

DOCKET SECTION

ORDER NO. 1201

UNITED STATES OF AMERICA
POSTAL RATE COMMISSION
WASHINGTON, DC 20268-0001

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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

Before Commissioners: Edward J. Gleiman, Chairman;
George W. Haley, Vice Chairman;
W.H. "Trey" LeBlanc, III;
H. Edward Quick, Jr., and George A. Omas

Postal Rate and Fee Changes

Docket No. R97-1

ORDER ON CERTIFIED MOTIONS

(November 4, 1997)

On October 17, 1997, the Commission accepted certification of three motions concerning the evidentiary status of materials initially submitted as library references by the Postal Service.¹ Responses to these motions were allowed until October 24, 1997. The Postal Service filed two separate oppositions to these motions on October 24, 1997² and 12 other participants also provided comments in seven separate pleadings.³

¹ Motion of Alliance of Nonprofit Mailers and American Library Association to Stay Proceedings, filed October 16, 1997; Nashua Photo Inc., District Photo Inc., Mystic Color Lab and Seattle Filmworks, Inc. 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; and Newspaper Association of America Motion in Opposition to Admission Into Evidence of Certain Library Reference Materials and Supplemental Testimony USPS-ST-44, filed October 16, 1997.

² Opposition of United States Postal Service to Motion of Alliance of Nonprofit Mailers and American Library Association to Stay Proceedings (Opposition to ANM/ALA); and 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 (Response to NDMS and NAA).

³ AMMA and RIAA Response to Presiding Officer's Ruling No. R97-1/49, filed October 23, 1997; Answer of Advo, Inc. in Opposition to Motions of Newspaper Association of America and NDMS to Strike Certain Testimony and Library References, and to Motion of Alliance of Nonprofit Mailers to Stay Proceedings, filed October 24, 1997; Joint Response of

This order rules on the specific requests for relief contained in the motions before the Commission. To place these rulings in context, and to facilitate further proceedings in this and future cases, this order also provides a restatement of the Commission's understanding of the appropriate role and status of library references filed with Postal Service Rate Requests.

The Postal Service has indicated that it will sponsor as evidence, 49 items initially provided as library references. In order to allow participants to prepare to cross-examine on this newly designated evidence, additional time must be allowed for discovery and additional hearing dates must be scheduled. These additional procedural steps will delay subsequent stages of the case, such as dates for submission of intervenor and rebuttal testimony. The Postal Service has thereby caused delay that will jeopardize the Commission's ability to issue a recommended decision within 10 months. Such a risk is obviously undesirable, but it is necessary to ensure that due process rights have been accorded to all participants.

It is possible that notwithstanding the thoughtful comments provided by participants, the dialogue on this topic could have been hampered by the pendency of a rate request which may be viewed positively by some participants and negatively by others. It is likely that a meaningful dialogue can best be undertaken when no active omnibus case is pending before the Commission. Therefore, the Commission will initiate a rulemaking to evaluate potential improvements in the relevant sections of the rules of practice and procedure after this docket is concluded.

Periodical Mailers to Motions Concerning Library References and Future Procedures, filed October 24, 1997; Mail Order Association of America Reply to Motions Seeking a Delay in the Proceedings or the Exclusion of Evidence, filed October 24, 1997; Motion of the National Newspaper Association Concerning Admission of Library Reference into Evidence and Comment on Alliance of Nonprofit Mailers Motion for Stay of Proceedings, filed October 20, 1997; Office of the Consumer Advocate Reply to Motion of Alliance of Nonprofit Mailers and American Library Association to Stay Proceedings, filed October 21, 1997; Memorandum of United Parcel Service on Motions to Strike Certain Testimony, Library References, and Supplemental Testimony, filed October 24, 1997.

