

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

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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 MOTIONS OF NDMS AND NAA TO STRIKE OR OPPOSE ADMISSION OF  
SPECIFIC PORTIONS OF TESTIMONY AND FOR OTHER RELIEF  
(October 24, 1997)**

**I. INTRODUCTION**

In accordance with Presiding Officer's Ruling No. R97-1/49, (October 17, 1997), the United States Postal Service hereby files this opposition to the Nashua Photo, Inc., District Photo, Inc., Mystic Color Lab and Seattle Filmworks, Inc. (NDMS) Motion to Strike Specific Portions of the Testimony of Various Postal Service Witnesses and Certain Library References and for Other Relief (filed October 16, 1997) (hereinafter, "NDMS Motion") and the Newspaper Association of America (NAA) Motion in Opposition to Admission into Evidence of Certain Library Reference Materials and Supplemental Testimony USPS-ST-44 (October 16, 1997) (hereinafter, "NAA Motion").<sup>1</sup> There is no basis for striking any portion of the testimony of any witness' testimony, for striking any library reference or portion thereof, for denying the admission of any witness' testimony, or for any other relief requested by NDMS or NAA. Accordingly, as will be demonstrated below, these motions should be denied in their entirety.

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<sup>1</sup>In a separate pleading filed today, the Postal Service is responding to a related motion by Alliance of Nonprofit Mailers and American Library Association (hereinafter, ANM/ALA). Motion of Alliance of Nonprofit Mailers and American Library Association to Stay Proceedings, Docket No. R97-1 (Oct. 16, 1997).

## II. PROCEDURAL BACKGROUND

The motions of NAA and NDMS arise out of disputes concerning the nature and status of the Postal Service's testimony in this docket, and particularly concerning the status and effect of certain library references filed with the Postal Service's Request. Generally, NDMS and NAA seek to strike or prevent admission into evidence of parts of the Postal Service's case that rely on and incorporate certain documentary exhibits filed initially as library references under the Commission's rules and practice, and certain testimony filed by the Postal Service as an outgrowth of this matter.

In Notice of Inquiry No. 1,<sup>2</sup> the Commission commented on a discovery dispute that had arisen between NDMS and the Postal Service regarding the sponsorship of a library reference relied upon by a Postal Service witness in formulating a rate proposal for non-standard First-Class Mail. Noting the presence of a broader issue involving reliance on unsponsored evidentiary material generally, the Commission invited parties to identify other library references whose status as evidentiary material might be subject to question. Five parties and the Postal Service responded.<sup>3</sup> These parties indicated

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<sup>2</sup>Notice of Inquiry No. 1 On Interpretation of Commission Rules Authorizing the Use of Library References, Docket No. R97-1 (September 17, 1997).

<sup>3</sup>Response of Alliance of Nonprofit Mailers to Notice of Inquiry No. 1 (Oct. 3, 1997); Newspaper Association of America Comments in Response to Notice of Inquiry No. 1 (Oct. 3, 1997); Parcel Shippers Association (PSA) Response to Notice of Inquiry No. 1 (NOI No. 1) on Interpretation of Commission Rules Authorizing the Use of Library References (Oct. 3, 1997); Nashua Photo, Inc., District Photo Inc., Mystic Color Lab and Seattle Filmworks, Inc. Response to Notice of Inquiry No. 1 On Interpretation of Commission Rules Authorizing the Use of Library References (Oct. 3, 1997); Office of the Consumer Advocate Response to Notice of Inquiry No. 1 on Interpretation of Commission Rules Authorizing the Use of Library References (Oct. 3, 1997); Response of the United States Postal Service to Notice of Inquiry No. 1 (Oct. 3, 1997).

six other library references.<sup>4</sup> After a discussion of the matter during hearings on the Postal Service's direct case,<sup>5</sup> the Presiding Officer in Ruling No. R97-1/42 asked the Postal Service to submit a list of library references it had announced the intention of offering as evidence, together with witness names.<sup>6</sup> On October 14, 1997, the Postal Service submitted this list, which included each of the library references specified by parties in response to NOI No. 1.<sup>7</sup> Ruling No. R97-1/42 also invited parties to submit motions concerning the admission into evidence of materials that had been provided as library references. In response, NDMS and NAA filed the motions addressed in this pleading. The matter was certified to the Commission in Presiding Officer's Ruling No. R97-1/49 (Oct. 17, 1997), and the Commission accepted certification in Order No. 1198 (Oct. 17, 1997).

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<sup>4</sup>The library references identified by each party included the following: NDMS – LR-H-106, LR-H-108, LR-H-114; Parcel Shippers Association – LR-H-108; NAA – LR-H-109, LR-H-182; OCA – LR-H-226. ANM did not identify any specific library references. In addition to the question of sponsorship, the OCA referred to a number of specific library references in connection with an earlier discovery request (OCA/USPS-8) for citations to library references in witnesses' testimonies. In response to a Presiding Officer's Ruling granting in part the OCA's subsequent motion to compel an answer to this interrogatory (Ruling No. 97-1/45), the Postal Service is today responding to the OCA's request for cross-reference information.

<sup>5</sup>Tr. 3/514-49 (Oct. 7, 1997).

<sup>6</sup>Presiding Officer's Ruling Concerning Witnesses Sponsoring Library References, Ruling No. R97-1/42 (October 10, 1997).

<sup>7</sup>United States Postal Service Response to Presiding Officer's Ruling No. R97-1/42 (Oct. 14, 1997). The Postal Service also listed a number of library references for which it would be prepared to provide witnesses and indicated that it was considering the availability of persons to testify if other library references were subsequently identified.

### III. ARGUMENT

#### A. **The Purpose Of These Proceedings Is To Develop An Evidentiary Record For Consideration By The Commission.**

The development of the evidentiary record upon which the Commission will ultimately rely is a process prompted by the submission of the testimony, exhibits, workpapers, and library references which support the Postal Service's request. The development of potential record material continues as the Postal Service and its witnesses provide written responses to interrogatories and information requests which seek clarification of those testimonies, exhibits, workpapers, library references, and other relevant and material matters.

The evidentiary record first takes shape, usually during the course of hearings, when the Commission formally admits material provided by the Postal Service and its witnesses into the evidentiary record. Generally, the evidentiary record will initially consist of the discrete documents originally designated in support of the Postal Service request as the direct testimonies of its various witnesses filed in conjunction with that request, accompanied by the designated responses to written and oral cross-examination questions. Nevertheless, it is the long-standing practice of the Commission, over the course of a proceeding, to admit into the evidentiary record other materials sponsored by particular witnesses or the Postal Service institutionally.

The Commission must approach each case in light of its own docket administration precedent, the expectations of the parties which flow from past Commission practice, and the unique circumstances of the case before it. Taking these factors into consideration, the Commission must apply its rules in a manner consistent with its paramount objective -- the development of as full and complete a record as due process will permit.

**B. The Evidentiary Record Must Be Developed In Accordance With Due Process.**

Procedural due process in the administrative context has its roots in the Due Process Clause of the Constitution. The Supreme Court has noted, however, that resolution of the issue of whether administrative procedures are constitutionally sufficient requires analysis of the particular facts of the case:

"[D]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place, and circumstances." . . . [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interests that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedure used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

*Mathews v. Eldridge*, 324 US 319, 334-35 (1976), quoted in 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 9.5 (3rd ed. 1994) Thus, in some measure, the approach taken to evaluating constitutional procedural due process claims must be a pragmatic one.

The provisions of the Administrative Procedure Act which apply pursuant to 39 U.S.C. § 3624(a) are hardly more precise. The most relevant provisions state:

Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. . . . A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

5 U.S.C. § 556(d) (in part). Clearly, under these provisions, administrative agencies are given a substantial amount of latitude to establish procedures and, for example, to determine the amount and the type of cross-examination that "may be required for a full and true disclosure of the facts" in specific instances.

How these provisions have been applied by the courts in the context of postal ratemaking, however, begins to shed more light on the more salient considerations. In *Newsweek, Inc. v. U.S. Postal Service*, 663 F.2d 1186 (2d Cir. 1981), the court was presented with two challenges relevant to the type of material upon which the Commission can rely in a section 3624 proceeding. In the revenue requirement area, the court considered a Notice of Inquiry promulgated by the Commission after the record was closed which presented new methodologies not introduced during hearings, and upon which no discovery or cross-examination was permitted. The court concluded the Commission violated section 3624 in this instance by failing to limit its reliance to material presented at record hearings conducted pursuant to the APA. *Id.* at 1205.

In the costing area, however, the court in *Newsweek* upheld the Commission's reliance upon a study submitted as a library reference and obtained by the parties through discovery. Despite the lack of a sponsoring witness, the court found that production of the study's model and data during the hearings provided the parties with sufficient time for analysis and cross-examination to meet the requirements of section 3624(a). *Id.* at 1208-09. In these instances, the court's due process inquiry clearly focused on the timing of when the material in question became available to the parties, and whether or not discovery and cross-examination were available.

