

# DOCKET SECTION

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

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POSTAL RATE COMMISSION  
OFFICE OF THE SECRETARY

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POSTAL RATE AND FEE CHANGES, 1997

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Docket No. R97-1

**OPPOSITION OF UNITED STATES POSTAL SERVICE  
TO "EMERGENCY MOTION" OF ALLIANCE OF NONPROFIT MAILERS  
(November 26, 1997)**

Late yesterday afternoon, November 25, 1997, the Postal Service received via fax a copy of an "Emergency Motion" filed by the Alliance of Nonprofit Mailers (ANM), apparently filed that afternoon. The motion is styled as a motion for clarification of Presiding Officer's Ruling No. R97-1/69, which directed ANM and the Postal Service to attempt to arrange technical conferences in order to answer questions regarding where data or supporting documentation may be found for library references whose evidentiary status has been challenged by ANM. In order to facilitate a prompt resolution of this issue, the Postal Service hereby provides an expedited reply, which, of necessity, will be brief.

Although its pleading is styled as a motion for clarification, it is apparent that ANM's true objective is to seek reconsideration and expansion of the conditions ordered into effect by the Presiding Officer. The basis for Ruling No. R97-1/69 was the correct conclusion that if the essence of ANM's repeated due process complaints is the allegation that ANM has not been given sufficient opportunity to examine and understand the documentation provided in this case by the Postal Service, an efficient way to allow ANM to further explore this documentation, and receive further technical information to supplement that documentation, if needed, would be through the time-

tested means of a technical conference. Such technical conferences have in all Commission proceedings been conducted on an informal basis, without the presence of the Presiding Officer, the Commissioners, or court reporters or any other recording devices, on the basis that such informality is more conducive to the efficient exchange of technical information. Following such informal procedures, such technical conferences have proven quite useful and productive in the past, and have fostered rapid exchanges of information.<sup>1</sup>

ANM now proposes, however, that it be allowed to bring a court reporter to the conference, stating that "for a 'technical conference' to have any significant value at this late stage, it must be *on the record*." ANM Motion at 2 (emphasis added)? This

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<sup>1</sup> At the outset of this case, the Postal Service demonstrated its willingness to sponsor such informal technical conferences. See Notice of the United States Postal Service Regarding Attorney/Witness Assignments (July 10, 1997). At no time did ANM avail itself of this opportunity to informally explore the adequacy of the Postal Service's documentation, preferring instead to engage in belated, time-consuming motions practice aimed not at developing the record, but at disrupting the proceeding.

<sup>2</sup> In essence, ANM seeks to convert the informal technical conference into a multiplicity of unauthorized depositions. The Commission's Rules of Practice and Procedure authorize the use of depositions in Commission practice only in narrowly defined circumstances. Rule 33 provides that depositions may be authorized upon request when:

(1) the person whose deposition is to be taken would be unavailable at the hearing, or (2) the deposition is deemed necessary to perpetuate the testimony of the witness, or (3) the taking of the deposition is necessary to prevent undue and excessive expense to a participant and will not result in undue delay or an undue burden to other participants.

ANM has not satisfied any of these requirements. In particular, none of the Postal Service's witnesses are expected to be unavailable at hearings next week, nor is their any need to perpetuate any witnesses' testimony. ANM also has not demonstrated any "undue" or "excessive expense" that will be incurred in the absence of the taking of depositions; to the contrary, its request serves to increase ANM's and the Postal Service's expenses, and to place an unreasonable and undue burden on the Postal Service.

assertion has two fatal flaws. First, it is plainly incorrect on the merits, because, as has been long recognized, to place the conference "on the record" would destroy the very informality which is essential for a free flow of information. The value of such a free flow of information is that any ambiguities or omissions in the documentation provided can be readily identified and corrected, and thus needless further discovery and motions practice avoided. Moreover, to the extent that any point made in the informal context would benefit the evidentiary record, it can be placed on the record more efficiently through later oral cross-examination or by the provision of written answers to specific questions for inclusion in the record. There is simply no "significant value" that would be served by the presence of a court reporter, and such a presence would have significant deleterious effects on the process.

Second, the ANM proposal flies in the face of the manifest intent of Ruling No. R97-1/69. In ruling that the parties should pursue technical conferences, it is clear that the Presiding Officer contemplated that the informality inherent in such methods of information exchange would be preserved by the parties<sup>3</sup>. The Presiding Officer envisioned that if, as the Postal Service steadfastly maintains, the information sought by ANM is readily apparent from the documentation long ago provided by the Postal Service, the rapid information exchange facilitated by informal technical conferences would be an especially appropriate means to resolve ANM's alleged informational deficiencies:

In the technical conference context, focused questions should be directed to specific library references at issue. The Service claims that the information sought is in many instances readily apparent. If that is the

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<sup>3</sup> "Otherwise proper interrogatories that are not satisfactorily answered in this *informal* context can be asked orally, during the December hearings." Ruling No. R97-1/69 at 4.

case, a technical conference will be more efficient than preparing written materials.