The Commission has determined that:

- it is not appropriate to suspend this case;
- it is unnecessary to decide, at this juncture, whether the events leading to this order include actions or omission that require, and justify, an extension of this case as permitted by § 3624(c)(2);
- specified materials initially filed by the Postal Service as library references that subsequently have been sponsored by a witness and designated as evidence will be accepted as part of the evidentiary record before the Commission for the purpose of evaluating the Postal Service Request;
- participants will be afforded additional opportunity for written discovery and oral cross-examination on these materials; and
- the Presiding Officer will issue a revised schedule in this case so as to continue these proceedings with the utmost expedition consistent with procedural fairness for the participants.

Motions pending before the Commission. Presiding Officer's Ruling R97-1/49 certified three motions to the Commission for resolution. They are a Motion of Alliance of Nonprofit Mailers and American Library Association to Stay Proceedings (ANM/ALA Motion), October 16, 1997; a Nashua Photo Inc., District Photo Inc., Mystic Color Lab and Seattle Filmworks, Inc. Motion to Strike Specific Portions of the Testimony of Various Postal Service Witnesses and Certain Library References and for Other Relief (NDMS Motion), October 16, 1997; and a Newspaper Association of America Motion in Opposition to Admission into Evidence of Certain Library Reference Materials and Supplemental Testimony USPS-ST-44 (NAA Motion), October 16, 1997. A brief statement of the events preceding the submission of these motions follows.

The issues raised in these three motions first surfaced in an August 29, 1997, NDMS Motion to Strike [Specified Portion of] Testimony of Postal Service Witness David R. Fronk (USPS-T32). Witness Fronk, who presents the Postal Service rate proposals for First-Class Mail, relied on the output of Library Reference H-112 as the

basis for proposing to increase the First-Class Mail nonstandard surcharge. NDMS moved to strike his testimony to increase the surcharge after it ascertained through discovery that witness Fronk was not responsible for H-112 and that this study was not being sponsored as evidence by the Postal Service.

Presiding Officer's Ruling R97-1/20 found that by submitting H-112 as a library reference unsponsored by any witness, the Postal Service had failed to meet the standards of rules 53, 54, and 31, if the Service intended to rely on the results of H-112 to support the proposed rate increase in the First-Class nonstandard surcharge. The Postal Service was allowed up to one week to identify the sponsoring witness for H-112, should it wish to do so. Meanwhile, the NMDS motion to strike portions of witness Fronk's testimony was denied without prejudice. P.O. Ruling R97-1/20, Presiding Officer's Rulings on NDMS Motion to Strike Fronk Testimony, NDMS Motions to Compel Responses from Witnesses Fronk and Crum, and Related Procedural Motions, September 17, 1997, at 10.

Also on September 17, 1997, in recognition of the potentially broad impact of the issues dealt with in P.O. Ruling R97-1/20, the Commission issued Notice of Inquiry No. 1 on Interpretation of Commission Rules Authorizing the Use of Library References (NOI No. 1). All participants were asked to identify and comment on other instances where the Service had improperly failed to designate as evidence, material filed as library references. Five participant replies were submitted in addition to a response from the Postal Service.⁴ These comments focused primarily on prospective rule

⁴ Response of Alliance of Nonprofit Mailers to Notice of Inquiry No. 1, filed October 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, filed October 3, 1997; Newspaper Association of America Comments in Response to Notice of Inquiry No. 1, filed October 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, filed October 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, filed October 2, 1997; and Response of United States Postal Service to Notice of Inquiry No. 1 (USPS Response), filed October 6, 1997.

changes which might serve to prevent reoccurrence of the controversy. Intervenors did identify five other library references that they contended should have been sponsored as exhibits by the Postal Service.⁵ For its part, the Postal Service contended that its filing was consistent with Commission precedent and sound administrative law practice, but indicated a willingness to sponsor witnesses necessary to allow participants to fully understand referenced studies. USPS Response at 8-10.

The Postal Service announced on September 25, 1997, that witness Daniel had prepared H-112 and it provided supplemental testimony [ST-43] in which she sponsors it as evidence. P.O. Ruling R97-1/38 scheduled receipt of this supplemental testimony on the date already established for witness Daniel to present USPS-T-29. The Postal Service subsequently indicated that it was prepared to sponsor as evidence numerous other library references that contained analyses relied on by its witnesses.

