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BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, DC 20268-0001

POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

Docket No. R97-1

Postal Rate And Fee Changes, 1997

**APPEAL OF THE ALLIANCE OF NONPROFIT MAILERS
FROM PRESIDING OFFICER'S RULING NO. R97-1/86
(January 16, 1998)**

Pursuant to section 32(b) of the Commission's rules of practice, the Alliance of Nonprofit Mailers ("ANM") respectfully requests that the Presiding Officer certify Presiding Officer's Ruling No. R97-1/86 for immediate review by the full Commission. ANM seeks review of that portion of the ruling which denied ANM's motion to compel responses to Interrogatories ANM/USPS-20, 21, 25 and 26.

This pleading is divided into three sections. Section I explains why the appeal satisfies the criteria for immediate review under section 32(b)(i) and (ii). Section II(A) discusses the Presiding Officer's finding that ANM filed the interrogatories too late. Section II(B) responds to the Presiding Officer's finding that answering the interrogatories would impose an undue burden on the Postal Service.

I. REVIEWABILITY

The Presiding Officer's ruling should be reviewed now because it raises important questions of law and policy, and because immediate review will materially advance the ultimate resolution of this proceeding. Moreover, deferring review until the Commission's Recommended Decision is likely to provide an inadequate remedy, for the data sought must be provided before the Commission's consideration of the entire proceeding to be useful.

As noted on pages 2-3 of the ruling, a mismatch between the IOCS and RPW data for nonprofit mail appears to have caused the Postal Service to overstate the costs attributable to Nonprofit Standard (A) mail. While the existence of the mismatch does not appear in dispute, the information produced to date by the Postal Service does not reveal the extent of the cost overstatement. If the Postal Service's litigation strategy runs true to form, the Service will produce no further data on the issue. At the close of the record, the Service is likely to invoke its failure of proof as an argument *against* any downward adjustment to the costs it has attributed to nonprofit mail.

The record, if left in this state, will present the Commission with a difficult choice: back out the increases in costs attributed by the IOCS to Nonprofit Standard (A) mail since the test period in the last rate case, or reject the Postal Service's rate request outright. One option will *not* be available to the Commission: accepting the cost levels attributed by the Postal Service. As the proponent of increases in nonprofit postal rates, the Service bears the burden of proving that the proposed increases are justified. 39 U.S.C. § 3624(a) (incorporating 5 U.S.C. § 556(d)). For nonprofit mail, the key element to be proven is the level of costs attributable to each subclass. 39 U.S.C. §§ 3622(b)(3), 3626(a)(3). The Service

can hardly meet this burden with attributable cost data that are corrupted with tallies from other subclasses, particularly without offering any data setting an upward bound on the magnitude of the overstatement.

The Interstate Commerce Commission faced a similar issue two decades ago. Rail Form A, the cost system used in railroad rate cases at the time, attributed the variable costs of system-wide investment in railroad track, ties, and related items to individual freight movements in proportion to various measures of volume. See *San Antonio, Texas v. United States*, 631 F.2d 831, 841-42 (D.C. Cir. 1980). In the late 1970s, the ICC determined that this methodology understated the costs of new high-volume unit train coal movements for electric utilities -- traffic that required massive new investments to rehabilitate the track over the route of the movement. Accordingly, the ICC allowed the railroads to attribute to individual coal movements a “fixed plant investment additive” based on the carrying costs of the capital improvements needed to handle the movements. *Id.*

The shippers argued that this additive would overstate costs unless the corresponding investment accounts were backed out of Rail Form A. *Id.* at 842. The ICC declined to back out any of the Rail Form A accounts. It conceded that including them would result in a slight, though unquantifiable overstatement of investment costs. *San Antonio, Texas v. Burlington Northern Inc.* (“*San Antonio II*”), 359 I.C.C. 1, 11-12 (1978), *aff’d*, 361 I.C.C. 482, 486-88 (1979) (“*San Antonio III*”). The ICC reasoned, however, that this consideration was insufficient to order an adjustment that would clearly understate the costs attributable to the movement by a significant amount. *Id.*

On appeal, the D.C. Circuit overturned the ICC's action, reasoning that failure to eliminate the double-count resulted in impermissible cross-subsidization. *San Antonio*, 631 F.2d at 844. The Court's reasoning applies with equal force here:

Variable costs by definition are only the costs caused by the relevant service and should not include costs caused by other services. We recognize that costing is not a particularly exact science, but by occasioning cross-subsidization in variable cost calculation, the Commission's decision is not merely imprecise, but arbitrary and unreasonable.

Id.; accord, *Celanese Chemical Co. v. United States*, 632 F.2d 568, 575-76 (5th Cir. 1980). See also *Cleveland-Cliffs Iron Co. v. ICC*, 664 F.2d 568, 580-82 (6th Cir. 1981) (upholding ICC's subsequent policy of backing out Rail Form A accounts).

ANM respectfully submits that reasoned decision-making would be served by addressing the discovery issue now, when the record is still open, rather than leave unresolved a dispute that could lead to an evidentiary train wreck at the end of the case.

II. THE MERITS

The Presiding Officer held that the ANM's interrogatories were permissible under Special Rule 2.E. of the Commissions Special Rules of Practice in this proceeding, noting that: "The essence of due process is a reasonable opportunity to ask relevant questions and get responsive answers." R97-1/86 at 7. The ruling holds, however, that ANM, despite having asked relevant questions permitted by the applicable rule, was not entitled to responsive answers. This conclusion rests on two grounds: (1) that ANM should have asked its questions earlier, and (2)

that answering the questions would impose too great a burden on the USPS. Both of these conclusions are incorrect.

