

BEFORE THE  
POSTAL RATE COMMISSION  
WASHINGTON, DC 20268-0001

Postal Rate and Fee Changes, )  
2006 ) Docket No. R2006-1

**OBJECTION OF MAGAZINE PUBLISHERS OF AMERICA, INC.,  
AMERICAN BUSINESS MEDIA, ADVO, INC., ALLIANCE OF NONPROFIT  
MAILERS, ASSOCIATION FOR POSTAL COMMERCE, DIRECT MARKETING  
ASSOCIATION, DOW JONES AND CO., INC., GROWING FAMILY, INC.,  
MAIL ORDER ASSOCIATION OF AMERICA, MAILING & FULFILLMENT  
SERVICE ASSOCIATION, THE MCGRAW-HILL COMPANIES, INC., NATIONAL  
ASSOCIATION OF PRESORT MAILERS, NATIONAL POSTAL POLICY  
COUNCIL, NATIONAL NEWSPAPER ASSOCIATION, PARCEL SHIPPERS  
ASSOCIATION, SATURATION MAIL COALITION, TIME WARNER INC.  
AND U.S. NEWS & WORLD REPORT, L.P.,  
TO RECEIPT INTO EVIDENCE OF THE  
RESPONSE OF THE UNITED STATES POSTAL SERVICE  
TO PRESIDING OFFICER'S INFORMATION REQUEST NO. 4,  
QUESTIONS 4-12, AND PRESIDING OFFICER'S INFORMATION  
REQUEST NO. 16, ITEMS 13-21  
(October 17, 2006)**

On October 16, 2006, in Presiding Officer's Ruling No. R2006-1/83, the Commission "designated for inclusion in the evidentiary record" a number of discovery responses filed by the Postal Service after the August 30 close of hearings on the Postal Service's direct testimony. Included in the list of designed items were the Postal Service's responses to Presiding Officer's Information Request No. 4, Questions 4-12 (filed September 22, 2006), and Presiding Officer's Information Request No. 16, Questions 13-21 (filed October 12, 2006). These responses

provide volume variability estimates of city carrier costs based on 2004 data, rather than the 2002 data relied on by the Postal Service in its case-in-chief. Pursuant to section 30(e)(1), 30(g), and 31(h) of the Rules of Practice, the undersigned parties respectfully object to the inclusion in evidence of these POIR responses.<sup>1</sup>

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<sup>1</sup> Section 32 of the Rules of Practice provides that appeal from a presiding officer's ruling shall be initiated by "[a] request for the presiding officer to certify an appeal [to the full Commission] within 5 days after the presiding officer's ruling has been issued." However, it is commonplace for matters addressed in presiding officer's rulings to be subject to clarification, reconsideration, amendment, or further action by the presiding officer pursuant to further pleadings addressed to the presiding officer.

The signatories to this Objection believe that the proper interpretation of P.O. Ruling No. R2006-83 is that it is intended to rule dispositively on the admission into evidence of the materials designated therein only if no objection is raised. There are three reasons for thinking that this is the case. First, the somewhat recent practice of extensive designations of evidence by the Commission must be understood in the context of the Commission's long tradition of scrupulously assuring that participants have an opportunity to comment or voice objection before ruling on the admission into the record of disputed materials. That the Commission or the Presiding Officer would intend to rule on such matters without affording any opportunity for objection runs so completely against the grain of the Commission's historical practice that it should not be supposed except upon the clearest possible expression of such an intent. Second, the Presiding Officer's practice in this docket with respect to such designations suggests a contrary intent. During the hearings, the Presiding Officer has repeatedly issued such rulings on the same date that designations of written cross-examination by participants are due, i.e., three days before the hearing, and has inquired at the hearing, before placing the designated materials—including those designated by the Commission—in the record, whether there is any objection to doing so. Third, the right to an opportunity to object is expressly granted by section 30(e)(1) of the Rules of Practice, which states in pertinent part (emphasis added):

Any participant shall have the right in public hearings of presentation of evidence, cross-examination (limited to testimony adverse to the participant conducting the cross-examination), objection [emphasis added], motion, and argument. . . . When *objections* to the admission or exclusion of evidence before the Commission or the presiding officer are made, the grounds relied upon shall be stated.

(footnote continued on next page)

The hearing requirements of 39 U.S.C. § 3624(a), and the provisions of the Administrative Procedure Act incorporated by that section, entitle participants in Commission rate cases to discovery, cross-examination and rebuttal of cost data that raise material disputed issues of fact. The attribution of city carrier costs is one of the most important, complex, controversial and fact-laden tasks that the Commission faces. Accordingly, as the Court of Appeals held in *Mail Order Ass'n of America v. USPS*, 2 F.3d 408, 428-430 (D.C. Cir. 1993) ("MOAA"), due process forbids the Commission from adopting city carrier cost estimates based on data or analyses not subject to full adversarial testing.

