be resolved in the context of this NOI but should be tackled when there is more time to give them adequate consideration.

The Postal Service likewise does not believe that it is a foregone conclusion that a formal rulemaking is necessary in the future. In this regard, it observes that the relationship between the function of library references in the administration of Commission proceedings and the question of evidentiary status is already addressed in the rules. Further clarification or refinement of the Commission's existing practices, as well as a better understanding of the effect on the evidentiary record, may obviate a formal rule change.

## **(2) Sponsorship**

The Postal Service notes that in these disputes considerable emphasis has been placed on the need to associate witnesses, or other persons, with studies, analyses, and other information offered as support for or inputs to Postal Service proposals. This association is often presumed to be, or is expressed as, a requirement for admissibility as evidence. Sponsorship is represented as linking a named individual with a study. Past Commission practice, however, has not always adhered to this formula.

The legal basis for the contention that every study or analysis must have a witness, no matter what its use, deserves in-depth exploration and thorough research. Regrettably, we have not been able to prepare the carefully researched memorandum on this topic that NOI 1 may have contemplated. Furthermore, it may well be that the Commission proceedings and the practices they have given rise to are distinctive

enough that parallels to the status of evidence in other litigation contexts are difficult to draw. Until we can explore these matters more comprehensively, we make the following general observations regarding Commission practice. We will also propose some practical solutions for the instant case.

In early Commission proceedings, form of sponsorship of ratemaking studies, analyses, and other types of information tended to dominate substance in some respects, and the Postal Service generally offered a handful of witnesses to front a conglomeration of materials. This practice worked, and it was tolerated by the Commission, but it led to criticisms when witnesses were unable to answer all questions regarding particular studies. Docket No. R84-1, however, created a watershed. In that case, the Postal Service for the first time attempted to present the authors of most of the major studies as witnesses, within practical limits. One result was that, in Docket Nos. R84-1, R87-1, and R90-1, the number of witnesses more than doubled, relative to earlier cases. The instant case represents something of another watershed in that the number of pieces of testimony offered by the Postal Service has roughly doubled again (relative, for example, to Docket No. R90-1), and now exceeds 40.

*The explosion of the scale and scope of cases over time can be traced to several sources, in addition to the Postal Service's conscious attempt to align evidence more closely with responsibility. Most importantly, the structure of rates and classifications, and the interrelationships among the different rate and service categories have gotten increasingly complex, particularly since Docket No. R90-1 and Docket No. MC95-1.<sup>6</sup> In part, this development is a reflection of the rapid rate of*

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<sup>6</sup> The magnitude of the change can perhaps best be understood by a simple comparison of the rate schedules for the two largest subclasses recommended by the Commission in the first rate case, Docket No. R71-1, with the rate schedules proposed

change within the postal operating environment, as new and more diverse technologies have been brought on line. To this can be added an expansion of the Commission's interests in and expectations for analytical refinement of the substance of ratemaking and greater information and data. Finally, the Commission's rules governing documentation and filing requirements have gotten increasingly more detailed and complex.<sup>7</sup>

These developments, combined with organizational changes within the Postal Service and time and resource constraints, have led to certain practical accommodations in presenting Postal Service rate filings that have created tensions with the expectation that each individual source of analysis and information will have a spokesperson in the case.<sup>8</sup> Increasingly, studies and related information have been

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by the Postal Service in this case for the same types of mail. In Docket No. R71-1, the Commission recommended exactly two rates for First-Class letters (the First-Class per ounce rate, and the Airmail per ounce rate). In this case, proposed Rate Schedule 221 for this same mail contains 13 different proposed rates. In Docket No. R71-1, the Commission recommended four discrete rates for Third-Class Regular Bulk Mail. In this case, proposed Rate Schedules 321.2A, 321.2B, and 321.3 contain over 30 discrete rate elements for mail that would have been classified as Third-Class Regular Bulk Mail in Docket No. R71-1. Growth in complexity of the same magnitude can be observed for the other subclasses as well.

<sup>7</sup> Over time, there is something of a cyclical nature to the expansion of Commission documentation requirements. Stated briefly, the cycle runs as follows. Parties complain that they cannot understand a particular type of analysis, and request that more information be required to be submitted with the filing. The Commission amends its rules, and the Postal Service provides the requested information. This, in turn, often appears to precipitate complaints that there is too much information to digest, and more efforts must be devoted to an explanation of the structure of the new information, and how it relates to the old information. Once this objective is achieved, the cycle begins anew with calls for the presentation of yet more information, and subsequent demands for more explanation of the new information.

<sup>8</sup> It seems clear that given the increasingly expansive amount of information currently available for potential use in postal rate proceedings, some practical limitation

designated as library references. Admittedly, in some instances, this trend has called into question the proper treatment of certain key studies.