The Postal Service began offering library references for admission into evidence during the evidentiary hearings scheduled to receive its direct case, commencing October 6, 1997.⁶ A number of participants contended that they had not had adequate notice to prepare full cross-examination of these documents. The Postal Service contended that the proffered library references had been prepared by the witnesses in support of their testimony, and that a full opportunity for discovery on these library references had been provided to the objecting parties, many of whom had taken the opportunity to pose numerous questions concerning these library references.

The Presiding Officer admitted sponsored library references into the record subject to motions for procedural relief to be submitted by October 16, 1997. The three motions filed contesting the admission of library references were certified to the

⁵ NDMS identifies H-106, H-108, and H-114 in addition to H-112. NAA lists H-109 and H-182 as well as H-112. PSA also identifies H-108. OCA discusses the importance of H-226, but does not contend it is an essential part of the Service's direct case.

⁶ See, for example, notice incorporating Library Reference H-108 into the testimony of witness Crum, October 1, 1997. The Service also filed supplemental testimony from new witnesses McGrane (October 8, 1997) and Smith (October 17, 1997).

Commission in P.O. Ruling R97-1/49. By Order No. 1200 the Commission accepted certification.

Information to be Provided with a Postal Service Rate Request. In January 1971, prior to the initial Postal Service request for a recommended decision, the Commission published rules of practice and procedure designed to enable it to provide the protections of the Administrative Procedure Act to the Postal Service, the users of the mail, and other interested participants in rate cases. Those initial rules provided that

Simultaneously with the filing of the formal request for a recommended decision under this subpart, the Postal Service shall file all the prepared direct evidence upon which it proposes to rely in the proceeding on the record before the Commission to establish that the proposed changes or adjustments in rates or fees are in the public interest and are in accordance with policies and applicable criteria of the Act. Such 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 CFR § 3001.53.

That rule has continued to be effective, without amendment, since January 1971. The rule directs the Postal Service to proffer, in testimony and exhibits, information which it considers sufficient to establish that its proposals are in accord with the policies of the Act.

Those initial rules also provided that “[d]ocuments and detailed data and information shall be presented as exhibits.” Rule 31(b). The initial rules did not specifically mention a category of documents to be known as “library references.”

Following Docket No. R71-1, more detailed rules were developed setting forth the specific types of information the Postal Service was to provide in support of rate requests. In Docket No. RM73-1 the Commission amended rule 54 by adding new sections (b)-(o) describing categories of information that must accompany major rate

filings. The Commission also added to rule 54(a) a new subpart (2) establishing the procedure to be followed when the information required by new sections (b) through (o) could not be made available without undue burden. This procedure was the genesis for library references.

The Postal Service, in its next rate request, provided much of the information called for in expanded rule 54. However, certain information was so voluminous that it could not be included in the filing, and served on participants in accordance with the rules.⁷ For example, consistent with rule 54(a)(2)(i) the Service's Request noted

One section of rule 54(k) calls for submission of summary reports of the workload reporting system for FY 1972 and FY 1973. These summary reports are both voluminous and detailed and the Postal Service for that reason has not attempted to include them in its filing. However, the Postal Service will make copies of the reports available to the Commission at its offices if the Commission or other participants wish to review the reports.

Docket No. R74-1 (printed version) Vol. II, Part 1 at 32.

Other voluminous information used by the Postal Service directly in preparing its case was provided as workpapers associated with, and sponsored by, the testimony of a witness. *Id.* at 30.

The use of material submitted as a library reference became the subject of controversy in Docket No. R80-1 and was treated by the court in *Newsweek, Inc. v. U.S. Postal Service*. 663 F2d 1186 (C.A. 2 1981).

Briefly, the Postal Service proposed a rate discount for intra-BMC parcel post. The sponsoring witness responded to questions about a study of costs at the San Francisco BMC that he had neither undertaken nor supervised. The study had been filed as a library reference with no sponsoring witness. The *Newsweek* court rejected challenges to the Commission's use of information contained in that study, agreeing with the Commission that the extensive review of relevant issues and the availability of

⁷ See Rule 52 in conjunction with rules 11(g) and 12; *see also* rule 31(g).

the study's model and data during the hearings provided participants with sufficient opportunity for analysis and cross-examination to satisfy the requirements of the Administrative Procedure Act. 663 F.2d at 1209.