**C. The Designation And Use Of Library Reference Materials Has Been A Longstanding Commission Practice.**

Consistent with the above due process principles, the Commission has generally adopted a pragmatic approach to the development of the record upon which its recommended decisions are based. In particular, the Commission's practice acknowledges that events subsequent to filing may bring to light material that should be considered by the Commission in its evaluation of the Postal Service's proposals. Starting with perhaps the most obvious example, responses to written interrogatories generated during the discovery process and introduced into evidence during hearings are routinely relied upon to support the rate and classification changes proposed in the filing.<sup>8</sup>

Other fairly obvious examples are supplemental testimony and errata to testimonies. As errors or omissions are discovered during the course of a proceeding, often in the early stages in response to written or oral cross-examination, it is natural to seek to reflect corrections in the material submitted for the record. It would be little short of absurd to suggest that no such mechanisms should be available to remedy deficiencies, with the result either that errors would have to be ignored, or, no matter how minor the errors might be, the entire proposal would have to be rejected. While it is certainly possible to hypothesize a situation in which last-minute revisions were manipulated in such a fashion as to violate the parties' due process rights to test and

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<sup>8</sup> Just as routinely, they may be relied upon to reject or alter such proposals, but the point here is that no one questions the Commission's ability to rely on interrogatory responses to support proposals merely because they did not exist at the time the proposals were filed.

analyze proposals, such instances are by nature extraordinary.

Moving to a specific and actual example of past Commission practice with respect to library references, one need return no further than the last general rate case, Docket No. R94-1. In that case, along with its Request, the Postal Service filed Library Reference G-136, which included the cost update that was the basis for the Postal Service's proposed increase to the fee for Business Reply Mail Accounting System (BRMAS) mail. No sponsor was identified for this library reference initially. Faced by a large amount of discovery on the cost study, the Postal Service announced, over two months after the filing of its Request, and two weeks before the start of hearings on its direct case, the availability of a witness (McCartney) to respond to oral cross-examination on the BRM study.<sup>9</sup> The Commission *sua sponte* scheduled witness McCartney for a hearing along with the other Postal Service witnesses.<sup>10</sup>

Brooklyn Union Gas (BUG) moved for reconsideration of the scheduling of witness McCartney, as well as to strike witness Foster's testimony concerning the BRMAS fee proposal, because it relied on the originally unsponsored library reference.<sup>11</sup> BUG specifically argued that the Postal Service's belated attempt to have a witness sponsor the cost study violates due process. Motion for Reconsideration, at 5-8. The Presiding Officer denied the BUG motions, asserting that "it does disservice to the goal of public rate proceedings to allow legalistic, strategic procedural maneuvering

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<sup>9</sup>Postal Service Response to P.O. Ruling R94-1/11 (May 18, 1994).

<sup>10</sup>P.O. Ruling No. R94-1/14 (May 20, 1994).

<sup>11</sup>Motion of the Brooklyn Union Gas Company for Reconsideration of P.O. Ruling R94-1/14 (May 26, 1994) (hereinafter Motion for Reconsideration).



to deflect the Commission from exploring the probative value of relevant information." Presiding Officer's Ruling No. R94-1/32, at 3. The Commission later stated its "preference, at least at that point [during hearings on the Postal Service's direct case], for further evaluation on the record of the merits of the BRM study." Order No. 1024 at 8.

BUG also argued that analysis of the BRM costs would have been facilitated if the Postal Service had presented a witness for the cost study as part of its direct case. Motion for Reconsideration at 11. Again, the Presiding Officer rejected BUG's argument:

[c]onsidering the breadth of issues raised in omnibus rate cases, the Postal Service cannot be held to a standard of perfect prescience. Although the Service might have moved more quickly to identify a witness to sponsor its business reply mail cost study it does not appear that BUG has been prevented from meaningful discovery on this topic.

P.O. Ruling No. R94-1/32, at 3.

While ultimately the Commission decided not to rely on the results of the BRM cost study, that decision was not based on the study's original status as a library reference. Rather, the Commission grounded its decision on the unreliable nature of the study, given the Postal Service's ongoing revision of it. Tr. 10/4731-36; Order No. 1024, at 8-17.<sup>12</sup>

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<sup>12</sup>In its lengthy Order, the Commission makes only one brief criticism of the Postal Service's failure to sponsor the study earlier in the proceedings:

the Commission not only agrees with Brooklyn Union that data integrity issues should have been resolved long before the BRM study was filed, but also notes that the Service's failure promptly to assign someone to sponsor the study, and be personally responsible for the accuracy of responses to interrogatories in this situation, lacked sensitivity to

Another example of Commission practice with respect to library references can be found in Docket No. N89-1. In that case, the Postal Service moved at the hearings on its direct case for admission of a recently completed, lengthy library reference which was first made available shortly before the hearings. While a Postal Service witness identified the library reference at the hearing, he did not prepare the library reference, nor rely upon it in his testimony. Over the objections of the Office of the Consumer Advocate and the American Bankers Association, the Presiding Officer allowed the library reference into the record. Docket No. N89-1, Tr. 2/231-33, 275. Additional time of about two weeks for discovery on the library reference material was provided. Presiding Officer's Ruling No. N89-1/4.

More recently, in Docket No. MC95-1, the Commission was faced with other challenges to participants' use of unsponsored library reference material. PRC Op. MC95-1, ¶¶ 5535, 5542. In that proceeding, PSA and RIAA challenged UPS witnesses' use of and reliance upon Postal Service Library Reference MCR-12, on grounds that the document was "never properly sponsored by a witnesses . . . and . . . [was] not properly part of the record in this case." PRC Op. MC95-1, ¶ 5542. At oral argument,

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longstanding Commission rules and basic principles of due process. It should have been clear from the outset that witness Foster was not the Postal Service representative to explain this study and present its results, and that institutional responses would not be satisfactory.

Order No. 1024 at 13-14. Notably, the Commission does not state that the study had to be filed as testimony (rather than a library reference) with the filing of the Postal Service's Request, or that the study had to be sponsored at that time. Instead, the Commission apparently viewed this as a "situation" that developed as BUG exhibited more and more intense interest in the BRMAS study during the discovery process, which then could have been much more satisfactorily resolved with the prompt assignment of a sponsoring witness.

counsel for PSA pointed to the lack of "sponsorship" of Library References MCR-10, MCR-12, and MCR-13 as grounds for rejecting UPS' proposal. Tr. 39/17385. The Chairman, in addressing counsel for PSA, acknowledged these arguments and offered *his comments upon the evidentiary status of library references*:

I suspect you have the same problem we do with many of the library references that have been submitted in this case. Actually, your little story, example that you provided, I think, is an interesting study in what we face as we try and wade through all the material that has been placed on the record and a lot of the material that has not been placed on the record.

Tr. 39/17391. The Commission, moreover, acknowledged the existence of the controversy by summarizing the participants' positions concerning the propriety of the use of library reference material in connection with the UPS proposal. PRC Op. MC95-1, ¶ 5535, 5542.

Despite the Commission's recognition of the participants' challenges to the use of "unsponsored" library reference material, the Commission has proceeded to use information and analyses presented in library references without reservation. Multiple examples abound. For instance, in Docket No. MC95-1, the Commission adopted witness Takis' attributable cost estimates, which ultimately were drawn from library reference materials that were not admitted into record evidence in their entirety.<sup>13</sup> Although the Commission could take some comfort in citing to witness Takis' Exhibit USPS-T-12C as a source for these figures, these costs were ultimately derived from inputs presented in numerous library references that were never formally "sponsored" through incorporation by reference into testimony, or otherwise offered directly into

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<sup>13</sup> See PRC Op. & Rec. Dec. at V-265.

evidence.<sup>14</sup>

In Docket No. MC96-2, the Commission effectively relied on library reference data through adoption of mail processing costs that were derived using inputs developed in library reference material. The Commission acknowledged as much, noting that witnesses Daniel and Brattli's mail processing costs were developed using inputs from "MODS productivity data, and accept and upgrade rates and downflow densities from special studies." PRC Op., MC96-2, at 6. The Commission's characterization of these as "special studies" did not convert the status of these documents; they were never received into the evidentiary record. The Commission's recommended dropship discounts, moreover, also had their source in library reference material. These discounts were based on cost avoidances presented in USPS LR-PRR-7, a library reference which was never formally entered into record evidence, either by stipulation or any other mechanism. Even though no witness sponsored this study, the Commission proceeded to rely upon it to recommend the dropship discounts for nonprofit categories.<sup>15</sup>

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<sup>14</sup> The figures underlying witness Takis' mail processing costs were derived from Library References MCR-1, Automation Equipment Accept and Upgrade Rates; MCR-2, Productivities, Acceptance Rates, and Mail Volume by Operation Technology; MCR-3, Downflow Density Study; MCR-4, Second-Class and Third-Class Mail Characteristics Studies; MCR-6, ODIS Volume Estimate Production Procedures In Support of Determining Automation Coverage Factors; MCR-8, Letter Bundle Handling Cost Survey; MCR-9, Development of Piggyback Factors; and MCR-10, First-Class and Third-Class Mail Processing Cost Benchmarks. Of course, these library reference materials were filed with the case, and could easily have been (and in some instances were) the subject of written cross-examination.