For the 2004 data and analyses to which the undersigned parties object here, this testing has not begun. The Postal Service has not asked the Commission to adopt the data or results, and neither the Postal Service nor the Commission has proffered a witness for discovery or cross-examination concerning the material. Moreover, too little time remains in this proceeding to allow adversarial testing to occur. Under the circumstances, giving evidentiary weight to the 2004 data in the POIR responses would be a fundamental violation of due process.

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In these circumstances, we believe the fair reading of the Presiding Officer's Ruling is that it intends to leave open the possibility of objection, and that an objection is the appropriate form for this pleading.

In the event that the Presiding Officer does not agree with this view and concludes that the appropriate pleading in these circumstances is a request under Rule 32 for certification of an appeal of P.O. Ruling No. R2006-1/83 to the full Commission, we respectfully request that this pleading be construed as such a request.

The gravity with which the mailing community views this issue is underscored by the broad range of interests that join in this Objection. Some of the undersigned parties would be likely to pay higher rates if the data and analyses at issue were used to estimate city carrier costs. Some would probably enjoy lower rates. For others, the probable effect of the disputed data and analyses is still uncertain. *All* of the undersigned parties, however, believe that administrative due process precludes the Commission from relying on the material to estimate costs and set rates in this proceeding.

#### **I. FACTUAL BACKGROUND**

In Docket No. R2005-1, the Postal Service presented an entirely new city carrier street-time study based on time and volume data collected from city carriers in 2002. The study was complex, involving considerable cooperation of carriers in the field, complicated data collection procedures, considerable data processing and manipulation, and econometric modeling. The Commission criticized the effort on a variety of grounds. PRC Op. R2005-1 ¶¶ 4005-4018, 4030-4091 and App. I. Moreover, cross-examination of a Postal Service witness indicated the Postal Service had collected but not used similar data in 2004, two years after the 2002 survey. Docket No. R2005-1, 6 Tr. 1997-98 (USPS witness Stevens). Ultimately, however, the Commission accepted the Postal Service's study, and the 2002 data underlying it, in the context of a docket that was "only partially litigated." PRC Op. R2005-1 ¶¶ 4005-4008 and 4033.

The Postal Service filed the R2006-1 case on May 3 of this year. To estimate variable city carrier street-time costs, the Postal Service again relied on the city carrier street-time variability results derived from the 2002 survey data and the econometric model that the Commission had accepted in Docket No. R2005-1.

On June 1, the Commission issued POIR No. 4, items 4 through 12 of which requested that the Postal Service update its city carrier street-time analysis and models by rerunning models with the 2004 survey data.

On June 9, the Postal Service filed a status report on its progress in developing a response to POIR 4. The status report explained that the 2004 survey time and volume data had not been processed (or, apparently, even reviewed).

The report also explained that valid use of the 2004 data would require extensive additional new analysis beyond merely substituting the 2004 data for the 2002 data. The required additional analysis would need to include:

- development of decision rules and algorithms to convert barcoded time scans into aggregations of proper cost pool times (equivalent to LR K-133 in R2005-1);
- development of decision rules and algorithms to treat potential data problems, errors, and unusual time scan sequences;
- assessment of major sources of error scans, to determine if, as suggested by the Commission, any are “recoverable”;
- preparation and testing of new programs to account for changes in the time scan and volume data, to identify and eliminate or recover problem data, to deal with errors in barcode sequences, to identify and possibly correct problematic zip codes (zips in the 2004 survey differ considerably from those in the 2002 survey), and to calculate “attrition rates” in the survey reporting effort;

- review of data sets for regression modeling to ensure appropriate matching and accurate coding and to determine need for any corrections/adjustments; and
- implementation of possible changes and improvements in econometric methods suggested by the Commission in its R2005-1 decision.

For these and other reasons, the Postal Service concluded that responding to POIR 4 would require approximately 13-18 weeks of additional work.

The Postal Service filed a second status report on August 11, estimating that completing the responses would require another 5 to 7 weeks, and a third report on August 25, estimating that the Postal Service could provide the responses in 3 to 5 weeks. The Postal Service ultimately filed its responses to POIR 4 on September 22—16 weeks after the issuance of the POIR. When completed, the responses had the character of a brand new city carrier street-time study and results, capable of replacing the study and results presented in Docket No. R2005-1.

On September 28, the Presiding Officer issued an additional Information Request, No. 16, which included eight items (13-21) asking the Postal Service to clarify and supplement in its October 12 response to POIR No. 4 concerning city carrier costs.