Prior to the July 23, 1980 filing of the Docket No. R80-1 Request, no provision in the Commission's rules of practice and procedure directly addressed the status of library references. On May 22, 1980, the Commission had published a Notice of Proposed Rulemaking in Docket No. RM80-1 adding a provision treating library references. No comments on that proposed rule were received, and in PRC Order No. 354 (September 10, 1980) at 14, the Commission adopted new rule 31(k)(1):

Designation of a document as a library reference is a procedure for facilitating reference to the document in Commission proceedings and does not, by itself, confer any particular evidentiary status upon the document. The evidentiary status of the document is governed by the preceding paragraphs of this section.

The rule on library references remains essentially unchanged, although it has been relocated in subsequent rulemakings and now is contained within rule 31(b).

Application of rules 53, 54, and 31 to the issues before the Commission. The plain language of these rules provides that:

- (1) When the Postal Service seeks to change rates, it is to file information that it believes is sufficient to justify its Request.
- (2) When the Postal Service seeks to change rates, it is to file all of the information that it intends to rely on in support of its Request.
- (3) The information described in (1) and (2) is to be provided in the form of prepared written testimony and documentary exhibits with supporting workpapers.

Materials submitted by the Postal Service when it files a Request with the Commission do not immediately have the status of evidence. Prepared written testimony may be moved into evidence after participants have had an opportunity to

object, and participants are provided ample time to engage in written discovery in order to, among other things, ascertain whether such an objection is appropriate.

Documents and detailed data and information are to be presented as exhibits. Exhibits must be sponsored by a witness and are offered as support in addition to testimony. Exhibits also may be moved into evidence only after participants have had an opportunity to object following a period of discovery.

The evidentiary record includes testimony and exhibits specifically admitted into evidence by the Commission or its Presiding Officer. This includes pre-filed testimony and exhibits prepared on behalf of, and moved into evidence by, the Postal Service. It also includes pre-filed testimony and exhibits prepared on behalf of, and moved into evidence by, other participants in Commission cases.

The Role of Library References in Developing the Evidentiary Record. Labeling a document as a library reference does not establish its evidentiary status. However, all or part of a library reference may become evidence in the same way as any other document. Library reference status was established, in part, as a way to facilitate the use of extensive data compilations and/or complex analyses, all or part of which might be identified for receipt into evidence. See Rule 31(b).

The earliest Commission rules required that all participants be served with the testimony and exhibits the Postal Service submitted in support of a Request. Subsequent amendments provided an exception: that when documentation or materials were too voluminous reasonably to be distributed, they could be filed as library references, designated, and sponsored as evidence. This practice also was particularly useful because it facilitated providing extensive data or analyses sought in discovery.

In sum, providing materials designated as a library reference was, and is, appropriate in the following situations:

- (1) To provide information in support of a filing that is too voluminous reasonably to be distributed to other participants. This situation may

occur when the Postal Service submits detailed, underlying cost, volume, or revenue data with a Request; or when the Postal Service or another participant provides detailed support underlying direct or rebuttal evidence. All or part of such a submission may be designated for admission into the evidentiary record when filed, or upon subsequent motion by a participant.

- (2) To provide information in response to a discovery request that is too voluminous reasonably to be distributed to other participants. A participant may designate that response for admission into the evidentiary record as written cross-examination. If the response is received in evidence, the library reference also becomes evidence.
- (3) To provide information considered potentially useful to the Commission or other participants which the sponsoring party does not offer as evidence. Examples include information that the Postal Service does not consider support for its request, referenced scholarly articles, reports or operating manuals, membership lists, etc. The Postal Service has indicated that it provided as library references certain items it expected would be requested in discovery. Opposition to ANM/ALA at 11, fn. 10.