<sup>15</sup> Despite the evident lack of "sponsorship" or entry into record evidence of this information, one of the chief critics in this Docket of practices concerning library references was quick to proclaim that "the record [in Docket No. MC96-2] provides

In Docket No. MC96-3, the Commission did not shy away from adopting unit costs for return receipts from Library Reference SSR-104, even though no witness offered testimony in support for these figures. PRC Op., MC96-3, App. D, Schedule 3, page 16. More recently, in Docket No. MC97-3, the Commission resorted to a survey presented in a Library Reference PCR-34, provided in a since-terminated proceeding, Docket No. MC97-2, to evaluate the effect of its recommended classification change. In its Opinion, the Commission characterized the survey as a "credible" source of information upon which to draw qualitative conclusions about changes in Bound Printed Matter volumes. The Commission commented:

the survey results do provide a credible basis for at least a qualitative conclusion that a substantial portion of Bound Printed Matter mailings consolidated in response to the higher weight limit would come from non-postal services and other postal subclasses. See results summarized in LR-PCR-34 at 6.

PRC Op., MC97-3, pp. 6-7.

The parties that have filed motions for relief in this instance are no strangers to these Commission practices. If reliance upon "unsponsored" library reference serves as a basis for their criticism, proposals the movants have advanced in prior dockets suffered from the same alleged failing. The movants have not been reluctant to use figures whose underlying sources can be traced to "unsponsored" library reference materials. For instance, in Docket No. MC95-1, NAA witness Chown proposed a surcharge for nonautomation-compatible noncarrier route Standard (A) letter mail of 4.0

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substantial evidence that the Postal Service's proposals will have a beneficial impact on nonprofit mailers." Initial Brief of ANM, Docket No. MC96-2, at 1. ANM's change of face is obviously driven by its own self-interest, rather than some lofty legal principle espoused in its and ALA's Motion To Stay Proceedings (filed October 16, 1997).

cents, which relied upon testimony in witness Takis' Appendix I, pages 21, 23, and 32. Yet, as explained above, costs presented in that testimony were based upon numerous inputs that were never entered into record evidence. Witness Chown's proposal for a delivery point barcode discount for carrier route letter mail could similarly be traced to library reference material. NAA-T-2 at 30.<sup>16</sup>

Witness Haldi in Docket No. MC96-3 also used piggyback factors presented in Docket No. R94-1 Library References G-105 to illustrate the costs of BRMAS pieces, to establish a benchmark to evaluate NMS' classification proposal. See Exhibit NMS-T-1 at 1, 2, and 3. ANM's hands are not necessarily clean either. In Docket No. R90-1, witness Haldi proposed, on behalf of ANM, third-class Nonprofit Bulk rates using cost differentials which were based, in part, on inputs having their sources in library references. See ANM-T-2, Docket No. R90-1, at 37.<sup>17</sup> Note that in citing these examples, the Postal Service is certainly not alleging past "misconduct" on the part of these parties. Instead, the point is that these parties have been much more than passive spectators to the evolution of the Commission practice described above, and indeed participated in such practices in the past when the result was to support the rate or classification results which they favored.

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<sup>16</sup> Witness Chown cited witness Takis' testimony at Appendix I page 28 for support for her proposed 0.8 cent discount. That figure, however, could only be derived using data from Library References MCR-2, Productivities, Acceptance Rates, and Mail Volume by Operation Technology, and MCR-9, Development of Piggyback Factors. Neither of these library references was entered into record evidence.

<sup>17</sup> That page of witness Haldi's testimony cites USPS-T-10 as the source of costs. The exhibits to USPS-T-10, in turn, cite throughout to LR-F-154 as the source of the piggyback factors. *E.g.*, Exhibits USPS-10B at 1, USPS-10C at 2, USPS-10E at 1, *etc.*

To summarize Commission practice, the tendency has been to elevate substance over form. When materials have been furnished with a filing, when the parties have been put on reasonable notice that such materials play a role in the proposed changes, when the parties have had the opportunity to use written cross-examination to probe such materials, and when no party complains, the Commission has generally not focused on the presence or absence of a witness to formally "sponsor" the material. When parties have complained, the Commission has generally taken the approach that if reasonable steps can be taken to cure any perceived deficiency, reliance on previously "unsponsored" material can be justified and may be the preferred alternative. The Postal Service submits that these practices are in accord with legitimate due process concerns.

**D. NAA And NDMS Are Confused About What Constitutes The Evidentiary Record.**

At the very heart of the NAA and NDMS Motions is a fundamentally flawed perception of the relationship between the material submitted in support of the Postal Service's request and the evidentiary record in this proceeding. Much of NDMS' and NAA's arguments proceed upon the assumption that the evidentiary record is defined by the Postal Service when it files its request, and the assertion that the Postal Service can move into evidence only that material which was originally designated as direct testimony and exhibits when the case was filed. Hence, NDMS argue at page 6 of their Motion that they only seek to strike testimony which is "**not based upon record evidence**" or which is based upon evidence that was **proffered months after the filing of the Postal Service's request . . .**" (Emphasis in original). Throughout their Motion,

NDMS mischaracterize the provision of supplemental testimony<sup>18</sup> under the circumstances of this case as reflecting that “the record evidence . . . [has changed] as the time for discovery and cross-examination of postal witnesses is ending.” NDMS Motion at 14. *In a similar vein, they argue that the Postal Service has submitted “a substantially new record mid-way through the case.” Id.* NAA echoes these arguments, by insisting that the Postal Service must file its evidence “at the outset.” NAA Motion at 3.

Despite the misunderstanding under which NAA and NDMS appear to be operating, *not one of the testimonies, exhibits, workpapers, or library references filed by the Postal Service on or after July 10, 1997, constitutes record evidence in this case until it is specifically admitted into the record by the Commission.*<sup>19</sup> From the moment of their intervention, the parties to this proceeding have been on notice that the testimonies, exhibits, workpapers, and library references filed by the Postal Service have the **potential** to become record evidence. Therefore, participants are on notice from the moment of their intervention to engage in discovery and participate in the process of examining the filed materials and instigating the production of other relevant and material information that could ultimately become part of the evidentiary record. The Commission should not lose sight of the fact that NAA and NDMS have had direct

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<sup>18</sup> In reality, what is at issue is the simple conversion -- from “library reference” status to “testimony” status -- of documents which have been subjected to adversarial scrutiny since the earliest stages of this proceeding.

<sup>19</sup> Rule 31(h) specifies that the Presiding Officer shall rule on the admissibility of evidence and otherwise control the reception of evidence.



access to all of the material upon which the Postal Service's request relies -- whether originally filed as testimony, exhibits, workpapers, or library references -- since their intervention and that -- to quote NDMS -- "[t]hey have diligently labored to investigate the proposals in light of their own interests . . . ." *Id.* at 13.<sup>20</sup>

Although NAA and NDMS cite several Commission rules in support of their Motions, none provides support for the proposition that any testimony should be stricken. The procedural requirements of the Postal Rate Commission are reflected in its Rules of Practice and Procedure, 39 C.F.R., § 3001. In pertinent part, those rules state:

Simultaneously with the filing of the formal request for a recommended decision . . . , the Postal Service shall file all of the prepared direct evidence upon which it proposes to rely in the proceeding on the record before the Commission . . . [and that s]uch prepared direct evidence shall be in the form of prepared written testimony and documentary exhibits which shall be filed in accordance with § 3001.31.

39 C.F.R. 3001.53.<sup>21</sup> Rule 31(a) indicates that material which is relevant and material

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<sup>20</sup> If, at pages 13-14 of their motion, NDMS intend to imply that their diligence has been limited to examination of direct testimony and exhibits only -- "the legitimate evidence in the case" -- and not workpapers and library references, their own discovery practice patently refutes such an implication.

<sup>21</sup> It has been the practice of the Postal Service and other parties to file some "documentary exhibits" in the form of workpapers and library references, which are explicitly referenced in the testimony and exhibits. At pages 6 and 14 of their motion, NDMS assert that Rule 53 is violated if a witness adopts the contents of a library reference by means of incorporation by reference or as supplemental testimony. If this were true, Rule 53 renders the last sentence of Special Rule 5 a nullity, since the latter clearly contemplates the conversion of library reference materials into testimony sponsored by a witness. The Commission's rules must be interpreted in concert with each other, to render each of them meaningful.

(and not unduly repetitious or cumulative) shall be admissible as evidence. Rule 31(k) specifies the criteria by which the reliability of certain types of studies and analyses admitted into evidence are to be determined.<sup>22</sup>

At page 7 of their Motion, NDMS argue that “[u]nsponsored library references have no protections applied to them to ensure reliability, a pre-condition of their being made part of the record.” The Postal Service observes that reliability is not a pre-condition to admissibility, but an issue to be resolved in determining how much weight should be given to that which has been admitted into evidence. Sponsored library references, such as those designated by the Postal Service on October 14, 1997, in response to Presiding Officer’s Ruling No. R97-1/42 are subject to the same admissibility standards of Rule 31(a) and, where applicable, the reliability standards of Rule 31(k).