Ruling No. R97-1/69 at 4.

*One can only wonder if a free flow of information, designed to correct any deficiencies in the record, is the objective sought by ANM.<sup>4</sup> If it is, AMN will find the Postal Service a cooperative party in this proceeding. The Postal Service must again observe that ANM has had many months to pursue such inquiries into Postal Service documentation, and chose not to do so, and thus is not entitled to any further discovery of any kind. However, the Postal Service stands ready to take all reasonable steps within its means to provide additional opportunities for exploration and examination of the disputed library references by this party. To this end, the Postal Service has arranged for several witnesses identified by ANM<sup>5</sup> to be available at Postal Service headquarters on Friday, November 28, 1997, to answer "focused, questions . . . directed at specific library references at issue," pursuant to the Ruling<sup>6</sup>*

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<sup>4</sup> From the tenor of ANM's pleading, it would appear that ANM actually seeks an opportunity to catch a Postal Service witness in the act of violating the rules, rather than facilitating construction of a complete record.

<sup>5</sup> Counsel for ANM has indicated that he wishes to question only five Postal Service witnesses during the technical conferences: McGrane, Smith, Degen, Talmo and Baron. The Postal Service is making arrangements to have as many of these witnesses as possible available at the Friday conference requested by ANM, either in person or by telephone., together with other personnel who may be able to contribute regarding technical details. Counsel for ANM *declined* the opportunity to participate at an informal technical conference with some of these witnesses today, despite the Postal Service's offer to make them available.

<sup>6</sup> The Postal Service does not intend to answer any detailed questions regarding "the individuals involved" in the preparation, review, or receipt of library references at the conference. See ANM Motion at 2. As Ruling No. R97-1/69 recognizes, such questions are overbroad and of little relevance to an understanding of the documentation at issue.

If however, ANM is not interested in the formation of an adequate record before the Commission, but seeks only to document, "for the record," dubious deficiencies in the Postal Service's evidentiary presentation which ANM broadly alleges, but never specifies, it is possible that the productive information exchange sought by the Presiding Officer and the Postal Service will be frustrated. In any event, the Postal Service sees no value in a technical conference "on the record," and will not participate if a court reporter is present. If the questioning conducted by ANM is to be of such a formal character, then expedition would best be served by proceeding directly to the additional hearings already scheduled, where a court reporter will be present, and the Presiding Officer will be available to observe the conduct of the parties and to rule on any procedural disputes.

In conclusion, the Postal Service states again that the documentation in dispute, which has been available to ANM, and all other parties, for the duration of this case, was designed to fulfill or exceed the requirements of the Commission's rules for such documentation. In most, if not all cases, the library references, on their faces, set out the documentation included in each, and, in wording reflective of the Commission's rules, show how various requirements have been met. Consider for example, a few of the library references sponsored by witness Nelson. Library Reference H-151, "MLR Survey - Development and Data" provides documentation of the Motorized Letter Route Survey (MLR), in conformance with the requirements of Rule 31(k)(2). Clearly set out in this reference are descriptions of the purpose of the survey, the survey design (including definition of the universe under study), the sampling frame and units, and the methods used to select the sample and conduct the survey. Survey forms used are reproduced and rules followed for data editing are explained. Library References H-152 through 159 are similarly documented so that even cursory inspection reveals their satisfaction of the

rules.

Instead of demonstrating any recognition of the existence of this documentation, and the fact that it has been available since the outset of the case, however, ANM persists in making tiresome, false and baseless general claims that “[o]n the eve of hearings for admission of these items into evidence, the full documentation contemplated by Rules 31 and 54 has yet to be produced” and that “[t]he Postal Service has objected to providing such information in response to ANM’s interrogatories.” ANM Motion at 2. Given the nature of ANM’s approach to this dispute, it is becoming apparent that the only way for this issue to be resolved may be for the Presiding Officer finally to rule that ANM has not alleged, let alone demonstrated, any specific failing on the part of the Postal Service to meet the Commission’s filing requirements, and that ANM’s failure, at this stage of the proceeding, to comprehend the nature and extent of the available documentation is due not to a lack of due process, but to ANM’s consistent reluctance to examine that documentation and to ground its allegations in reality.

Regardless of the prospect for such a ruling, ANM should be discouraged from engaging in further unproductive motions practice relating to this dispute. For this and

the reasons stated briefly above, the ANM Motion should be summarily denied in its entirety.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

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November 26, 1997

CERTIFICATE OF SERVICE

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



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November 26, 1997