The Postal Service's September 22 responses to POIR No. 4, items 4 through 12, and October 12 responses to POIR No. 16, items 13 through 21, amount to a completely new analysis of city carrier costs. Not only do they substitute 2004 survey data for the 2002 survey data accepted in R2005-1, but the results derived from those data effectively redo from scratch the costing of all rate subclasses and

categories.<sup>2</sup> The results of the new analysis, if accepted by the Commission, could potentially affect every rate proposed by the Postal Service in this proceeding. Taken together, the recent responses to POIR 4 and POIR 16 amount to virtually a brand-new case:

- Witness Kelley briefly describes, in response to Item 4, the 2004 survey design in a manner equivalent to his discussion of the 2002 survey design in USPS-T-16 and in discovery responses in R2005-1.<sup>3</sup>
- Witness Stevens, in responses to Items 7, 8, 9, and 10, briefly describes the preparation for and conduct of the 2004 data collection and the processing and manipulation of the raw data to produce the data sets used to:
  - disaggregate city carrier street time into functional cost pools (response to Item 5); and
  - develop the city carrier delivery regression models (response to Item 6).

Stevens also sponsors LR L-179, which contains a variety of materials, including information on scan time and volume data collection, SAS programs, and SAS program outputs. His responses to POIR 4 and LR L-179 are, collectively, the equivalent of a large portion of his testimony (USPS-T-15) and the entirety of USPS LR K-78, -79, and -80 in Docket No. R2005-1.

- Witness Bradley provides an overview of the rationale for the 2004 survey and briefly presents results from six different models developed from the

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<sup>2</sup> POIR No. 16, Item 16, requests information on how to “flow through” the new model results to the base year CRA and the delivery cost by rate category analysis. The Postal Service response explains how to “flow-through” the regression model results to the analyses in LR-L-5 (Witness Milanovic’s A and B [Base Year] Workpapers) and LR L-67 (Delivery Costs by Rate Category).

<sup>3</sup> Kelley’s October 12 responses to POIR No. 16, Items 13-15, 16 (d) and (e), essentially completes replication for the 2004 survey of his R2005-1 testimony on this subject.

2004 data. This is the equivalent of a large portion of his testimony (USPS-T-14) and the entirety of USPS LR K-81 in R2005-1. In addition, he briefly addresses some of the concerns expressed by the Commission in its R2005-1 Opinion. He sponsors USPS LR L-180, which contains his SAS programs, logs, and outputs.

Stevens and Bradley also state that the 2004 data collection activities differed from those used to collect the 2002 data, for reasons that the two witnesses attempt to explain. In response to POIR No. 4, Item 8, Stevens states that:

the 2004 data collection did not replicate the 2002 surveys in all aspects. One goal of the new study was to see if a smaller sample would suffice. Another goal was to simplify the role of the data collectors by making more use of existing data sources. To that end, study coordinators were not asked to verify DOIS data. . . Similarly, collection mail volumes were not measured in feet and inches but provided in containers.

Bradley adds, in response to Item 11 of POIR No. 4:

[T]his data collection effort by the Postal Service was not designed as a replication of the 2002 study, and involved some important differences in data collection methods. In fact, the data collection effort was in part experimental, in the sense that resource-saving collection methods were being tested to see if they could provide similar quality data as was collected in 2002.

Bradley further explains that the 2004 survey sample is smaller than the 2002 sample and has a smaller regression data set, that there were changes in how collection mail volume was measured, and that (unverified) DOIS counts were used for DPS, cased letters, cased flats, and sequenced mail. He also expresses reservations as to how collection mail was measured.

In LR L-179, Stevens is slightly more specific about some of the differences between the 2002 and 2004 data collections, including:

- changes in the definition of some barcode time scans, addition of new barcode time scans, and changes in how some barcode time scans were used by the carriers;
- changes in how time scan data were processed to develop the cost pools and (apparently) changes in how those time scan data were processed to develop the time data set used for the regression models;
- changes in how the volume data were collected and processed;
- updates of the socio-geographic and delivery point data; and
- apparent changes in how carefully time scan, volume, socio-geographic, and delivery point data were coordinated for each zip-route.

In sum, the city carrier cost study produced by the Postal Service in response to POIR 4 and POIR 16 differs thoroughly from the study recommended by the Commission in R2005-1.

## II. DISCUSSION

### A. Due Process Entitles Rate Case Participants To Discovery, Cross-Examination And Rebuttal Of Any Materially New Cost Data And Models Relied On By The Commission To Determine City Carrier Costs.

The Postal Reorganization Act requires the Commission to provide "a hearing on the record under sections 556 and 557 of title 5 [the Administrative Procedure Act]" in postal rate cases. 39 U.S.C. § 3624(a). The concept of due process under these provisions is flexible,<sup>4</sup> and must be tailored to meet the particular circumstances. But even the *ordinary* due process afforded to participants

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<sup>4</sup> "Due process is inherently a flexible concept; the procedures required must be tailored to meet the needs of particular proceedings and interests." *Northern California Power Agency v. Morton*, 396 F.Supp. 1187, 1192 (D. D.C. 1975).

in hearings under sections 556 and 557 includes the right to the appearance of a sponsoring witness or witnesses in support of a proposed new model or methodology; the right to pursue discovery and oral cross-examination of the sponsoring witness on any material issue of fact; and the opportunity to prepare testimony that rebuts or offers alternatives to the proposal.