Following adoption of the library reference provision in Docket No. RM80-1, the use of library references was largely consistent with these purposes. In the initial Docket No. R84-1 filing, the 24 Postal Service witnesses sponsored 173 exhibits, and the Service provided 42 library references. In the initial Docket No. R87-1 filing, the 21 Postal Service witnesses sponsored 169 exhibits, and the Service provided only 25 library references. However, over the years the Service has increased the proportion of materials that it has provided as library references. Response to NDMS and NAA at 7-15. In the initial Docket No. R97-1 filing the 42 Postal Service witnesses sponsored 127 exhibits, and the Service provided 214 library references.

This case is widely acknowledged to be the most technically complex rate

proceeding ever considered by this Commission. The Postal Service has proposed many elaborate new costing analyses and has presented testimony which discusses important theoretical pricing concepts. It seems unlikely that such a complex Request would require approximately 30 percent fewer evidentiary exhibits than were submitted in cases filed 10 years ago.

Furthermore, many of the library references in this docket can not be characterized as "too voluminous reasonably to be distributed."⁸ Lodging material as a library reference absolves the filer from the obligation of actual service on other participants. Only notice of the filing of the reference must be provided. Misuse of this process may effectively prevent other participants from obtaining timely access to information which might be relevant and material to their concerns. This potential problem is not the focus of the requests for relief certified to the Commission, but it should be addressed in the rulemaking to be established after the conclusion of this docket.

During the evidentiary hearings to receive its direct case, which began on October 6, 1997, the Service began to offer library references for admission into evidence. On October 14, 1997, in response to P.O. Ruling R97-1/42, it submitted a list of the library references it had announced an intent to sponsor, as well as a list of others it was prepared to sponsor.

The three motions before the Commission contend that the Postal Service Request was fatally flawed because it failed to designate as part of its direct case evidence, certain library references that it now offers as exhibits. Certainly the daunting task of obtaining a working understanding of the complex Postal Service filing would have been less onerous if the Service had been more thorough in identifying supporting cost studies at an earlier stage of this proceeding. Without question, most participants are best served when they and the Commission can evaluate all available relevant evidence. A primary Commission function is to provide non-partisan, expert

⁸ See for example H-168 (2 pages).

independent review of the issues. Whenever possible, the Commission will strive to avoid excluding relevant information for procedural reasons, especially when such a step is not necessary to assure due process to all participants.

The library references currently at issue have been available since the Request was filed, and the Postal Service has responded to discovery concerning many of them. The Commission will provide additional time to allow participants the opportunity for further inquiries. Under the circumstances, staying this proceeding, or refusing to consider evidence premised on these library references, is unwarranted.

The Postal Service is subject to broad and somewhat unique obligations when it files a rate Request with the Commission. These obligations exist both because the Postal Service is the proponent of changes in rates, and because the Service is the repository for the vast majority of data relevant to rate case issues. Not only the Postal Service, but also the parties and the Commission, have to use and rely on information collected in Postal Service data systems and developed by Postal Service employees and consultants. Neither the participants nor the Commission has access to the Postal Service for the purpose of performing studies or collecting data. Necessarily, the Postal Service is the source of the vast preponderance of the data used in Commission proceedings. For this reason, rule 54 requires the Service to make available significant amounts of relevant information on its costs and operations. The Service is often called upon to identify, and vouch for the reliability of data collection and analysis that it may consider extraneous to its specific proposals. Its cooperation in response to such data requests has provided the Commission with the information essential to providing recommended decisions that reflect the substance as well as the form of due process to intervenors.

Another consideration that gives rise to an especially stringent obligation to thoroughly document a Postal Service request is that unlike most agencies covered by the Administrative Procedure Act, this Commission is afforded only 10 months, a relatively short time period (for the scope of the inquiry involved) to complete its work.

Even when no procedural disputes arise, measuring appropriate due process protections such as an "adequate" opportunity for discovery must be balanced against the need to allow sufficient time to complete subsequent phases of the case within the allotted 10 months. As a result, due process requires that all reasonable steps be taken early in a case to assure that participants have as complete an opportunity as possible to explore relevant and material concerns.