Subsection (b) of Rule 31 states that designation of a document as a library reference is a procedure for facilitating reference to that document and does not, by itself, confer any particular evidentiary status upon the document. In support of this Rule, the Commission has adopted Special Rule 5 which, in pertinent part, states that “[l]ibrary reference material is not evidence unless and until it is designated and sponsored as a witness.” Presiding Officer’s Ruling No. R97-1/4, Appendix B at 7

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<sup>22</sup> At page 8, note 7, of their Motion, NDMS summarily assert that Library References H-106, H-112, H-114 and H-128 all fail to meet the requirements of Rule 31(k)(1). Curiously, though, nowhere in the footnote or in the 16 pages of their Motion do NDMS point out a single Rule 31(k)(1) deficiency with respect to any of these Library References, or any testimonies which incorporate them. Since the NDMS assertion is not supported by any concrete or specific allegations, it should be summarily dismissed.

(August 1, 1997). This rule unambiguously contemplates that a document originally filed as a library reference may, under certain conditions, be entered into the evidentiary record, notwithstanding the fact that it was not originally filed as testimony.

In support of their Motion, NDMS argue that the disputed testimony and library references were incompetent as evidence or as a foundation for evidence at the time they were originally filed. NDMS Motion at 3. The essence of their argument is that any technical deficiencies which are perceived in the format of the Postal Service's direct case are, *per se*, incurable after the case has been filed and that any such deficiency found after the date of filing renders any affected testimony unreliable.

On this point, a little history is instructive. In reference to a Docket No. R94-1 motion to strike testimony relying upon an unsponsored library reference, the Commission noted that:

[considering the breadth of issues raised in omnibus rate cases, the Postal Service cannot be held to a standard of perfect prescience. Although the [Postal] Service might have moved more quickly to identify a witness to sponsor its business reply mail cost study it does not appear that . . . [the complaining party] has been prevented from meaningful discovery on this topic.

Presiding Officer's Ruling No. R97-1/32 (June 10, 1994).

In Docket No. R80-1, before the adoption of Special Rule 5, the Commission was faced with the question of whether it could rely on an unsponsored Postal Service library reference which contained a BMC cost study. In that case, although the document was not sponsored as the testimony of any witness, the parties took advantage of the discovery period to obtain information and Postal Service witnesses

answered questions about the study during discovery and cross-examination.

Although it characterized the Postal Service's evidentiary presentation to be "less-than-perfect" procedurally, the Commission found that it was appropriate to rely on the unsponsored library reference study, because the parties had received satisfactory protection of their due process rights. PRC Op. R80-1, Vol 1. at 502-05 (February 19, 1981). The reviewing court agreed,

that the Postal Service's production of the study's model and data during the hearings provided the parties with sufficient time for analysis and cross-examination to meet the requirements of 3624(a) . . . ."

*Newsweek, Inc. v. United States Postal Service*, 663 F.2d 1186, 1209 (2d Cir 1981).

When read in conjunction with the *Newsweek* holding and Presiding Officer's Ruling No. R94-1/32, the Commission's current rules can be interpreted as supporting the proposition that the form in which material is originally filed is not dispositive on the question of whether that material can become evidence upon which the Commission can rely. The key question is whether the parties have a fair opportunity to examine and test it adversarially. With respect to the material referenced in the NAA and NDMS motions, the answer is in the affirmative.

NAA and NDMS essentially argue that any material filed simultaneously with the Postal Service's request, but which is not specifically designated at that time as the direct testimony of a witness (or an exhibit attached to that testimony), cannot be relied upon by the Postal Service or any party or the Commission as evidence. Such an interpretation of the Commission's Rules flies in the face of several decades of contrary

practice<sup>23</sup> and, if adopted now, would fundamentally alter the nature of these proceedings, without fair notice to the parties.

Under NAA's and NDMS' misguided view of the rules, the early focus of this litigation would shift away from the examination and clarification of the material offered in support of the Postal Service's request, and away from the development of relevant and material information for inclusion in the evidentiary record for the benefit of the Commission. Instead, the parties would seek to discourage the Commission from *considering relevant and material information, solely on the basis of whether that information -- at the beginning of the 10-month statutory period -- was specifically and perfectly designated as direct testimony (or an exhibit attached thereto)*. This approach to litigation would require the Commission to ignore whether such material could reasonably be deemed to be incorporated by reference into testimony or exhibits. The Commission would be required to ignore whether the parties had a reasonable opportunity to examine the disputed materials and question witnesses about it. This approach would prevent even the slightest technical deficiency in the original filing from being cured and would ignore whether any perceived deficiency in the original filing could be corrected without prejudice to any party.

Such an approach might seem reasonable if the purpose of Commission proceedings were merely to permit an "up or down" vote of Postal Rate Commissioners

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<sup>23</sup> Notwithstanding the apparent adoption of Special Rule 5 for the first time in Docket No. R90-1, the Commission has continued to rely upon evidence which was originally filed in the form of library references.

in response to the Postal Service rate and classification proposals, and if there were no opportunity for the parties to conduct discovery or propose alternatives. However, the fundamental purpose of omnibus rate proceedings before the Commission is to permit the adversarial examination of the changes in rates and classifications proposed by the Postal Service and to develop an evidentiary record upon which the Commission can base its recommendations to the Governors – whether those recommendations were prompted by the Postal Service's request or by any alternatives proposed by the other participants.

**E. NAA's And NDMS' Interpretation Of The Rules Is Inconsistent With The Purpose Of These Proceedings**

An interpretation of the Commission's rules which would exclude from the record any material not specifically designated as the direct testimony of a particular witness when the sponsoring party files its direct case would, among other things, have prevented the Commission from attempting to obtain an understanding of Business Reply Mail costs in Docket No. R94-1 solely because the cost study at issue was originally filed as a library reference.

NDMS and NAA apparently prefer an interpretation of the Commission's Rules which would exclude from the record any material not specifically designated as the direct testimony of a particular witness when the sponsoring party files its direct case. This would, among other things, prevent parties from correcting or explaining minor

substantive errors later found in that testimony.<sup>24</sup>

The NAA and NDMS interpretation of the Commission's rules would work to inhibit the Postal Service from taking the initiative to correct major substantive errors and revise its rate proposals, as was necessary in Docket No. R94-1, when the Postal Service discovered that the misidentification of In-Office Cost System tallies had resulted in the misallocation volumes and costs for second-class in-county mail, resulting in materially skewed rate proposals. In that instance, the Postal Service revised previously filed testimony and provided supplemental testimony explaining its proposed corrections. The Commission made appropriate adjustments within the 10-month procedural schedule. See, Presiding Officer's Ruling No. R94-1/15 (May 20, 1994).

The NAA and NDMS approach also would discourage the Commission from calling upon the Postal Service to provide supplemental testimony on issues which surface months after the filing of the request, as it did in Docket No. R90-1 with respect to the second-class mail processing cost trends. See, Docket No. R90-1, PRC Order Nos. 870 (July 18, 1990) and 872 (July 26, 1990); and Presiding Officer's Ruling No.

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<sup>24</sup> In a perfect rate case, it would not be necessary for the Postal Service to file errata correcting the materials supporting its request. Nevertheless, whether discovered by the Postal Service, by a diligent intervenor engaged in discovery, or the Commission's technical staff responsible for drafting Presiding Officer's Information Requests, errata are an integral part of the development and refinement of the evidentiary record for the benefit of the Commission.

R90-1/49 (August 10, 1990).<sup>25</sup>

**F. NDMS Has Presented No Persuasive Arguments For Striking Any Testimony Or Library Reference**

In the second and third arguments enumerated at page 3 of their Motion, NDMS assert that they would be severely prejudiced if the disputed testimony and library references were allowed to constitute a part of the record. The testimonies NDMS seek to have stricken are listed below and are discussed in Section III:

First-Class Mail nonstandard surcharge proposals:

the direct testimony of witness David Fronk pertaining to his First-Class Mail nonstandard surcharge proposals (USPS-T-32, at page 24, lines 3-11); the supplemental testimony of witness Sharon Daniel (USPS-ST-43) which reflects the cost analysis upon which those nonstandard surcharge proposals are based and which adopts the substance of USPS Library Reference H-112.

Standard Mail (A) Nonstandard surcharge proposals:

the direct testimony of witness Joseph Moeller (USPS-T-36, from page 11, line 3, through page 15, line 6) pertaining to his nonstandard surcharge proposals for Standard Mail (a) non-letter, non-flat pieces; the direct testimony of witness Charles Crum (USPS-T-28, pages 10-12 and Exhibit USPS-28-K). The Exhibit reflects the cost analysis upon which the nonstandard surcharge proposal is based and adopts the substance of USPS Library Reference H-108.

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<sup>25</sup> See also, Docket No. R84-1, PRC Order No. 556 (April 13, 1984). Four months after the initiation of that proceeding, the Commission revised the procedural schedule to accommodate the filing of supplemental testimony (as well as discovery and hearings) on a substantive issue which arose after the case had been filed.