The Commission has adhered to these principles from its earliest days. In Order No. 280 in Docket No. MC78-1, the Commission said that conduct that "frustrated other parties' attempts to inform themselves fully about the Service's proposal in order to formulate rebuttal testimony as well as counter-proposals . . . is inconsistent with the standards of due process inherent in 39 U.S.C. § 3624(a) and (c), and in the Administrative Procedure Act generally." Order No. 280 (issued May 18, 1979) at 27. In a footnote to that statement, the Commission explained:

An adequate opportunity to rebut an opponent's case by evidence of one's own has always been considered a requirement of due process. *Ohio Bell Telephone Co. v. Public Utilities Comm. of Ohio*, 301 U.S. 292, 301-303 (1937); *Northeast Airlines, Inc. v. CAB*, 345 F.2d 484 (1st Cir. 1965), *cert. denied sub nom. Eastern Airlines, Inc. v. Northeast Airlines, Inc.*, 382 U.S. 845 (1965).

The true principle is that a party who has a sufficient interest or right at stake in a determination of governmental action should be entitled to an opportunity to know and to meet, with the weapons of rebuttal evidence, cross-examination, and argument, unfavorable evidence of adjudicative facts. . . .

Davis, *Admin. Law Treatise*, § 7.02 (1958),

The requirements of due process are especially demanding for ratemaking and econometric modeling, complex exercises with potentially broad impact on the public interest.<sup>5</sup> The Commission has long recognized the connection between the difficulty and importance of the issue and the degree of process that is necessary. In its Opinion in Docket No. R76-1, for example, it stated:

An amendment of the Service's revenue requirement could well affect our decision on the level of rates and fees to be established, requiring that adequate notice be given the parties under 5 U.S.C. § 553(b) and § 17 of our rules (39 C.F.R. § 300l.17). Thereafter, the provisions of 5 U.S.C. § 556(d) would insure the parties' rights of cross-examination and rebuttal on the matter before we reached a decision. See *American Louisiana Pipe Line Co. v. FPC*, 344 F.2d 525 (D.C. Cir. 1965).

PRC Op. R76-1 (June 30, 1976), p. 25, n. 2.

The attribution of city carrier costs is one of the most important, complex and difficult modeling exercises that the Commission must undertake. City carrier street time is a major cost that affects all subclasses and most services. A major change in that cost can have serious impacts on multiple rate levels and structures. The

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<sup>5</sup> See, e.g., *State of Ohio v. U.S. Dept. of the Interior*, 880 F.2d 432, 479 (D.C. Cir. 1989) ("when an agency relies upon an economic model, it is incumbent upon it to 'provide a full analytical defense' of the model" [citing *Eagle-Picher Indus. v. EPA*, 759 F.2d 905, 921 (D.C. Cir. 1985)]). See also *Northern California Power Agency v. Morton*, 396 F.Supp. at 1193:

In the context of rate-making of this kind, due process requires that the basis advanced for the change be set out in sufficient detail to permit those affected to make a meaningful response. As a practical matter, this may require on-the-record questioning of experts to lay bare their assumptions and reasoning. . . . The extent to which detail is required is a practical question which depends on the nature of the subject matter and cannot be resolved in the abstract.

introduction of virtually any new model of city carrier costs therefore requires a full opportunity for analysis and discussion of pertinent issues of data collection, data quality, and modeling.

These issues are numerous and difficult. The collection and processing of the new data (here, the 2004 data obtained by the Commission through POIR 4 and 16) need to be thoroughly investigated and analyzed. If the data are found reliable or processed into reliability, then new results need to be generated, evaluated and finalized by combining them with econometric model structures that are designed to explain the new data (and operational realities) and tested and interpreted to ensure that they do. In particular, it is critical to verify that (1) the 2004 data are accurate and reliable; (2) the data have not been forced into old model structures that are inappropriate; and (3) the models chosen avoid the econometric and interpretive problems that have undermined the validity and reliability of previous models.

These analytical steps are time consuming. Indeed, when the last set of new street time models was introduced in Docket No. R86-1, an extensive, intense discovery and evaluation process ensued; and even though much progress was made in R86-1, that process continued over several subsequent rate cases.

This process may not be bypassed on the theory that more recent data, whatever their shortcomings, are likely to produce better results than older data. There is no basis for assuming that running models from more recent but unproven data produces better results. As the Commission noted in Docket No. R2005-1:

Proposed analyses do not improve upon established ones simply because the underlying data are more current. Data must not only be current, but be reasonably free of both sample error and reporting

error. The data must be of a kind that can be translated into meaningful econometric variables. The data also must be modeled in a way that makes theoretical sense, and yield results that are consistent with operational experience.

PRC Op. R2005-1 (Nov. 1, 2005) at ¶ 4032.