Several of the participants now contend that, at the least, an extended additional period for discovery is needed to delve into certain library references that have only recently been designated as evidence. Earlier in the case participants sought, and were granted, additional time for discovery on the materials filed by the Postal Service with its Request and to prepare responsive evidence. See P.O. Ruling R97-1/4 at 1-2. A key consideration in this dispute is that almost all of the library references at issue here have been available for, and subject to discovery since July. This fact tends to support a finding that participants have had adequate opportunity to review the materials in question.

A counter-balancing fact is that subpart B of the rules of practice and procedure requires the Postal Service to identify, and provide as testimony and exhibits, the information it considers the support for its Request. It further provides that supporting testimony and exhibits are to be provided to all participants so that they will be able to understand and question the Postal Service rationale. When a piece of testimony that premises a rate discount on a cost difference, includes a footnote that refers to an attached exhibit which contains the analysis that developed the cost difference, intervenors can easily review the Postal Service presentation. The same level of information is not provided when the footnote identifies as the source of the cost difference a library reference not readily available to the reader.

Participants in this case have had to refer to numerous analyses initially available only as library references in the Postal Rate Commission and Postal Service libraries in order to fully understand the Postal Service Request. However, participants

do not have the luxury of months for the review and evaluation of numerous library references to determine which may or may not have important effect on rate proposals of particular interest to them. Even under the generous procedural schedule adopted for this case, parties must complete questioning on the Postal Service direct case, and prepare their case-in-chief, including rebuttal to the Service, in approximately four months. In these circumstances, it is essential that the Postal Service provide as part of its Request sufficient information to enable any interested participant to understand the bases for its Request. When important information is contained in an extensive analysis which can not easily be provided, it may be appropriate to submit as an exhibit, a description of the analysis and a summary of the major intermediate and final outputs of the analysis. At a minimum, the Postal Service should provide a complete, detailed road map to allow a reviewer easy access to sources used to develop a witness's conclusions.

The need for a complete, detailed road map can not be over emphasized. To a witness who has spent months developing cost studies to support testimony, it may be obvious how studies interrelate, and how one study provides the source of the justification for a relationship relied upon by a second study. To a reader less familiar with the topic, the relationship probably is not so clear. The Postal Service recognizes this potential problem.⁹ Whether the failure to provide sufficiently clear references gives rise to due process problems will depend on the specific circumstances of each situation.

Evidence Necessary to Support Commission Recommendations. In rate cases subject to the standards of the Administrative Procedure Act such as Postal Rate Commission proceedings, see 39 U.S.C. § 3624(a), the proponent of any particular finding must attempt to provide sufficient evidence so that a Commission finding in favor

⁹ Opposition to ANM/ALA at 7. The discussion that follows demonstrates that Postal Service counsel are familiar with H-77, but the clarifications provided support the general proposition that citations to specific pages of lengthy documents are helpful.

of that proposition can be said to rest on "substantial evidence." Thus, the Postal Service has the obligation to show that rate changes are justified, and that the specific rates and classifications it proposes are supported by substantial evidence.

Because the Postal Service is the proponent of the rate changes suggested in its Request, there may be some temptation to accept the proposition that only the Postal Service suffers if it fails to sponsor sufficient evidence to support portions of its Request. However, such a conclusion would be wrong.

Participants in postal rate cases are largely dependent on Postal Service data for developing direct and rebuttal evidentiary presentations. It is helpful when relevant cost and demand analyses are sponsored by someone with first-hand knowledge of how data were collected and analyzed to develop reported outputs, and those individuals are generally Postal Service employees or contractors. Meaningful public participation may be unnecessarily made more difficult when relevant available data collections and analyses are not offered as evidence by the Service.

Special rule of practice 2.E. allows participants to continue to direct discovery to the Postal Service for the purpose of obtaining information on procedures or data available only from the Service. This procedure may allow a participant to become sufficiently familiar with the source of information to effectively sponsor it as evidence. Nonetheless, this process is less satisfactory than having the individual initially responsible for conducting or directing the production of the information available for questioning.

