

**ORIGINAL**

ORDER NO. 1207

UNITED STATES OF AMERICA  
POSTAL RATE COMMISSION  
WASHINGTON, D.C. 20268

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

Postal Rate and Fee Changes

Docket No. R97-1

ORDER AFFIRMING  
PRESIDING OFFICER'S RULING R97-1/86

(February 9, 1998)

On January 16, 1998, the Alliance of Nonprofit Mailers (ANM) submitted an appeal from P.O. Ruling R97-1/86, to be considered by the full Commission. Appeal of the Alliance of Nonprofit Mailers from Presiding Officer's Ruling No. R97-1/86 (ANM Appeal). P.O. Ruling R97-1/88, issued January 22, 1998, certified that appeal to the full Commission under 39 U.S.C. § 3001.32(b).

The appeal under consideration evolves from ANM efforts to elicit information from the Postal Service on how certain events might affect data collected in the In-Office Cost System (IOCS) and Revenue Pieces and Weight (RPW) system. These are two of the Service's most basic data collection systems, and they have been the source of data used in every major Postal Service rate request. In this case, Postal Service witness Degen provided direct testimony and responded to discovery requests concerning the IOCS, and Postal Service witness Pafford provided direct testimony and responded to discovery requests concerning RPW. Discovery on the Postal Service direct case was initially scheduled to continue until September 17, 1997, see P.O.

Ruling R97-1/4, although discovery on supplemental evidence sponsored by the Service was extended until November 14, 1997, see P.O. Ruling R97-1/55.

ANM has offered testimony suggesting that these systems operated in such a manner as to present misleading information about the base year costs of Standard (A) Nonprofit mail. On December 9, 1997, ANM addressed a series of extremely detailed discovery questions to the Postal Service that apparently were designed to glean information relevant to whether, and if so to what extent, this problem existed. On December 19, 1997, the Service filed its objection to these interrogatories, arguing that the questions were untimely and unduly burdensome. ANM submitted a motion to compel responses to those unanswered interrogatories on December 22, 1997.<sup>1</sup>

P.O. Ruling R97-1/86, issued January 8, 1998, addressed the Postal Service's obligation (or lack thereof) to answer ANM interrogatories that seek information on data used in the IOCS and RPW that determine the costs attributable to Standard (A) Nonprofit mail. It found that the information requested focuses on the Service's data systems and their outputs, which were the subject of substantial testimony in the Service's direct case. Postal Service witnesses with expertise on the operation of those systems had been available to respond to discovery from the beginning of the case. The Ruling ultimately concluded that it would require extensive field efforts by the Service to ascertain whether the information sought in several of those discovery requests existed in any usable degree, and that the potential probative value of such an effort was outweighed by the substantial burden the process would impose upon the Service, a burden exacerbated by the submission of those requests at a very advanced stage of the proceeding. Accordingly, ANM's motion to compel responses to the interrogatories presently at issue was denied.

ANM contends that P.O. Ruling R97-1/86, which denied its motion to compel Postal Service responses to several questions regarding the potential treatment of

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<sup>1</sup> The ANM interrogatories at issue, ANM/USPS-20, 21, 25 and 26, are attached to this Ruling as Appendix A.

Standard (A) Nonprofit Mail in Postal Service data collection systems, was erroneously decided on the unfounded grounds of tardiness and excessive burden. ANM Appeal at 4-5. On the tardiness issue, ANM maintains that the Service failed to disclose the apparent mismatch between IOCS and RPW data on Standard (A) Nonprofit mail (the current point of contention) both in its case-in-chief and in response to other, timely ANM interrogatories which ultimately evolved into the questions at issue. *Id.* at 6-7. On August 4, 1997, ANM filed discovery requesting all data bearing on the major factors responsible for the "disproportionate" increase in Standard (A) Nonprofit costs reported by the Service. *Id.* at 6. According to ANM, the Service's response made no reference to the "mismatch" between RPW and IOCS tallies. *Id.*

Other discovery requests by ANM led to a technical conference which actually prompted the interrogatories at issue (upon ANM witness Haldi's then realization 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"). ANM Appeal at 6.

ANM contends that it submitted the disputed interrogatories 11 days after the technical conference, and "more than two months before the close of discovery." ANM Appeal at 6. It argues that its interrogatories thus were filed in a timely manner, especially since the Service filed "voluminous supplemental testimony...[and] 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." *Id.* at 5.