**B. The 2004 City Carrier Cost Data And Models Produced By The Postal Service In Response To POIR 4 and POIR 16 Have Not Received The Adversarial Scrutiny Required By Due Process.**

For the 2004 study, data and models produced by the Postal Service in response to POIR 4 and POIR 16, the necessary review has not even begun. Neither the Postal Service nor any other participant has proposed adoption of the 2004 data and models in this case. No witness competent to sponsor these materials is known to advocate their use.<sup>6</sup> In the following two subsections, we discuss in turn the unanswered questions about the 2004 data collection and analysis, and the results of the Postal Service's regression model runs with the 2004 data.

**1. The 2004 data collection and analysis**

POIR No. 4 requested, and the Postal Service provided, information on the 2004 data collection. That information, however, is neither equivalent to, nor a substitute for, testimony and discovery concerning the survey design, data collection process, data manipulations and analyses, and programming. Nor, importantly, can the responses to the Commission's follow-up questions in POIR No. 16 (Items 13 to

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<sup>6</sup> It should be reemphasized that both POIR No. 4 and No. 16, as they relate to the 2004 results, principally focus on the resultant model results and how to replace the proposed Postal Service city carrier base year costs with them. Nothing in the POIRs suggests adequate due diligence on the new data collection, programming, or on the totality of modeling issues.

21) fill in the evidentiary chasm respecting these features of the analysis. None of the questions were designed to determine the analytical foundation or the quality and reliability of the 2004 data collection, or to determine how they compare to the quality and reliability of the 2002 data. These omissions contrast notably with the Commission's extensive analysis of the 2002 data described in Appendix I of its Opinion in R2005-1.

Further, although witnesses Stevens and Bradley identify some of the differences between the two studies, neither witness attempts to compare differences in data quality and reliability, and neither recommends adoption of the 2004 data as "better" than the 2002 data for ratemaking.

## **2. The 2004 regression model results**

In his response to item 11 of POIR No. 4 and to items 18 and 19 of POIR No. 16, witness Bradley provided the Commission with seven different regular delivery regression models and one parcel/accountable model. Each of the seven regular delivery models is somewhat similar in mathematical form, variables, and results to the one accepted by the Commission in R2005-1. The parcel/accountable model is also similar to the R2005-1 model.

However, Bradley identified and briefly discussed three modeling issues, without discussing the relative strengths and weaknesses of the two different data collections or of the 2005-1 model and the new models presented in his response to POIR 4:

- more widespread use of delivery point sequencing and the use of a "three bundle" approach;

- differences in delivery technologies among routes; and
- multicollinearity among explanatory variables.

This discussion, together with Bradley's presentation of multiple new models without assessing their relative strengths and weaknesses, implies that he believes that they need further investigation. Importantly, Bradley did not recommend that the Commission accept or place any reliance on any of the new models he developed.

It is important to recognize that, despite the sophisticated procedures used in the development of these models, there are major unresolved issues associated with the modeling of city carrier delivery time. Among the most important is how to deal with the inherent multicollinearity in the explanatory variables.<sup>7</sup>

In an attempt to address that problem in his R2005-1 testimony, Bradley estimated both full and restricted quadratic models. His reply to POIR No. 4, item 11, also provides full and restricted quadratic regular delivery models, but the cross-product variables eliminated in the new restricted models differ from those in the

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<sup>7</sup> OCA witness Smith (OCA-T-3) has also identified multicollinearity as a serious problem that afflicts both the USPS R2005-1 study and his own preliminary work with the DOIS data. See OCA-T-3 at 22-23. Multicollinearity is a problem inherent in the data (regardless of whether it is the 2002 or 2004 study data or the DOIS data used by OCA witness Smith). Unfortunately, a full assessment of how to treat this specific problem has not yet been conducted on the record and remains to be resolved. See, e.g., Bradley responses to OCA/USPS-T13-6 (b) and (c), OCA/USPS-T13-12; in R2005, see, e.g., response to POIR No. 9, Items 9 through 11.

Another such issue is how to deal with the heteroskedasticity in the model results. See Bradley responses to OCA/USPS-T14-9; in R2005, see, e.g., response to POIR No. 9, Item 14, and Bradley responses to ADVO/USPS-T14-3, 4, 16 and to OCA/USPS-T14-11.

R2005-1 models. The Commission, undoubtedly recognizing the multicollinearity problem that afflicts the 2004 data, thereupon issued POIR No. 16, Item 19, requesting a further restricted quadratic regression model, again as an attempt to deal with the multicollinearity issue.<sup>8</sup> Without giving *participants* an opportunity to pursue such issues through discovery, cross-examination and rebuttal, however, the Commission's attempt to conduct modeling analysis through the POIR process falls short of the full adversarial testing required by the Administrative Procedure Act.

Moreover, there are a number of other modeling issues that require thorough review in any consideration of the suitability of the results provided in the responses to POIR Nos. 4 and 16. The 80-plus pages of detailed discussion provided by the Commission itself in its R2005-1 Opinion, and other statements of Dr. Bradley in this case (see, e.g., USPS-T-14 (Bradley) at 8-10), merely suggest the scope and complexity of these issues.