In sum, it is evident that sound administrative practice would suggest that the Postal Service should endeavor to err, if at all, on the side of sponsoring too much, rather than too little, evidence in support of its proposals.

The central issue raised in the motions currently pending before the Commission is the extent to which the Postal Service should be allowed to supplement the testimony and exhibits contained in its initial request by sponsoring additional evidence to further support its proposals.

Rule 53 provides that the initial Postal Service filing should include "all the evidence upon which it proposes to rely." However, no rule prevents the Service from supplementing its case if events indicate that such a step may be necessary. Thus the issue devolves into one of balancing the interests of all participants.

Once the Service submits a Request, interested participants have a limited amount of time to learn about, and critique that Request, as the Commission has only 10 months in which to arrive at its decision. If the Service delays the provision of supporting material information which it knows or should have known is necessary for the careful evaluation of the Request, it can put other participants at an extreme disadvantage. If accepting supplemental testimony from the Postal Service at an advanced stage of a proceeding would effectively violate the due process right of those participants to learn about and critique the effected segment of the Postal Service presentation, then the supplemental testimony should not be accepted.

In this case, several parties have suggested that large amounts of data and analyses that should have been sponsored by witnesses and designated as evidence in the initial Postal Service Request were instead improperly provided as library references. The Postal Service has responded by agreeing to provide testimony of witnesses sponsoring numerous library references for admission as evidence. The Service maintains that as all of these library references were available from the inception of this case, and many of them have already been subject to significant amounts of written discovery, accepting these materials into evidence will not violate any participant's due process rights.

The Postal Service notes that when it first offered to sponsor these library references as evidence, none of its pre-filed evidence had yet been accepted into the record. While it contends that other participants have had a full and sufficient opportunity to obtain information through discovery concerning these library references, it accepts the proposition that any potential unfairness can be eliminated through the opportunity for additional discovery and/or cross-examination.

The Commission has determined to allow the Postal Service to supplement its direct case by sponsoring library references as evidence. The Commission is charged with recommending rates consistent with enumerated statutory policies. These policies can be better applied when the evidentiary record contains this available relevant and material evidence.

In several pleadings submitted earlier in this case, the Postal Service defended its submission of documents as library references as a proper exercise of its “litigation strategy.” The use of this term left the impression that the Postal Service had made a conscious decision to withhold sponsorship of potentially relevant and material information for strategic reasons – perhaps in the belief that this would hamper participants’ ability to effectively challenge its proposals. The Service attempts to defuse this impression, stating that its use of the term “litigation strategy” was a poor choice of words that misrepresented its position. It suggests that the Commission, participants, and the Postal Service itself are best served when Commission recommendations are supported by a complete and comprehensive evidentiary record.¹⁰

The Commission fully supports the proposition that available relevant, material information should be admitted into the evidentiary record so long as doing so will not deny due process to any participant. In this instance, the Postal Service is offering to sponsor as evidence information that will enhance the ability of participants and the Commission to evaluate its Request. This information has been available to participants, and its admission into evidence at this time, while parties still have an adequate opportunity to explore the probity of this information and present evidence concerning it, will not unfairly impact on any participant’s due process rights.

A review of the comments provided in response to Notice of Inquiry No. 1 and the pleadings related to the motions currently before the Commission, reveals a surprisingly broad spectrum of opinions about the status of library references and the

¹⁰ Response of the United States Postal Service to Notice of Inquiry No. 1 at 11-13.

contents of the evidentiary record in a Commission case. The diversity of views was particularly evident during the discussion of this matter during the October 7, 1997 hearing. Tr. 3/514-48. Under these circumstances, it is best to clarify areas of uncertainty, and to admit appropriate materials as evidence to assure that a full and complete record is available as the basis for decision.