The Docket No. R84-1 case is instructive because it confirms that Postal Service testimony need not have been filed simultaneously with the request in order to become evidence. Otherwise, the Docket Nos. R84-1 and R97-1 controversies are distinguishable, because the instant controversy does not involve the introduction of "new" material in the middle of the case. In all material respects, the documents which the Postal Service seeks to introduce into evidence as supplemental testimony in the instant proceeding were filed at or very near the beginning of the case, and were clearly referenced in the direct testimony of its witnesses filed on July 10, 1997.



Supplemental testimony of Marc Smith (USPS-ST-45):

filed October 17, 1997, in response to Presiding Officer's Ruling No. R97-1/42 (October 10, 1997), this supplemental testimony adopts as the direct testimony of witness Smith the cost analyses he developed in Library References H-77, H-106, H-128, and H-129,<sup>26</sup> which were filed on July 10, 1997,<sup>27</sup> to support of the testimonies of various witnesses.

USPS Library Reference H-114

filed on July 10, 1997, this analysis was prepared by witness David Treworgy in support of his delivery confirmation costs testimony (USPS-T-22); as indicated at page 2 of the October 14, 1997, USPS Response To Presiding Officer's Ruling No. R97-1/42, witness Treworgy is prepared to sponsor this library reference as his supplemental testimony

Below, the Postal Service will establish:

- (a) at the outset of this proceeding, the Postal Service clearly identified the material on which its witnesses' testimony relied;
- (b) NDMS have had access to all such material from the moment of their intervention and the opportunity to examine all such material since that time; and that
- (c) NDMS and other parties have diligently used the discovery process to examine the disputed materials relied upon by the Postal Service's witnesses.

As a consequence, any conversion of that material from library reference status to testimony or exhibit status does not prejudice NDMS. In fact, such conversion serves to perfect their due process rights by giving them an opportunity to follow up any written cross-examination with oral cross-examination concerning the materials relied upon by postal witnesses

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<sup>26</sup> See, USPS Response To Presiding Officer's Ruling No. R97-1/42, at 1 (October 14, 1997).

<sup>27</sup> With the exception of H-128, which was filed on July 17, 1997.

**1. There is no basis for relief related to any material supporting the USPS First-Class Mail nonstandard surcharge proposals.**

Simultaneously with the filing of its request, the Postal Service submitted, *inter alia*, the testimony of witness Fronk (USPS-T-32), which proposes changes in the First-Class Mail nonstandard surcharges – USPS-T-32, page 24, lines 3-11. The basis for witness Fronk's nonstandard surcharges proposals was a cost analysis contained in USPS Library Reference H-112 ( also filed July 10, 1997) which updates and refines the cost analysis on which the Postal Service and the Commission relied as the basis for the First-Class Mail nonstandard surcharges recommended in Docket No. R90-1.<sup>28</sup>

Beginning August 1, 1997, NDMS have directed numerous interrogatories to the Postal Service seeking clarification of the cost analysis contained in USPS Library Reference H-112. The Postal Service responded to each and every NDMS interrogatory concerning the substance of the document.<sup>29</sup>

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<sup>28</sup>The historical development of First-Class Mail nonstandard surcharge costs can be traced back through Workpaper II of Docket No. R94-1 witness Foster (USPS-T-11), which updates USPS Docket No. R90-1 Library Reference F-160, which updates USPS Docket No. R87-1 Library Reference E-8, which updates USPS Docket No. R84-1 Library Reference D-9, which updates Workpaper IV.B of Docket No. R80-1 witness Allen (USPS -T-10), which updates the original Docket No. R78-1 analysis of witness Gingrich (USPS-T-1). From case to case, the issue of whether the cost analysis should be presented in testimony, library reference, or workpaper has not surfaced, until now.

<sup>29</sup> It is noteworthy that NDMS interrogatories ultimately resulted in the discovery of an error which reduced the unit cost for nonstandard single piece from 15.08 cents to 14.95 and increased the unit cost for nonstandard presort from 10.78 to 10.79 cents. See, USPS response to NDMS/USPS-T32-2(e), filed August 18, 1997. NDMS interrogatories also resulted in the discovery of more current shape mix data than were

On September 27, 1997, in accordance with Presiding Officer's Ruling No. R97-1/20 (September 19, 1997), the Postal Service converted USPS Library Reference H-112<sup>30</sup> into supplemental testimony (USPS-ST-43) sponsored by witness Daniel. On October 1, 1997, the Postal Service identified the institutional interrogatory responses which were being adopted by witness Daniel.

There are only two material differences between the original library reference and the supplemental testimony. The testimony explicitly incorporates the response to NDMS/USPS-T32-2(e), to reflect more accurate cost data than were presented in the library reference (and that were relied upon by witness Fronk for his nonstandard surcharge proposals). Supplemental testimony USPS-ST-43 also contains an Exhibit C, the sole purpose of which is to acknowledge the potential impact on nonstandard costs which could result if one were to utilize the new shape mix data provided in response to NDMS interrogatory T32-29.<sup>31</sup>

At page 4, footnote 1 of their Motion, NDMS describe the history of this matter in a manner which – to be charitable – deviates from the facts. Presiding Officer's Ruling

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originally relied upon in the library reference. See, USPS response to NDMS/USPS-T32-29(a)&(b), filed September 9, 1997.

<sup>30</sup> As revised by the August 18, 1997, response to NDMS/USPS-T32-2(e).

<sup>31</sup> In his supplemental USPS-T-32, Appendix A (as revised October 8, 1997), witness Fronk acknowledges that his original 16-cent single piece and 11-cent presort First-Class Mail nonstandard surcharge proposals were based upon the original USPS-LR-H-112 cost data and that reliance upon the August 18, 1997, revision (incorporated into USPS-ST-43) by the Commission could lead to a different surcharge. He also testifies that if the new shape mix data reflected in Exhibit USPS-43C were incorporated by the Commission, the costs would change and his proposed rates would no longer reflect 100 percent passthroughs.

No. R97-1/20 was issued on September 19, 1997. The Postal Service filed USPS-ST-43 on September 27, 1997.<sup>32</sup> NDMS argues that “there was no time to propound written discovery”<sup>33</sup> concerning USPS-ST-43. This argument implies that the contents of USPS-ST-43 were a complete mystery before September 27, 1997. The fact is that the overwhelming bulk of USPS-ST-43 was contained in USPS-LR-H-112, as filed on July 10, 1997, and revised by the August 18, 1997, response to NDMS/USPS-T32-2(e), and the September 9, 1997, response to NDMS/USPS-T32-29.

The only arguably “new” material consists of Exhibit USPS-43C, which merely reflects the impact of incorporating into the cost model the shape mix data requested by NDMS and provided in response to NDMS/USPS-T32-29(a) – an exercise which NDMS surely has performed since receiving that interrogatory response. If there was not time to propound discovery concerning USPS-ST-43 between September 27, 1997, and October 9, 1997, NDMS have certainly not been deprived of an opportunity to do so in the month since that supplemental testimony was filed. Their alternative request for relief, that they **now** be given time to conduct discovery to make up for the month they have squandered, is a blatant attempt to have their cake and eat it, too.

As the facts make clear, there is no basis for NDMS’ claims that they have been

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<sup>32</sup> Sending a facsimile copy to NDMS counsel that same day. By the Postal Service’s reckoning, NDMS received a copy of the supplemental testimony 8 days after it was ordered to be produced, not 13 days, as alleged in their Motion.

<sup>33</sup>NDMS Motion at 4, n.1.

denied due process. A notice concerning each of the library references now disputed by NDMS was filed on July 10, 1997, and provided to NDMS when they were served with copies of the request and the testimonies, upon their intervention. Each disputed direct testimony specifically identifies the library references upon which it relies.

Any suggestion that NDMS was prejudiced by the filing of material as library references when it, arguably, might have been filed as testimony, is belied by their discovery practice in this proceeding and the Postal Service's responses to their interrogatories. Aside from initially objecting to resolving the legal and procedural question of library reference "sponsorship" through interrogatory responses,<sup>34</sup> the Postal Service has responded to each and every interrogatory concerning the library references to which the NDMS Motion pertains.

With respect to USPS-LR-H-112, NDMS' real complaint is that their diligence in pursuing discovery may have worked to their disadvantage, since it has resulted in the production of more recent shape mix data, which the Commission might utilize as an alternative basis for estimating nonstandard costs and recommending surcharges. NDMS have had due process. They are now startled by the revelation that procedural due process does not guarantee a desirable substantive outcome.

NDMS' claim that it has been disadvantaged by the lack of opportunity to engage in further discovery on USPS-ST-43 presupposes that there is any aspect of that testimony that requires additional discovery. NDMS' failure to request or pursue any

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<sup>34</sup> See, Response Of USPS To NOI 1, at 12-13 (October 6, 1997).

additional discovery in the month since the filing of USPS-ST-43 is clearly part of a strategy to contrive a basis for their motion to strike and their alternative plea for additional time for discovery.