**C. Insufficient Time Remains In This Proceeding To Cure The Violation Of Due Process That Would Result From Commission Reliance On The 2004 Data.**

Too little time remains in this case to allow the adversarial testing of the 2004 data and regression runs required by 39 U.S.C. § 3624(a). As noted above, the necessary procedures would include the filing of testimony by a witness capable

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<sup>8</sup> Moreover, the Postal Service's responses to other questions (Items 13-15 and 17-18, 20-21 of POIR No. 16) clearly demonstrate that: (1) considerable analysis remains to be performed on the new 2004 data and results; and (2) even the Postal Service, with all its resources, is prone to make simple mistakes when required to perform analyses on short notice (e.g., see programming errors identified in response to POIR No. 16, Item 18).

of sponsoring the new data and analyses and willing to advocate their use by the Commission; the opportunity for written and oral discovery of such testimony by other participants; and the opportunity for the filing of rebuttal testimony. All of these elements would be necessary before the Commission could lawfully consider reliance on the 2004 data. Even with the best efforts of all interested participants, too little time remains in the ten-month schedule established by 39 U.S.C. § 3625(c)(1). See Statement of Antoinette Crowder (attached *infra*).

The courts have made clear that this situation does not entitle the Commission to circumvent the requirements of due process. As the Supreme Court has observed, the Commission itself recognized this sometimes unwelcome truth early in its existence:

The legislative history supports the Rate Commission's view that when causal analysis is limited by insufficient data, the statute envisions that the rate Commission will "press for . . . better data," rather than "construct an 'attribution' " based on unsupported inferences of causation. PRC Op. R74-1, pp. 110-111.

*National Ass'n of Greeting Card Publishers v. USPS*, 462 U.S. 810, 827 (1983).

The wisdom of this view was illustrated in *Mail Order Ass'n of America v. USPS*, 2 F.3d 408 (D.C. Cir. 1993) ("MOAA"), where the Court found that the Commission had neglected the requirements of due process in a desire to replace a carrier street time costing methodology with which it was dissatisfied with one more to its liking. The factual background, as related by the Court, was as follows:

In its January 22, 1991 decision, the Postal Service objected to the Commission's access costs attribution because "it appeared that to some extent this new analysis differs from analyses previously used by the Commission and from analyses presented in the record of this proceeding," "no party presented evidence in support of the use of

single subclass costs," and "in various instances the Commission relied upon econometric analyses whose foundation in the record is unclear." Decision of the Governors . . . Docket No. R90-1, at 8 (Jan. 22, 1991). . . .

[T]he Commission attempted to explain its analysis more fully, conceding that "certain aspects of our conclusions . . . were not subject to full testimonial challenge from all participants," PRC Further Rec. Dec. app. I at 39, and that it had "felt constrained to use analyses which, while available on the record, had not been subject to direct critical review for all possible purposes," *id.* at 40. . . .

Finally, in its January 6, 1992 decision, rejecting the Commission's third recommended decision, the Postal Service again criticized the Commission's methodology, asserting it had "conducted a series of its own econometric investigations of [] data, and applied a variety of new and untested analytic procedures without benefit of a witness or a party advocate."

*MOAA*, 2 F.3d at 428, 429.

The Commission in turn argued that "because the Postal Service and the petitioners declined the Commission's . . . invitation to proffer testimony [on the disputed methodology], they "simply cannot be heard to complain that the Commission's carrier cost methodology is insufficiently explained." 2 F.3d at 62. The Court rejected "the Commission's contention that the initial procedural defects were cured by the Commission's belated invitation to the parties 'to offer testimony,'" and remarked:

The simple taking of testimony is no substitute for the close scrutiny available in a full-blown section 556 hearing on the record, replete with discovery, cross-examination and rebuttal.

2 F.3d at 430.

Explaining the basis on which it remanded the matter to the Commission, the Court in *MOAA* stated:

Section 556 of the APA provides: "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." The parties here were afforded no opportunity during the hearing to test, or even examine, the methodology the Commission ultimately adopted or the figures and calculations used to attribute access costs.

2 F.3d at 429-30.

In *MOAA*, the disputed methodology did not surface until after the close of the evidentiary record. That fact was not dispositive, however, given the Commission's offer to reopen the record to receive testimony on the subject. What was dispositive was the Commission's failure to include in its offer "the full range of procedures from discovery to cross-examination." 2 F.3d at 430. Merely offering to reopen the record, the court held, was therefore "an opportunity inadequate to satisfy the Act's requirements." *Id.*

The Commission itself has acknowledged that the opportunity for discovery, cross-examination, and rebuttal may be "inadequate to satisfy the Act's requirements" when evidence is proffered during the hearing process, but "too late to allow adequate review." In Docket No. R94-1, for example, the Commission struck testimony from the record on this basis:

The material that the Commission struck from the record was a package that included estimates from a Bradley-style econometric model of access variability with calculations that are complicated and potentially controversial. The Commission concluded that the package raised due process concerns because it was filed too late to allow adequate review of these econometric calculations.

