

## DOCKET SECTION

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

POSTAL RATE COMMISSION  
OFFICE OF THE SECRETARY

Postal Rate and Fee Changes, 1997)

Docket No. R97-1

OFFICE OF THE CONSUMER ADVOCATE  
REPLY TO MOTION OF  
ALLIANCE OF NONPROFIT MAILERS AND AMERICAN LIBRARY ASSOCIATION TO  
STAY PROCEEDINGS  
(October 21, 1997)

The Office of the Consumer Advocate ("OCA") hereby submits its views with regard to the above-filed motion. We conclude that the ratemaking process would be best served by the Commission exercising its authority under 39 U.S.C. §3624(c)(2) to stay this proceeding for an appropriate time period.

OCA has filed a number of pleadings in this proceeding expressing its views with regard to procedural problems. In addition to numerous Motions to Compel, OCA on October 3, 1997, also filed its Response to Notice of Inquiry No. 1. Rather than submit another lengthy pleading, we wish to incorporate our NOI Response by reference into this document. We specifically direct the Commission's attention to Section III.D. in that Response, which discussed a few examples of the Postal Service's vague evidentiary presentations in this proceeding.

## RELEVANT LEGISLATIVE HISTORY

It is instructive to consider the legislative history behind 39 U.S.C. §3624(c)(2).

The text of the subsection reads:

(2) In any case in which the Commission determines that the Postal Service has unreasonably delayed consideration of a request made by the Postal Service under section 3622 by failing to respond within a reasonable time to any lawful order of the Commission, the Commission may extend the 10-month period described in paragraph (1) of this subsection by one day for each day of such delay.

On its face, this subsection implies that unreasonable failure to respond to the Commission's procedural orders in a case gives cause for imposition of the sanctions therein. Such orders include those procedural rules adopted through regulation, e.g., Rule 54: "Each formal request filed under this subpart shall include such information and data and such statements of reasons and bases as are necessary and appropriate *fully* to inform the Commission and the parties of the nature, scope, significance and impact of the proposed changes or adjustments in rates or fees . . . ." (emphasis added.) Orders also include the special rules of procedure adopted in a particular case, such as those specified in P.O. Ruling R97-1/4.

The legislative history of 39 U.S.C. §3624(c)(2) is instructive on the issue of the Postal Service's obligation to provide complete and timely data.<sup>1</sup> The subsection was

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<sup>1</sup> Legislative history page references are to "H.R. 8603, Postal Reorganization Act Amendments of 1976, Public Law 94-421, Legislative History, Committee on Post Office and Civil Service, House of Representatives, 94<sup>th</sup> Cong., 2<sup>nd</sup> Sess., October 1976." (hereinafter, "Legislative History.")

added by the Postal Reorganization Act Amendments of 1976, Public Law 94-421. House Report 94-391 accompanied H.R. 8603 to the floor of the House. Section 7 of the House bill revised section 3624 of title 39 by establishing time limits for the consideration of rate and mail classification cases before the Postal Rate Commission.<sup>2</sup> The House Report stated: "If the Commission determines that the Postal Service *has caused unreasonable delay in responding to interrogatories and supplying data*, the Commission may extend the time period by an amount of time equal to the delay."<sup>3</sup> (emphasis added.)

Additional instructive language was provided by the bill's conference managers, who added this commentary at the end of the section entitled "Postal Rate Commission Provisions:"<sup>4</sup>

*The managers wish to emphasize that, under existing law, the Postal Service must provide the Commission with prompt and reliable data in order for the Commission to carry out its responsibilities under the law. Under this legislation the Commission has been granted the additional authority to suspend implementation of proposed temporary rates on a day for day basis when it determines that the Postal Service has engaged in undue delays during consideration of rate cases. This authority should be sufficient to insure postal service cooperation. If it is not,*

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<sup>2</sup> Id. at 59. Thus, the House bill would have extended the ten-month deadline period to cases under sections 3622 and 3623(b) of title 39. Id. at 29.