**2. There is no basis for any relief concerning any material related to the USPS Standard Mail (A) residual shape surcharge proposal.**

The basis for the motion to strike portions of the testimonies of witnesses Moeller (USPS-T-36) and Crum (USPS-T-28) rests squarely on the fact that witness Moeller's proposed surcharge for non-letter, non-flat Standard (A) Mail was based upon witness Crum's cost analysis which, as originally filed, relied upon inputs from Library Reference H-108, which was prepared under witness Crum's direction.<sup>35</sup> Notwithstanding all this, and despite the fact that witness Crum authored responses to interrogatories concerning LR-H-108,<sup>36</sup> and putting aside the fact that he has incorporated that library reference into his testimony as Exhibit USPS-28K, NDMS argue that because Exhibit USPS-28K was not designated as such on July 10, 1997, it should be stricken from the record.

NDMS would have the Commission ignore the fact that the incorporated library reference was subjected to adversarial testing on par with that of direct testimony from the outset of the case. In reality, NDMS have no basis for claiming that they have been prejudiced in any manner by the fact that Exhibit USPS-28K was originally filed as

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<sup>35</sup> See, September 9, 1997, response of witness Crum to NDMS/USPS-T28-1.

<sup>36</sup> See, Notice Of USPS Of Incorporation Of Library Reference H-108 Material Into The Direct Testimony Of Witness Charles Crum (October 1, 1997).

USPS-LR-H-108. At the earliest stages of discovery, NDMS focussed its discovery on Library Reference H-108.<sup>37</sup> For the reasons discussed above, the NDMS Motion to strike any portion of the testimony of witness Moeller (USPS-T-36) or witness Crum's Exhibit USPS-28K should be denied. In addition, the NDMS request for additional discovery should be denied. Having taken full advantage of the opportunity to explore its contents when it existed in library reference form, NDMS have no basis for claiming a need for additional discovery concerning Exhibit USPS-28K.

**3. NDMS offer no basis for their motion to strike the supplemental testimony of witness Smith.**

Filed on October 17, 1997, in response to Presiding Officer's Ruling No. R97-1/42, this supplemental testimony adopts as the direct testimony of witness Smith (in the form of USPS-ST-45) the cost analyses he originally developed in Library References H-77, H-106, H-128, and H-129.

**USPS-LR-H-77:** Filed on July 10, 1997, this library reference reflects witness Smith's development of piggyback factors by major function, mail processing operation-specific piggyback factors, and premium pay factors. Witness Smith's analysis produces outputs which are used by witnesses Peter Hume (USPS-T-18), Phillip Hatfield (USPS-T-25), Paul Seckar (USPS-T-26), and Daniel (USPS-T-29). Discovery on this library reference was conducted by ABA&EEI&NAPM and MMA.

**USPS-LR-H-106:** Filed on July 10, 1997, this library reference was developed by witness Smith to provide estimates of test year volume variable mail processing

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<sup>37</sup> *Id.* at 2.

costs by shape and presort level volume, the benchmark costs used by witnesses Hatfield (USPS-T-25), Seckar (USPS-T-26) and, Daniel (USPS-T-29) to apply the CRA adjustment, which is used to reconcile model costs to CRA costs. It estimates the unit cost for the First-Class Mail bulk metered benchmark used by witness David Fronk (USPS-T-32). Its base year benchmark costs are incorporated in the mail volume mix adjustment in USPS-LR-H-126 which supports the testimonies of witnesses Richard Patelunas (USPS-T-15) and Charles Crum (USPS-T-28). The library reference was the subject of discovery by ABP, APWU, ABA, ABA&EEI&NAPM, ADVO, BUG, MMA, NFN, NDMS, and VP-CW.

**USPS-LR-H-128:** Filed on July 17, 1997, this library reference was developed by witness Smith to develop the coverage factors used in the letter, card, and flat mail processing cost models developed by witnesses Michael Miller (USPS-T-23), Hatfield (USPS-T-25), Seckar (USPS-T-26), and Daniel (USPS-T-29). Discovery on this library reference was conducted by DMA and Time-Warner.

**USPS-LR-H-129:** Filed on July 10, 1997, this library reference was developed by witness Smith to measure delivery point volume estimates and savings by subclass and rate category. It provides inputs for numerous witnesses:

Witness Patelunas (USPS-T-15) uses its city carrier DPS distribution key for FY 97 and FY 98 to distribute DPS savings.

Witness Hume (USPS-T-18) uses its budgeted FY 94 to FY 96 DPS savings estimates to account for the current level of DPS savings in developing his test year city carrier delivery unit costs by category. He also uses it in incorporating DPS savings in



test year city carrier letter delivery unit costs by rate category.

Witness Alexandrovich (USPS-T-5) uses it as an input for the distribution of DPS savings in developing his estimate of base year rural carrier costs in his Workpaper 10.

It also provides a shape breakdown of the FY 98 volume forecast of witness Tolley (USPS-T-6) for First-Class Mail and Standard Mail (A). These volumes are used by witnesses Hatfield (USPS-T-25) and Seckar (USPS-T-26) to reconcile the model costs with CRA benchmark costs. These volumes are also an input in the calculation of CRA benchmark units costs in witness Smith's library reference H-106. Discovery H-129 was conducted by ABA&EEI&NAPM, APWU and DMA.

*NDMS do not specify a basis for its motion to strike witness Smith's supplemental testimony.* Presumably, the basis for its motion relates to the fact that witness Smith's testimony incorporating these library references was not filed on July 10, 1997.

NDMS have had ample opportunity to conduct discovery on all of the incorporated library references. Their discovery on Library References H-106, H-108 and H-112 established, without doubt, that they have focussed their discovery on materials relied upon by witnesses, regardless of whether those materials were originally filed as testimony, exhibits, or library references. The incorporation of Library References H-77, H-106, H-128 and H-129 into the supplemental testimony of witness Smith (USPS-ST-45), in accordance with Presiding Officer's Ruling No. R97-1/42, has not prejudiced NDMS or any party. In fact, the conversion of these library references to supplemental testimony status has perfected their due process rights by ensuring that

they have an opportunity to follow-up written discovery with oral cross-examination.

There is no basis for the motion to strike. It should be denied.

To the extent that the NDMS Motion can be interpreted as requesting additional discovery on USPS-ST-45 because it incorporates these library references, the Motion should also be denied. NDMS have had their opportunity to engage in adversarial testing, when the materials incorporated into USPS-ST-45 existed in library reference form.

**4. NDMS offer no basis for any relief concerning Library Reference H-114.**

Created by the Postal Service at the behest of and after consultation with witness David Treworgy, this library reference develops certain inputs which support his (USPS-T-22) delivery confirmation cost estimates. In particular, USPS-T-22, Input Sheet B-3, lists USPS-LR-H-114 as a source for the breaking out delivery confirmation mail volume into the various types: city carrier, rural carrier, box section clerk, and firm holdout. On August 22, 1997, NDMS propounded interrogatories concerning H-114 (T33-20 through T33-22, all of which were responded to in a timely fashion. In particular, the last of these inquired into specific details of how H-114 was put together, and witness Treworgy responded to them, notwithstanding the fact that they originally had been directed to another witness. NDMS have thus exercised their due process rights by inquiring into the details of H-114, since witness Treworgy responded to their interrogatories. Accordingly, there should be no surprise that, at page 2 of the October 14, 1997, USPS Response to Presiding Officer's Ruling No. R97-1/42, the Postal

Service identified witness Treworgy as available to testify or appear for cross-examination concerning the substance of LR-H-114.

The NDMS Motion states no particular basis for striking witness Treworgy's USPS-T-22 reliance upon the H-114 cost inputs which were prepared pursuant to his direction. The opportunity to conduct oral cross-examination, as follow-up to their interrogatories, in no way compromises NDMS' due process rights. To the contrary, there is no basis for the motion to strike. It should be denied. To the extent that the NDMS Motion can be interpreted as requesting additional discovery on H-114, the motion also should be denied. NDMS have fully exercised their opportunity to engage in written adversarial testing.

**G. NDMS Have Presented No Grounds For Relief Under 39 U.S.C. § 3624(c)(2).**

At page 14 and 15 of their Motion, NDMS suggest that, under present circumstances, the Commission is authorized by 39 U.S.C. § 3624(c)(2) to extend the 10-month period allotted for the issuance of its recommended decision. That subsection explicitly states:

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 to a lawful order of the Commission, the Commission may extend the 10-month period described in paragraph (1) of this section by one day for each day of such delay.

*In support of this argument, NDMS assert that the Postal Service has violated the Rule 53 requirement that it file all of the prepared direct evidence upon which it proposes to rely simultaneously with the filing of its request. NDMS Motion at 14-15. But the fact of*

is that all of the prepared direct evidence on which the Postal Service proposed to rely to support its rate and classification proposals was filed on July 10, 1997, along with its request, or very soon thereafter. NDMS identify four offending library references in their Motion: H-106, H-108, H-112, and H-114, all of which were filed on July 10, 1997.