A. Timeliness of the Interrogatories

The Presiding Officer's finding that ANM's interrogatories were tardy is unfounded on several grounds.

Any analysis of the timeliness of intervenors' filings in this case must begin with the Postal Service's own conduct. This case, the most complex in the Commission's history, has also witnessed the most pervasive and persistent shortcomings in the Postal Service's case-in-chief. As ANM has previously noted, the Postal Service's direct case filed on July 7, 1997, omitted many key elements of the documentation required by the Commission's rules. Many of these gaps have never been filled.

Furthermore, the Postal Service submitted voluminous supplemental testimony, much of it in the form of enormous Library References, well as massive and repeated errata, well into the month of December—more than five months after the Service's direct case was required to be filed. The burden of reviewing and analyzing these supplemental filings was compounded by the Postal Service's failure to comply with the workpaper requirements of subsection 54(o), which requires a road map to the data and citations sufficient to enable a reviewer to trace any number used but not derived in the associated testimony and exhibits. Under the circumstances, the timing of ANM's discovery efforts was more than reasonable.

The Postal Service's case-in-chief, for all its bulk and detail, made no mention of the apparent mismatch between RPW and IOCS tallies for Nonprofit Standard (A) mail—and disclosed no apparent explanation for the disproportionate increase in the costs attributed by the Postal Service to Nonprofit Standard (A) mail. On August 4, 1997, ANM filed discovery aimed at filling this gap. Interrogatories ANM/USPS-T29-10, 11, 14 and 15 specifically requested all data bearing on the major factors responsible for this disproportionate increase in Nonprofit Standard (A) costs reported by the Postal Service. The Postal Service's response made no mention of the mismatch between RPW and IOCS tallies.

ANM followed up with further discovery requests, prompting a flurry of objections by the Postal Service and, ultimately, a technical conference ordered by the Commission in lieu of responses to many of the interrogatories. Not until ANM's economic expert, Dr. Haldi, reviewed the results of the conference with legal counsel did ANM realize that a mismatch between IOCS and RPW data could be at the root of the disproportionate increase in the unit attributable cost of Nonprofit Standard Mail (A) Regular vis-à-vis the corresponding commercial subclass.

The discovery requests at issue followed promptly thereafter. ANM filed them 11 days after the technical conference, and more than two months before the close of discovery.

The notion that ANM's discovery requests were an "afterthought" is also at odds with the Presiding Officer's finding that ANM/USPS 20 and 21 "appear designed to further buttress a point raised by the ANM's direct testimony." They were indeed: the information sought in ANM/USPS 20, 21, 25 and 26 is directly

related to ANM's direct case. But that is hardly a reason for withholding discovery. Had ANM been aware earlier of the mismatch between the IOCS and RPW data, it would have posed the questions earlier. To deny discovery because ANM failed to discover sooner what the Postal Service refused to disclose in its case-in-chief or in response to ANM's earlier interrogatories would punish ANM for the Postal Service's nonresponsiveness and noncompliance with the Commission's rules.

B. Balancing the Burdens

The Commission's finding of undue burden is also unfounded. The short answer is that the requested work should have been done in preparing the Postal Service's case-in-chief, before the filing of the case. Properly estimating the costs attributable to each subclass of mail is a threshold requirement of a *prima facie* case. 39 C.F.R. § 3001.54(h)(4). Whatever extra burdens the Postal Service may bear in deferring the work until now are of the Service's own making.

Second, ANM asked the Postal Service for a technical conference to determine how difficult it would be for the Postal Service to provide the information sought and whether there were more efficient and less burdensome ways to get the requested data requested, or other data that would address ANM's concerns. The Postal Service rejected to ANM's request. Nor has the Postal Service proposed any less burdensome alternative to answering the questions since then.¹ The Postal Service's failure to meet the issue halfway further weakens its claim of hardship.

¹ It might, after all be possible to develop data through a sample survey rather than by securing information from every post office in America. The IOCS does not collect data at every Post Office.

Third, Presiding Officer's ruling ignores the *relative* burden that each party would bear in developing the data. While the requested data may be voluminous and dispersed, they are unquestionably in the Postal Service's possession. ANM, in contrast, does not have access to the Postal Service's data. While ANM has initiated a survey of its members and some other nonprofit mailers, ANM cannot realistically expect to secure responses from more than a comparatively small number of nonprofit mailers.

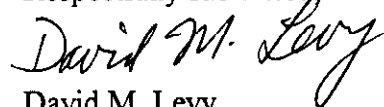
Finally, the Presiding Officer's ruling does not address the burden that nonprofit mailers will bear in paying excessive rates if the Postal Service's attributable cost data are credited. As the Commission is well aware, the Postal Reorganization Act does not authorize retroactive rate relief for recommended rate changes implemented by the Governors, even if those rates are ultimately found excessive on subsequent judicial or administrative review.

CONCLUSION

For the foregoing reasons, ANM respectfully requests that the Presiding Officer certify Presiding Officer's Ruling No. R97-1/86 for immediate review by the full Commission, and that the Postal Service be directed to answer Interrogatories ANM/USPS-20, 21, 25 and 26.

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Respectfully submitted,



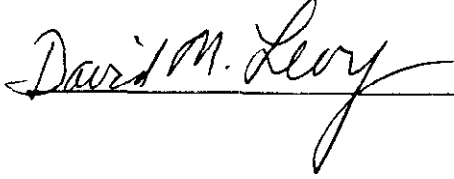
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January 16, 1998

CERTIFICATE OF SERVICE

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



January 16, 1998