Significant time has elapsed since this evidentiary problem first surfaced. The Service, in most of its recent filings,¹¹ has been cooperative in offering to provide witnesses to assist participants to understand its direct case. At this juncture, the Commission believes it most efficient to admit into evidence all of the library references identified in the Postal Service Response of October 14, 1997. The Presiding Officer can schedule a reasonably limited amount of additional time for written discovery on this material, and schedule hearings to conduct any desired oral cross-examination.

The Postal Service also stated in its Response of October 14, that it is inquiring into the availability of individuals to sponsor other library references. In response to Notice of Inquiry No. 1, only a handful of library references were identified by participants as requiring sponsorship and designation as evidence. Participants should review their analysis of the Postal Service direct case to ascertain if other library references fit into this category. At this point the Commission would be skeptical of any participant claim of surprise that the Service intended to rely on a library reference cited in its existing testimony or exhibits. Just as the Postal Service's reliance on "litigation strategy" was viewed as questionable, so too participants ought not to assert that a rate can not be recommended solely because it rests on a library reference if there has been an adequate opportunity to inquire into the validity of its contents.

Impact of this Controversy on the Procedural Schedule. It has been suggested that the Postal Service request to sponsor large numbers of library references as

¹¹ The Service has opposed a motion from the National Newspaper Association that it be directed to sponsor a witness to testify on library reference H-89. That motion was not certified to the full Commission, and the Commission has made no attempt to evaluate the issues involved in that dispute.

evidence is an indication that its Request as filed on July 10 was fatally flawed. OCA recommends that, pursuant to rule 56, the Commission should stay this proceeding until the Postal Service completes a review of the materials currently lodged as library references, and provides a full list of those it will sponsor as evidence. The OCA further suggests that the 10-month period for evaluating Postal Service Requests should commence on the date that list is filed.

Other participants also suggest that a reasonable interpretation of the Postal Service actions in this case would justify the Commission extending the 10-month period pursuant to § 3624(c)(2). The Postal Service contends neither action is justified.

At this time, the Commission finds it unnecessary to act on either of these suggestions. Both are apparently premised on the view that it is no longer possible for the Commission to complete its deliberations in 10 months, while providing procedural fairness to the parties. The Commission is not yet ready to accept that premise.

Almost all of the library references which are to become part of the evidentiary record have been available since this case was initiated. Participants, including those filing the motions currently before the Commission, have submitted numerous written discovery requests addressing library references. An additional opportunity for discovery concerning these materials and the individual witnesses sponsoring them is currently underway. The Postal Service has been directed to provide exceptionally prompt responses to this discovery. See PRC Order No. 1200 (issued October 27, 1997). It is the Commission's hope and desire that, after an appropriate opportunity for additional discovery and cross-examination concerning these materials, expeditious conduct of the remainder of this proceeding will enable the Commission to complete its work within 10 months.

It is evident that the Postal Service decision to provide certain detailed data and information as library references rather than as exhibits, was the proximate cause of this controversy that has delayed certain procedural events. However, it is not clear to what extent this action has unreasonably delayed consideration of the R97-1 Request.

Therefore it is premature to make a finding that the prerequisites for invoking § 3624(c)(2) have been satisfied.

It is ordered:

1. The library references identified in the October 14, 1997, United States Postal Service Response to Presiding Officer's Ruling R97-1/42, and the supplementary testimony provided to sponsor those materials, are to be received into evidence in this case.


2. The Presiding Officer is to schedule an additional period for written discovery on these materials, and hearings for the purpose of conducting oral cross-examination on sponsoring witnesses.

3. The Motion of Alliance of Nonprofit Mailers and American Library Association to Stay Proceedings, filed October 16, 1997, is denied.

4. The Nashua Photo Inc., District Photo Inc., Mystic Color Lab and Seattle Filmworks, Inc. 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, is denied. Alternative procedural relief discussed in the motion is provided to the extent described in paragraph 2.

5. The Newspaper Association of America Motion in Opposition to Admission into Evidence of Certain Library Reference Materials and Supplemental Testimony USPS-ST-44, filed October 16, 1997, is denied.

By the Commission.
(S E A L)


Margaret P. Crenshaw
Secretary