In discovery, some of the same growing complexities have resulted in increasing use of institutional responses to interrogatories. In this sense, institutional responses are an accommodation made necessary by growing complexity and by differences in the uses and status of various kinds of information, studies, and analyses in Commission proceedings. Short of creating formalistic devices, such as presenting witnesses who would front or sponsor a wide range of materials in which they might not have been personally involved, the Postal Service has answered authoritatively numerous questions as an institution. Given the broad scope of discovery requests posed by intervenors, some of which range well beyond the topics covered (or, in some instances, the topics in any way relating to the topics covered) in the testimony of the Postal Service's witnesses, using institutional responses is the only practical alternative to providing dozens, if not hundreds, of additional witnesses. For the most part, Commission practice has been able to adapt to the emerging role of these institutional responses. The dual nature of discovery devices has contributed to this development. The practice of utilizing discovery as written cross-examination, to do more than just uncover facts, but also to serve as a vehicle for exploring assumptions, methodologies, calculations, and even opinions and rationales relating studies and their results and conclusions, has contributed significantly to the Commission's ability to develop an evidentiary record in an increasingly complex and sophisticated context of substantive

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must be placed on the number of witnesses presented. In the context of these proceedings, it would be logistically impossible for a witness to be put forward with respect to every study, document or number relied upon or discovered in the course of the case.

issues. In large part, furthermore, the Postal Service has been able to provide a great deal of important information and guidance in the form of responses to discovery that *could be entered directly as evidence without having to burden the procedural schedule with an explosion in the number of witnesses who must be cross-examined.*

Increasingly, however, parties have tended to single out the absence of "sponsorship" by individuals as a procedural defect embodying a denial of due process, regardless of the actual need to have a witness adopt particular answers. While this practice is understandable as an approach to the litigation, in light of the financial importance of postal rate proceedings, it does not shed any additional light on the reliability of some of the information whose status as library references has been questioned.

In general, the personal identities of sources are only really important in three respects:

- a. Qualifications of experts who offer opinions.
- b. Accuracy and reliability (i.e., credibility).
- c. The ability to follow-up on potential lines of inquiry, such as the ability to test assumptions, etc.

Depending on the type of information involved, however, only for the third point might one actually need a witness. With much of the information that becomes evidence (via written cross-examination), opinion is not involved. If the information in question is inherently objective, and as long as the Postal Service is willing to certify its accuracy and reliability, it is unclear what additional value is obtained by having the name of an individual associated with that information. Under such circumstances, an "institutional" approach to the provision of such information does not appear unreasonable.

Moreover, even in instances where some follow-up to the original body of information might appear to be warranted, it is often possible for the Postal Service to respond to such follow-up in writing. Once again, this depends on the nature of the type of information requested. If there appears to be a reasonable consensus on the type of information which the type of analysis in question requires (based, for example, on past Commission practice regarding that particular type of analysis, or closely similar types), and if there is an objective, empirical source for such information, no witness may be necessary. This comports with past Commission practice. To insist that the evidentiary value of study results is nullified by not having a named witness may elevate form over substance, depending on the nature of the study and its factual basis.

In this case, as noted above, the Postal Service has offered an unprecedented number of pieces of testimony, by an approximate factor of two. To some extent, in launching such a case, we were sailing into uncharted waters. Avoiding the appearance of a deliberate attempt to "overload" the Commission was a matter of some concern. In retrospect, it is clear that some parties now would prefer that we had provided an even larger number of pieces of testimony than were filed initially. As the nature of their concerns have become more clear, the Postal Service has participated in a process of offering witnesses for certain library references which have been identified as needing them. See, e.g., Presiding Officer's Ruling No. R97-1/38. The Postal Service will consider others. But the test should be more than simply that some party has proclaimed a desire to have a witness. The test should be, given the nature of the library reference in question, whether there is any real purpose to be served by the

identification of a witness.

Similar concerns would need to be addressed to sustain an argument that providing a witness at this stage of the case would so clearly fail to remedy earlier shortcomings as to violate due process. A party making such an allegation should have to demonstrate more than that it diligently attempted to utilize written cross-examination and that it was unable to pursue every line of inquiry it perceived to be relevant using that vehicle. As no party has yet obtained oral cross-examination, there are many parties in the position of having taken written cross as far as it will go. The relevant standard would appear to be something along the lines of showing that having had a named individual would have allowed earlier exploration of a necessary line of written cross that could not have been pursued without the name of a witness. While in theory such an instance may be possible, it would appear that it would be far from the norm with regard to the types of studies presented in most of the library references that have been mentioned.

### (3) "Litigation Strategy"

The Postal Service fears that the NOI, in part, may be premised upon a misreading of its earlier pleadings. In relation to the Postal Service's motion practice concerning the use of discovery to determine the evidentiary status of USPS Library References, the NOI asserts that

A reading of the [Postal] Service's filings on the NDMS motions indicates that it interprets the Commission's authorization of the use of library references as broader license for "litigation strategy" that effectively insulates key material supporting several of its proposals from the standard process to which other

evidence is subject.”