With regard to the issue of excessive burden, ANM argues that the Presiding Officer's ruling ignores: (1) the relative burden which each party would bear in developing the data sought which, while possibly voluminous and dispersed, are "unquestionably in the Postal Service's possession;" and (2) the burden nonprofit mailers will bear in paying excessive rates if the Service's attributable cost data are credited. ANM Appeal at 8. ANM further maintains that the Service would not be *unfairly* burdened if now compelled to respond to the interrogatories, as it was the

Service's responsibility to complete the requested work in preparation of its proper estimation of the costs attributable to each subclass of mail. *Id.* at 7.

ANM thus argues that responding to these discovery requests is an unavoidable part of the Service's burden to prove that the level of costs attributed to each mail subclass justifies the proposed rates. ANM Appeal at 2, 7. In support of this contention, ANM cites *San Antonio, Texas v. United States*, 631 F.2d 831, 844 (D.C. Cir. 1980) for the proposition that a regulatory commission's action issuing approved rates will be overturned if the ratemaking process impermissibly allows cross-subsidization in variable cost calculation so that one customer subsidizes another.<sup>2</sup> *Id.* at 4.

Finally, according to ANM, the Service's claim of undue hardship is further weakened as it has failed to propose any less burdensome alternative to answering

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<sup>2</sup> In *San Antonio*, the D.C. Circuit Court set aside the orders of the Interstate Commerce Commission (ICC) prescribing maximum reasonable rates for unit-train shipments of coal from Wyoming to Texas. 631 F.2d at 833-34. Realizing that the costing method then used in railroad rate cases understated the costs of new high-volume unit train coal movements for electric utilities, the ICC let railroads attribute to the individual coal movements a "fixed plant investment additive" based on the carrying costs of the capital improvements required to handle the movements. *Id.* at 841-42. The shippers argued that the additive would overstate costs unless the corresponding investment accounts were backed out of the cost system, which the ICC declined to do. *Id.* at 842. While conceding that including the costs would result in a slight, although unquantifiable overstatement of investment costs, the ICC nonetheless reasoned that this consideration was insufficient to order an adjustment which would clearly understate the costs attributable to the movement by a significant amount. *San Antonio, Texas v. Burlington Northern Inc. ("San Antonio I")*, 359 I.C.C. 1, 11-12 (1978), *aff'd*, 361 I.C.C. 482, 486-88 (1979) ("*San Antonio III*"). Although criticizing more than one aspect of the ICC ratemaking process, the D.C. Circuit Court overturned the ICC action on the basis that failure to eliminate the double-count resulted in impermissible cross-subsidization:

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.

*San Antonio*, 631 F.2d at 844.

ANM's questions. ANM Appeal at 7. In light of the aforementioned considerations, ANM contends that the Presiding Officer's Ruling is ripe for reconsideration because it raises significant questions of law and policy, with immediate review materially advancing this proceeding's resolution. *Id.* at 2.

In its response to ANM's appeal, the Postal Service asks that the appeal be dismissed, arguing that this dispute boils down to a simple procedural issue of whether the Service should be ordered to respond to burdensome discovery filed "grossly out of time" by ANM, and that due process is best served by requiring that all participants adhere to the Commission's scheduling requirements. Response of the United States Postal Service to Appeal of the Alliance of Nonprofit Mailers from Presiding Officer's Ruling No. R97-1/86 (Postal Service Response), January 28, 1998, at 2.

The Service maintains that the RPW and IOCS testimony which is questioned in the discovery at issue "was virtually the identical presentation made by the Postal Service on July 10, 1997," and not submitted in the form of supplemental testimony or extensive errata. Postal Service Response at 3-4. Thus, ANM had adequate opportunity for review, analysis and discovery of the data, and did, in fact, question Postal Service witness Degen on the topic during cross-examination.<sup>3</sup> *Id.* at 3.

According to the Service, ANM's claim that the Service is suppressing information and thereby compromising ANM's discovery formulation is unfounded. Postal Service Response at 4. The Postal Service maintains that ANM merely presents a *theory* on nonprofit costs in the testimony of ANM witness Haldi, and that the Service is not responsible to investigate the validity of every theory propounded by intervenors, although it may address intervenor presentations during rebuttal, if it so desires. *Id.* at 5-7.

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<sup>3</sup> The Service notes that ANM never pursued this line of inquiry with Postal Service witness Pafford in either written or oral form, although the opportunity to do so existed. Postal Service Response at 3.