<sup>3</sup> Id. The Senate Report noted that its version of the ten-month limitation did not apply to mail classification cases but provided no insight on the specific reasons for the change. Senate Report 94-966; see Legislative History at 301. The Conference Report noted that the final bill adopted the Senate version of the 10-month provision, which imposed no limits for mail classification cases. House Report 94-1444; see Legislative History at 533.

<sup>4</sup> Id. at 534.

further consideration should be given this matter by the appropriate committees of the Congress." (emphasis added.)

It seems clear that Congress was concerned both about the reliability and timeliness of Postal Service evidentiary submissions. Thus, the term "order" in the subsection's language has roots in the very issues plaguing this case.

#### ADDITIONAL DISCOVERY DELAYS

As noted above, OCA already has set forth a litany of informational foot-dragging problems in this case. However, NOI No. 1 did not address another informational issue – the lateness of interrogatory responses from the Postal Service. This is apparent from the flood of motions for late acceptance the Postal Service has filed. Such motions are routinely granted, and parties do not oppose such motions in pleadings. The reason is that there are no palatable sanctions to these individual late filings. One would not want to strike the answer for it often contains a valuable piece of information.

Cumulatively, these delays add up and impact the preparation of parties' direct cases. They thus have the impact of shortening the useable period of parties' discovery on the Postal Service.

Perhaps overlooked in the blizzard of motions for late acceptance is the fact that many delays have been substantial. We here examine institutional interrogatories OCA directed to the Postal Service and the late replies filed thereto. For example, OCA filed a set of interrogatories on the Postal Service (OCA/USPS-44-53) on September 8, 1997, which as of October 20, 1997, had not been responded to. The questions dealt

with the Postal Service's PRM and QBRM proposals (and, thus, inferentially, CEM). The likely witness to cross-examine on the responses would have been witness Fronk, who already has testified.

Another set (OCA/USPS-64-70) was filed on September 12, 1997.<sup>5</sup> As of October 20, 1997, only one of the responses has been submitted. Although the interrogatories were directed to the Postal Service, witnesses Fronk, Mayes and Treworgy would have been the likely persons to cross-examine on the issues raised in the set of interrogatories.<sup>6</sup> These witnesses already have appeared.

These problems are not isolated. The response to OCA/USPS-34 was filed 13 days late. Responses to OCA/USPS-25-33, 35, 39 and 40 were filed 10 days late. Responses to OCA/USPS-54-61 were filed six days late.

### RECOMMENDATION

We recommend that the Commission strongly consider imposing a stay of this proceeding under 39 C.F.R. §3001.56 in order to give parties time to evaluate the late-filed evidence in this case. A period of from 60 to 90 days would seem appropriate, and would minimize the danger of a successful due process court challenge to the proceeding.

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<sup>5</sup> The response to OCA/USPS-69 was filed three days late.

<sup>6</sup> OCA/USPS-64 dealt with aspects of the delivery confirmation proposal. OCA/USPS-65-67 dealt with CEM. OCA/USPS-70 dealt with the proposal to increase the maximum combined length and girth limitation for packages for certain mailers.

Finally, we respectfully note that an expeditious decision by the Commission is highly desirable, if not necessary, for the participants to this proceeding. OCA is now beginning to prepare its direct case and must soon make decisions about the scope of its direct case. Other parties likely are in the same position as OCA. An expedited ruling will facilitate that decision making process.

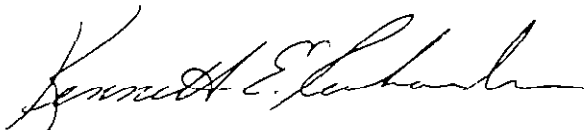
Respectfully submitted,



KENNETH E. RICHARDSON  
Attorney

#### 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.



KENNETH E. RICHARDSON  
Attorney

Washington, D.C. 20268-0001  
October 21, 1997