NOI 1, at 2. The filing to which the NOI refers is the Postal Service’s September 12, 1997, Objection To OCA Interrogatory OCA/USPS-T32-57b, in which the Postal Service characterized that interrogatory as seeking to explore the Postal Service’s “litigation strategy.” The Presiding Officer characterized this objection (admittedly cryptic, upon hindsight) as “mak[ing] it clear that . . . [the Postal Service’s] position on sponsorship of the support for its proposals . . . is at odds with the basic rules of evidence.” Presiding Officer’s Ruling No. R97-1/20, at 6 (September 17, 1997).

At page 6 of the Ruling, the Presiding Officer<sup>9</sup> opines:

This impression is reinforced in the [Postal] Service’s statement, in its objection to an OCA interrogatory to [witness] Fronk regarding sponsorship of H-112, that the question relates to “litigation strategy, as opposed to substantive issues in this proceeding.”

The Ruling also refers to another Postal Service statement that it would “respond to cross-examination on the contents of H-112 in a manner consistent with its litigation interest.”<sup>10</sup> Although the statement made clear that the Postal Service viewed its litigation interest as providing the necessary support for the nonstandard surcharge proposals of witness Fronk, this statement apparently left the Presiding Officer with the impression that the Postal Service may have been adverse to offering a sponsoring witness.

The conclusion that the Postal Service has embarked on a strategy to “insulate”

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<sup>9</sup> Quoting the September 12, 1997, Postal Service Objection To OCA/USPS-T32-57(b).

<sup>10</sup> Reply Of USPS To NDMS Motion To Strike Testimony Of Witness Fronk, at n. 3. (September 8, 1997).

any materials from examination<sup>11</sup> is a regrettable misunderstanding which may have been avoided by a dash more clarity in the Postal Service's earlier pleadings. Because this unintended impression of its pleadings appears to form the basis for the NOI, the Postal Service believes it is critical make the most of this opportunity to clear the air.

The Postal Service's objection to the interrogatory concerning USPS Library Reference H-112 (NDMS/USPS-T32-16),<sup>12</sup> *intended to reflect its belief that the discovery process was being used improperly to resolve procedural and legal issues for which motion practice was more appropriate.*<sup>13</sup>

If that point was not made sufficiently clear in motion practice related to USPS Library Reference H-112, it should have become clear from motion practice related to USPS Library Reference H-226. At page 3 of its September 25, 1997, Reply to The Motion To Compel A Response To T32-57(b), the Postal Service explained that an interrogatory asking whether or not it was necessary to provide a witness to testify on a particular matter does not seek information pertaining to the substantive issues in the case, but seeks disclosure of how the Postal Service intends to proceed with the litigation of the case. By this, the Postal Service meant that such questions as whether to designate a witness to offer testimony or to sponsor certain material are fundamental matters which, for an organization as large and complex as the Postal Service, will

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<sup>11</sup> NOI 1 at 2.

<sup>12</sup> As well as its pending objection to OCA/USPS-T32-57(b). See, *Objections Of USPS To OCA Interrogatories To Witness Fronk (T32-57b)*, at 1 (September 12, 1997); *Opposition Of United States Postal Service to OCA Motion To Compel Response To Interrogatories OCA/USPS-T32-57(b) and OCA/USPS-8*, at 3-4 (September 25, 1997).

<sup>13</sup> The Postal Service concedes that any other interpretation of its pleadings may have resulted from a failure to articulate this point as clearly as possible at the earliest opportunity.

require deliberations among various departments (and outside consultants) which contribute personnel, expertise and material in support of the Postal Service's request and the litigation of these proceedings. The resolution of such questions necessarily involves considerations of how best to obtain the Postal Service's objectives in this case<sup>14</sup> -- its "litigation strategy."

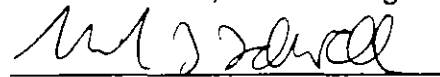
From the Postal Service's perspective, the situation it faced with respect to Library Reference H-112 was a straightforward one. NDMS asked an interrogatory seeking to determine whether a witness would be designated to sponsor the Library Reference. The Postal Service objected to the use of discovery for that purpose. The Postal Service's subsequent designation of a witness to "sponsor" Library Reference H-112 is consistent with its "litigation strategy" and interests -- those being to support its First-Class Mail nonstandard surcharge rate proposals.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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Michael T. Tidwell

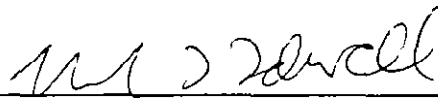
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<sup>14</sup> The Postal Service's objectives, of course, are the recommendation by the Commission of its rate and classification proposals.

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing document upon all participants of record in this proceeding in accordance with section 12 of the Rules of Practice.

  
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Michael T. Tidwell

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