NDMS identify five offending pieces of testimony in its Motion:

USPS-T-28, USPS-T-32, and USPS-T-36, all of which were filed on July 10, 1997;

USPS-ST-43, the substance of which (with the exception of Exhibit USPS-43C, coming from LR-H-112, which was filed on July 10, 1997;<sup>38</sup> and

USPS-ST-45, which incorporates library references H-77, H-106, H-128 and H-129, all of which were filed on or soon after July 10, 1997.

Since all the material on which the Postal Service relies was filed simultaneously with (or soon after) its request, NDMS's resort to §3624(c)(2) has no foundation.

Moreover, a second essential basis for a claim for relief under § 3624(c)(2) is missing. Nowhere in its discussion does NDMS cite a lawful order of the Commission to which the Postal Service has failed to respond. In fact, NDMS' real frustration is generated by the fact that the Postal Service has responded completely to every Presiding Officer's ruling which has addressed this controversy.

At page 15, note 7, of their Motion, NDMS refer to October 16, 1997, oral cross-examination of witness Tayman which "made it abundantly clear that the Postal Service would suffer no financial hardship were the Commission to re-promulgate or amend the

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<sup>38</sup>It should be noted that witness Fronk's nonstandard surcharge proposals are based upon originally filed USPS-LR-H-112, which has been superseded by USPS-ST-43.

current docket schedule.” NDMS provide no specific cross-examination citation, other than to refer to Transcript Volume 9. The oral cross-examination of witness Tayman covers 70 pages, from Tr. 9/4524-94.<sup>39</sup> The Postal Service submits that none of it can reasonably be interpreted as a reflecting any discussion by the witness about what the financial impact would be **if the Commission re-promulgated or amended the current docket schedule.**

But putting that aside, the Postal Service respectfully submits that revenue projections are irrelevant to the question of whether due process compels the Commission to suspend a rate proceeding under § 3624(c)(2), on the basis of an alleged refusal of the Postal Service to obey a lawful order. In the instant case, the § 3624(c)(2) issue should be decided solely on the basis of the absence of merit to the arguments offered by the movants. If the Commission is misled into basing its § 3624(c)(2) decision upon considerations of postal financial projections and the manipulation of the timing of implementation of Docket No. R97-1 rates, then the Commission will have acted contrary to the admonition of the *Newsweek* court that it refrain from arbitrary action designed to affect the timing of decisions reserved to the Board of Governors. See, *Newsweek, Inc. v. United States Postal Service*, 663 F.2d 1186, at 1205 (2d Cir 1981).

There is no basis whatsoever for extending the 10-month schedule. Save the rescheduling of the presentation of supplemental testimony made necessary by

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<sup>39</sup> An telephone inquiry seeking a page citation from NDMS counsel has proven fruitless.

Presiding Officer's Ruling No. R97-1/49 (October 17, 1997) and any downstream consequences that may result, the NDMS Motion presents no basis for shifting any filing dates within the existing 10-month schedule.

**H. NAA's Objections To The Admission Into Evidence Of Witness McGrane's Testimony, As Well As Portions Of Witnesses Moeller's And Daniel's Testimony, Are Without Merit.**

In its Motion, NAA objects to the admission into evidence of the supplemental testimony of witness McGrane, USPS-ST-44, and the portions of testimony offered by witnesses Daniel (USPS-T-29) and Moeller (USPS-T-36) that draw conclusions from Library Reference H-109, Standard Mail (A) Mail Processing ECR Costs, and Library Reference H-182, Standard Mail (A) Unit Volume Variable Cost by Weight Increment. NAA complains that the materials in these library references contain "new," "supplemental," and "unsponsored" analyses and "should have been included in the Postal Service's direct case at the outset." NAA Motion at 1, 4.

The analysis contained in LR-H-182 builds upon prior analyses designed to gain insight into the relationship between cost and weight in Standard (A). This analysis responds to the Commission's desire, expressed almost seven years ago, that a cost study be presented to evaluate the pound rate for third class bulk mail. In Docket No. R90-1, the Commission urged that such an analysis be performed:

For this proceeding the Service has performed important studies on third-class bulk mail cost behavior. As a result it has proposed and we recommend rates based not only on pound and minimum per piece, but also on shape, carrier route sequence and entry as related to the configuration of the distribution network. However, the relationship of weight to costs remains largely unexplored. For example, no cost study underlies the pound rate, a fundamental component of rate design. We

think it important for the Service to conduct a study to obtain this information.

PRC Op. R90-1, App. K at 1-2. The Postal Service's first response to this request arose in Docket No. MC95-1, where the Postal Service presented cost information by weight cell showing that weight played a minor cost-causative role in Standard (A). See USPS LR-MCR-12; USPS-T-18 at 12, 15, 17. In that docket, Postal Service witness Moeller cited the study as one of several justifications in support of reductions in the pound rates for Standard (A) subclasses. The analysis presented in LR-H-182 in this docket represents an improvement over the MC95-1 study in that it presents an even more comprehensive analysis of costs.

The analysis contained in LR-H-109 introduces a refinement in the estimation of the mail processing costs for subcategories within the enhanced carrier route subclasses. This is similar to the methodology used in Dockets No. R87-1 and R90-1 to ascertain the cost differences between carrier route and 3/5-digit tier.

NAA would apparently have the Commission believe that the analyses contained in these library references, or witness McGrane's testimony which adopts them, have been foisted upon the Commission well into the course of this proceeding in some last ditch effort to supplement the Postal Service's case-in-chief. See NAA Motion at 1. NAA, however, selectively presents the facts to bolster its claims. In fact, the analyses in H-182 and H-109 were designated as library references and filed with the Commission on July 10, 1997, the same date that the Postal Service filed its direct case.

Participants were made aware of the contents and purposes of these library references through clear and unambiguous references and explanatory passages in witnesses Daniel's and Moeller's direct testimony. Witness Daniel introduced LR-H-109 through her direct testimony, noting that the analysis contained therein served as an improved methodology for estimating carrier route mail processing costs:

[a] refinement has been made in the calculation of ECR and NPECR mail processing costs. Library Reference H-109 shows the mail processing cost differences between walk sequenced (WS) endorsed (Saturation and High Density) and non-WS endorsed ECR and NPECR (Basic) letters and nonletters.

USPS-T-29 at 11. In her Exhibit USPS-29D, witness Daniel proceeded to use the results of LR-H-109 to separately determine the costs of ECR and NPECR Basic and High Density/Saturation categories. Exhibit USPS-29D. All references to LR-H-109 were clearly documented in witness Daniel's Exhibit. Witness Moeller also comments upon LR-H-109 in his direct testimony, noting:

The Postal Service proposes the continuation of the High-Density and Saturation tiers in Enhanced Carrier Route. An updated study used by witness Daniel (USPS-T-29) uses In-Office Cost System data to help ascertain the relevant mail processing cost differences. In previous proceedings, the differential was based solely on delivery cost differences. This new methodology allows for a more comprehensive analysis of the cost differentials. The study groups High-Density and Saturation together for cost measurement purposes, so the reported mail processing difference between High-Density and Saturation is zero. However, this is an improvement over previous studies which assumed that the mail processing differential was zero between all three tiers.

USPS-T-36 at 29.

Witness Moeller's direct testimony also highlights and comments upon Library Reference H-182. In particular, he observes that the analysis serves as one of several



reasons in support of a reduction in the pound rates for the Standard (A) subclasses:

USPS LR-H-182 graphically displays the very small role that weight plays in Enhanced Carrier Route costs. The Christensen Associates' study distributes all cost components to weight increment using a variety of distribution keys. The most significant cost driver is In-Office Cost System tallies. The shape of the cost curve for ECR in the study shows very little increase in costs as weight increases. Even if some of the costs that are distributed on a per-piece basis were instead distributed on a weight basis, it is difficult to envision a curve that would support a steep pound rate.

USPS-T-36 at 25-26.

In view of the witnesses' use of and reliance upon these analyses, and their availability at the Commission and Postal Service libraries, all participants, including NAA, were on notice of their existence and the purposes and uses made of them by the Postal Service's witnesses. Participants accordingly were given ample opportunity to conduct written cross-examination on their contents. Indeed, multiple participants, including NAA, directed numerous interrogatories to the Postal Service and its witnesses concerning these analyses, beginning with the first set filed on August 18, 1997.<sup>40</sup> The Postal Service provided thorough and timely answers to these discovery requests on the analyses presented in the library references, either through institutional or witness-sponsored responses.<sup>41</sup> No question was left unanswered; indeed, some

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<sup>40</sup> ABA filed its first institutional interrogatory upon the Postal Service concerning Library Reference 182 on August 18, 1997. Other participants, including AAPS, ADVO, MOAA, and NAA, filed discovery on LR-182 and 109 thereafter.