PRC Op. R94-1 (November 30, 1994) at III-40, n. 41.

*MOAA* and R94-1 are controlling here. As discussed above, the complex factual and methodological issues raised by the 2004 data and models, and the far-

reaching impact that their adoption by the Commission would have on ratepayers in all classes of mail, preclude any reliance on the 2004 materials absent a full opportunity for adversarial testing through discovery, cross-examination and the filing of rebuttal testimony. Because too little time remains in this case for these procedures, consideration of the 2004 data must await a future rate case.

### CONCLUSION

For the foregoing reasons, the undersigned parties respectfully request that the Commission exclude from the evidentiary record the Responses of the United States Postal Service to Presiding Officer's Information Request No. 4, Questions 4-12 (filed September 22, 2006), and to Presiding Officer's Information Request No. 16, Questions 13-21 (filed October 12, 2006).

Respectfully submitted,

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## **ATTACHMENT**

### **STATEMENT OF ANTOINETTE CROWDER**

My name is Antoinette Crowder and I am the principal of Eagle Analytics LLC consulting firm. The Magazine Publishers Association et al. have asked me to (1) review the USPS response to POIR No. 4, Items 4 through 12, which describe the Commission-requested models developed using the time and volume data collected in the 2004 city carrier street-time survey and (2) estimate the amount of time and effort required to conduct a thorough discovery and evaluation of the Postal Service work and develop more appropriate model results.

Eagle Analytics has two senior consultants participating in this case. I have had nearly thirty years of experience participating in postal rate cases, either as support or as a principal. My associate, Dr. William Miller, has had roughly twenty years of similar experience. My first expert witness testimony before the Commission was in the R87-1 rate case. Dr. Miller and I have both been extensively involved in city carrier costing activities. In Dockets No. R87-1 and R90-1, we both contributed to testimony on city carrier-out-of-office costs. In the Docket No. R90-1 Remand, I presented direct testimony on behalf of MOAA et al. on city carrier street time. In Docket R97-1, I presented testimony in response to Presiding Officer's Notice of Inquiry No. 3 on city delivery carrier load time costs and rebuttal testimony on carrier costs. In Docket No. R2000-1, I again presented direct testimony on city delivery carrier costs, on behalf of a coalition of mailers and industry associations.

In Docket No. R2005, Dr. Miller and I reviewed the new Postal Service city carrier study and concluded that it is a major improvement over the previous studies that the Commission had relied on. Because that case was settled, we did not perform a full analysis of the study, and, until now, we were not asked to do so in this case.

After Docket No. R2005-1 ended, we did have the opportunity to review the study and the Commission's extensive discussion of it in its R2005-1 Opinion. The Commission expressed views about the additional work that it believes is required on the data processing and on the modeling. We also believe that much work remains to be done, and that it is very important work.

In order to do that work, it would be necessary to conduct full discovery on and perform a careful evaluation of the 2004 study and its results, as presented in POIR No. 4, Items 7-12, and in POIR No. 16, Items No. 13-21. We believe it would take all of the time allotted in the R2006-1 procedural schedule for discovery on the Postal Service case (i.e., ten weeks) plus the six additional weeks provided for preparation of an intervenor direct case. Even that schedule would be very tight for such an extensive activity, particularly if there are any other issues in the case that also require our attention.

Attached is an outline of the activities that would be required for due diligence and model development and a rough estimate of the calendar time it would take to do them, if we were free to make a full commitment.<sup>1</sup> This assumes two experienced individuals and a part-time support individual. And, even that schedule appears tight. Until the work proceeds, there is no way to know what issues will show up or how much time it will take to resolve them. Thus, there is a need to include considerable "thought and research" time in any project estimate.

Further, it should be noted that in this type of work, it is not usually possible to add more manpower, because the work requires considerable knowledge of postal operations and costing. But, even with that knowledge, there is still a need to spend considerable time and thought in (1) reviewing and assessing the data, (2)

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<sup>1</sup> The work plan actually estimates 14 to 19 calendar weeks while the procedural schedule in this case provides roughly 16 calendar weeks between the Postal Service filing date and intervenor direct filing date.

developing a conceptually appropriate model, and (3) checking and re-checking analyses and results. Thus, the work requires not only manhours but also calendar time.

At this point in the rate case, Dr. Miller and I are committed to other activities. Our resources to take on additional work are limited for the duration of this case. But, even if that were not true, there is simply not enough calendar time remaining in the case to accommodate thorough analyses that could produce reliable results.<sup>2</sup>

Our preference would be to have the Commission defer judgment on any new studies or models in this case and then to open a costing proceeding where full due diligence could be performed and all the issues could receive a full airing and discussion. Then, it would be easier for all involved to (1) determine the value of the data and how it should be used, (2) recognize the most appropriate modeling approaches, and (3) consider more appropriate approaches and study designs (for future Postal Service studies).

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<sup>2</sup> It is always easy to come up with some model results relatively quickly, particularly ones that might favor a particular position. However, unless one is extremely lucky, those results are likely to be difficult to interpret and impossible to support.

## **ACTIVITIES ON NEW 2004 CCSTS DATA, PROGRAMS AND MODELS**

### **I. Discovery on USPS Effort (6-8 weeks, minimum)**

This involves review and assessment of all of the following to ensure correct understanding of USPS efforts, correct utilization of the data, and correct interpretation of the model results. In each of the following, review, assessment, preparation of discovery to the appropriate Postal witness, and evaluation of discovery responses is required.

#### **A. Data Collection**

1. Sample Design
  - Representation of total system operations
  - Treatment of uncollected sampled zips, routes, days
  - Sample weighting schemes
2. Data collection design and decision rules
  - Objectives and constraints
  - Analytical/operational basis and intent
  - Procedures
  - Capture of route and zip operational characteristics
  - Time scan rules and implementation
  - Definitions and measurement activities (volumes, barcoded activities, types of deliveries, etc.)
  - Other data (e.g., population, businesses, square areas)
3. Carrier, data collector, and quality control training materials and decision rules
4. Field observations and unusual data collection difficulties
5. Comprehensiveness of collection among sampled zips, routes, days
6. Comparison to, reasons for, and impact of differences between two studies

**B. Data Quality, Management, and Manipulation**

1. Reasons for data cleaning and manipulation
2. Data cleaning and manipulation programs
  - Decision rules
  - Observation and data losses
  - Consistency
  - Effectiveness of programming
3. Review of final data results
  - Unusual or counter-intuitive observations
  - Inconsistent observations
  - Zero or negative data
  - Outlier data
  - Treatment of observation and data losses
4. Replication of USPS program results
5. Comparison to and differences between two studies

**C. Modeling Efforts**

1. Model development track
  - Conceptual analysis of activities explained by model
  - Ability of available data to explain dependent variable
  - Potential impacts of data errors and assumptions
  - Relationship between data obtained and concept
  - Mathematical structure
2. Econometric analysis
  - Alternative models and generated statistics
  - Diagnostic tests (e.g., specification, multicollinearity, heteroskedasticity)
  - Treatment of possible econometric problems
  - Treatment of problem data (errors and missing values).
  - Econometric model adjustments
  - Interpretation of model results
3. Replication of USPS program results
5. Comparison to and differences among 2002 and 2004 models

## **II. Alternative Model Development and Assessment (6-8 weeks)**

There may be some overlap with the above activities, since model development depends upon the available data. New programming will likely be required for some or all of these tasks. Research of the econometric literature may also be required to determine how other economists have treated particular issues that may arise as the work proceeds.

### **A. Analysis and manipulation of data**

1. Prepare and/or modify and check programs to summarize and investigate data in various ways
2. Review variations and consistencies in data to acquire information on differences in characteristics among routes, zips and days
3. Identify possible “problem” data not already identified by USPS data
4. Determine potential impacts of all “problem” data
5. Develop potential alternative treatments for “problem” data

### **B. Modeling Efforts**

1. Consider previous work performed both by USPS, the Commission, and OCA witness Smith
2. Review Alternative Models
  - Prepare conceptual basis of activities being explained by the model and specify the variables necessary for the model
  - Determine the ability of available data to represent variables required for conceptual model
  - Assess consistency of data and relationships among the data variables
  - Assess various mathematical structures for consistency with concepts
  - Determine appropriate criteria for treating already identified econometric problems of multicollinearity and heteroskedasticity

3. Prepare and/or modify programs to generate and test reasonable alternative models
  - Generate alternative econometric models and evaluate initial statistics.
  - Analyze feasibility of model cost behaviors with expected results.
  - Perform diagnostic tests (e.g., specification, multicollinearity, serial correlation, heteroskedasticity) and evaluate results.
  - Determine impacts of various data cleaning and correction actions
  - Determine impacts of various “outlier” and other unusual observations
  - Revise econometric approach as necessary, rerun models and finalize results.
4. Compare differences among developed models and the various 2002, 2004, and DOIS models

### **III. Preparation of Testimony and Workpapers (2-3 weeks)**

Preparation of testimony would require developing a description of the data used in the modeling process, an explanation of the conceptual basis for the model choice and its development track, interpretation of the preferred model(s), presentation of any relevant alternative models, and a discussion of statistical and econometric tests performed and results acquired. It might also include formulating recommendations for improvements in the study design and data collection efforts. Associated workpapers would require sufficient detail so that all results could be replicated and all programming could be audited.

**DECLARATION**

I, Antoinette Crowder, declare under penalty of perjury that the foregoing is true and correct.

Signature

*Antoinette Crowder*

Executed on:

*Oct 17, 2006*