<sup>41</sup> See responses to AAPS/USPS-T36-7-11 (filed October 1, 1997); ABA/USPS-1 (filed September 2, 1997); ADVO/USPS-26-28 (filed October 1, 1997); MOAA/USPS-T36-1 (filed October 1, 1997); NAA/USPS-T36-17-27, 29-31 (filed September 4, 1997); and NAA/USPS-18-19 (filed October 6, 1997). Although the preceding answers were

*discovery responses engendered further written cross-examination.*<sup>42</sup>

Notwithstanding the Postal Service's conscientious efforts to provide timely and complete answers to all written cross-examination pertaining to the analyses presented in the library references, on September 26, 1997, NAA moved to strike those portions of witness Moeller's testimony that related to Library Reference H-182. NAA's chief complaint was that the "Postal Service [had] not seen fit to provide a witness to sponsor LR-H-182 or to attest to [its] answers" to NAA's written discovery.<sup>43</sup> Shortly thereafter, in its Response to Notice of Inquiry No. 1, NAA identified both LR-H-182 and LR-H-109 as material that did not qualify for library reference designation.<sup>44</sup>

The Postal Service understood from NAA's two filings that the NAA's chief criticism was the absence of the identity of the author of the analyses in the library references and the discovery responses pertaining to them. Accordingly, in an effort to stem further motions practice concerning witnesses Daniel's and Moeller's testimony, and to respond to NAA's chief concerns, on October 6, 1997, the Postal Service gave notice of its intent to offer a witness to adopt the analyses and withstand oral cross-

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filed as institutional responses, the Postal Service has given notice of witness McGrane's intent to adopt them as his own responses. See Notice of the United States Postal Service Concerning Filing of Supplemental Testimony of Michael R. McGrane (USPS-ST-44) (filed October 8, 1997). In addition, witness Moeller has answered discovery concerning LR-H-182. See Tr. 6/2780, 2801-06.

<sup>42</sup> See, e.g., NAA/USPS-T36-41-55, filed on September 17, 1997.

<sup>43</sup> Newspaper Association of America Motion to Strike Testimony of United States Postal Service Witness Joseph D. Moeller (filed September 26, 1997) at 3.

<sup>44</sup> Newspaper Association of America Comments in Response to Notice of Inquiry No. 1 (filed October 3, 1997).

examination of both library references H-109 and H-182.<sup>45</sup> Two days later, the Postal Service filed witness McGrane's testimony, designated as USPS-ST-44, and advised the participants of witness McGrane's intent to adopt the institutional responses to written cross-examination pertaining to these library references.<sup>46 47</sup>

Contrary to NAA's characterization of the contents of USPS-ST-44, there is nothing "new" or intrinsically "supplemental" in witness McGrane's written testimony. The only addition to the record resulting from the receipt of witness McGrane's testimony is the introduction of witness McGrane's autobiographical sketch. In his testimony, witness McGrane simply states his purpose is simply to "adopt the results and analyses contained in Library Reference H-109, Standard Mail (A) Mail Processing ECR Costs, and Library Reference H-182, Standard Mail (A) Unit Volume Variable Cost by Weight Increment." USPS-ST-44 at 2. The body of his five page testimony accomplishes his stated objective. The testimony consists of nothing more than a restatement of the studies' methodologies and a short summary of the important results contained therein. For completeness, Library References H-109 and H-182 are appended to witness McGrane's testimony as exhibits.

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<sup>45</sup> Response of United States Postal Service to Newspaper Association of America Motion to Strike Testimony of United States Postal Service Witness Joseph D. Moeller and Notice of Intent to File Testimony (filed October 6, 1997).

<sup>46</sup> Notice of the United States Postal Service Concerning Filing of Supplemental Testimony of Michael R. McGrane (USPS-ST-44) (filed October 8, 1997).

<sup>47</sup> The Presiding Officer initially scheduled witness McGrane to appear for oral cross-examination on October 23, 1997. P.O. Ruling No. R97-1/42, but then withdrew this portion of that ruling on October 17, 1997, to facilitate further motions practice. P.O. Ruling No. R97-1/49.

NAA's pending motion evidently manifests a serious miscalculation in its litigation strategy. NAA's purpose is simple and straightforward: it intends to block the admission of all evidence in this docket that serves to enhance precision in the estimation of costs for Standard (A) subclasses or support a sensible rate design. It should be no surprise that NAA opposes the introduction of these studies because the rate design that these analyses support is contrary to NAA's members' interests. NAA evidently expected the Postal Service to resist any effort to cure the alleged deficiencies raised in NAA's Motion to Strike. Surely, if NAA's concerns had been genuine, then the Postal Service's response to NAA's Motion to Strike and NAA's Response to Notice of Inquiry No. 1 should have muted any further criticisms. Instead, the Postal Service's proffer of witness McGrane's testimony incited NAA to file the pending Motion. NAA, however, can only blame itself, for it received precisely what it claimed was lacking. Indeed, it received an added bonus, for the Postal Service offered to have witness McGrane withstand oral cross-examination on the analyses in LR-H-182 and LR-H-109. It is evident that NAA intended to use the absence of the identity of a sponsor for these analyses to argue on brief that the Commission could give no weight to the analyses in LR-H-182 and LR-H-109 in view of their designation as library reference material. Now that its legal strategy has backfired, NAA desperately seeks to prevent the record from benefitting from witness McGrane's identity as the sponsor of these analyses, as well as the testimony pertaining to these analyses, witness McGrane's adoption of written cross-examination under oath, and his appearance at hearings.

NAA has not even claimed harm or prejudice to it by virtue of the introduction of witness McGrane's testimony, or the designation of the two analyses as library reference material. NAA could not possibly show any such harm. It was obviously aware of the existence of the library references, and it submitted them to rigorous analysis through written cross-examination. Among all participants, NAA asked the most questions about them during written discovery. Stripped of the luxury of a legitimate claim of harm, NAA is left to complain that witness McGrane's adoption of the analyses is contrary to the Commission's Rules 31 and 53, 39 C.F.R. §§ 3001.39, 3001.53, and Special Rule of Practice 5, adopted in P.O. Ruling R97-1/4. NAA Motion at 3-4. As explained above, NAA has incorrectly interpreted the Commission's Rules of Practice and Special Rule 5. The Commission's rules do not forbid the practice at issue here; rather, they contemplate the very practice that the Postal Service has undertaken in this instance.

Even assuming NAA's interpretation of the Commission's rules were correct, the remedy NAA proposes would not advance the two objectives it claims would be served by striking testimony pertinent to the H-182 and H-109 analyses. First, NAA claims that permitting the receipt of witness McGrane's testimony into evidence would "harm[] the integrity of the Commission's processes by making the Postal Service's case a moving target, thereby making these proceedings less efficient and its task more difficult." NAA Motion at 4. To the contrary, the Commission's processes would be harmed by the remedy NAA seeks, namely, the exclusion of witness McGrane's testimony. It hardly bears repeating that NAA's contention rests on the mistaken assumption that the Postal

Service's case has not become a "moving target" by virtue of the introduction of witness McGrane's testimony. To the contrary, the Postal Service presentation has not changed in any substantive manner. It would be contrary to sound administrative practice and common sense to exclude the proffered testimony, particularly since its contents constitute nothing more than material that was available to all participants—and discussed in testimony—from the first day of this proceeding. Granting the relief NAA seeks would merely serve to deprive the Commission the opportunity to fulfill its well established objective of building a complete and comprehensive administrative record. It would also be prejudicial to the Postal Service by denying it an avenue by which to offer the very support NAA previously claimed was lacking in connection with its proposals in this docket.

The second objective NAA claims would be served by granting its requested relief is that its proposed remedy would discourage "future violations by the Postal Service." This contention rests, however, upon the incorrect impression that the Postal Service's actions here are inconsistent with the Commission's Rules. In fact, as explained above, the Postal Service's actions here are in harmony with the Commission's rules, particularly Special Rule 5, which contemplates the sponsorship of library reference material by a witness. In any event, in its Response to Notice of Inquiry No. 1, the Postal Service set forth a reasonable framework for identifying witnesses to testify to various studies in the context of this proceeding, as well as in the

future.<sup>48</sup>

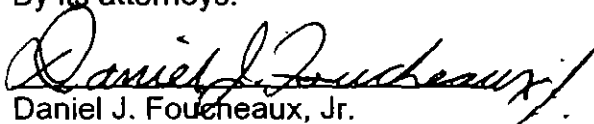
#### IV. CONCLUSION

In summary, the Postal Service submits that NDMS' and NAA's Motions should be denied in their entirety.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

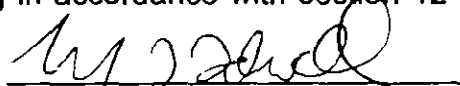
By its attorneys:

  
Daniel J. Fouchaux, Jr.  
Chief Counsel, Ratemaking

Michael T. Tidwell  
Eric P. Koetting  
Scott L. Reiter  
David H. Rubin  
Anthony F. Alverno

#### 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.

  
Michael T. Tidwell

475 L'Enfant Plaza West, S.W.  
Washington, D.C. 20260-1137  
(202)268-2998/FAX: -5402  
October 24, 1997

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<sup>48</sup> See Response of the United States Postal Service to Notice of Inquiry No. 1 (filed October 6, 1997).