As for ANM's argument that the Service declined to hold a technical conference or to otherwise propose another alternative for addressing ANM's questions, the Service reiterates its rationale for refusal—namely, that the conference would not be appropriate, given the Service's other objections to the line of discovery, and that the process of gathering relevant personnel for such a meeting was "certain to be, in itself, extraordinarily painstaking." Postal Service Response at 7. Further, the Service maintains that there is no requirement that it offer a "less burdensome" alternative to ANM, nor has ANM cited any requirement that the Commission weigh the relative burdens of the parties in this discovery dispute. *Id.*

On January 29, 1998, the National Federation of Nonprofits (NFN) submitted a brief statement supporting ANM's appeal.<sup>4</sup> NFN maintains that the Service is in possession of data which would allow "some quantification of the extent or magnitude of the mismatch between the IOCS data and the RPW data, which overstates to an undetermined amount the unit cost of Nonprofit Standard (A) Regular mail." See Statement of NFN at 1. According to NFN, unless the Service is compelled to provide the data, the Commission will not have the requisite information to recommend fair and equitable rates, as required by law. *Id.* NFN argues that the Commission must consider all parties' burdens in the case, including the nonprofit mailers' burden of paying excessive rates for an indefinite period of time. *Id.*

#### Discussion

ANM contends that the Service is effectively withholding information on this issue from the other parties and the Commission through "nonresponsiveness and noncompliance with the Commission's rules." See ANM Appeal at 7. The Service

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<sup>4</sup> Statement of National Federation of Nonprofits in Support of the Motion of the Alliance of Nonprofit Mailers' to Appeal from the Presiding Officer's Ruling R97-1/86 (Statement of NFN).

responds that this "issue" is merely a theory proposed by ANM, and it reiterates that ANM could have, and should have, pursued this line of inquiry earlier.

The Commission operates under a 10-month deadline, as prescribed by statute. Completion of omnibus rate proceedings in this timeframe is exceedingly difficult under any circumstances, and the Presiding Officer must frequently make difficult decisions to assure that the requirements of 39 U.S.C. § 3624 are met. Throughout each complex omnibus rate proceeding, new lines of potential probative inquiry arise. It is simply not possible to continue to explore all potential areas where adjustments of Postal Service data might be justified. Thus, procedural schedules must be established and adhered to.

In this case, the procedural schedule was previously adjusted, and ANM had more than four months to pursue this line of inquiry, with Postal Service witnesses Degen and Pafford available for cross-examination on questions of this nature.

ANM notes that it asked general questions early in the case seeking potential explanations for why costs did not behave in accordance with its expectations. There is no reason to suppose that the answers provided did not reflect the full knowledge of the Service's witnesses. Therefore, it is reasonable to assume that this problem, if it exists, was not recognized by the Service or its experts. P.O. Ruling R97-1/86, while directing the Service to provide certain information available to headquarters personnel, also found that several of the questions posed by ANM would require extensive, lengthy field studies, and the Presiding Officer concluded that the requested data collection might well fail to produce any useful information. He further concluded that initiating data collection of this magnitude more than halfway through an omnibus case would prevent the Commission from issuing a timely decision. Therefore he denied ANM's motion to compel responses.

P.O. Ruling R97-1/86 rests largely on two related findings: that compelling answers would impose a significant burden on the Postal Service, and that these questions were not likely to generate probative evidence. On appeal, ANM does not

contest that obtaining answers would be very time consuming and costly. Nor does it explain how answers to its questions might help the Commission to evaluate the scope or effect of the data problem it asserts.<sup>5</sup> In its appeal, ANM still does not provide any explanation of the purpose of its questions, or offer any rationale that justifies *overturning conclusions reached by the Presiding Officer. Absent a convincing explanation of why compelling answers might produce anything but delay, the Presiding Officer's refusal to compel answers remains sound.*

The case law cited by ANM may be relevant to issues of burden of proof, but it does not stand for the proposition that the Commission should delay action interminably when there is little substantial prospect for obtaining additional probative evidence. This is especially true here, as the factors cited by ANM witness Haldi, that nonprofit mailers were charged with postage deficiencies in 1996, and that reported costs for nonprofit mail increased disproportionately in 1996, were known or should have been known to ANM well before the Service initially filed its request.

ANM interrogatories ANM/USPS-20, 21, 25 and 26 seek an extremely large amount of detailed "local" information on the collection and retention of substantial amounts of diverse data at various Postal Service offices, and whether the treatment is the same at all field offices. See Appendix A. In response to efforts to resolve part or all of this controversy informally, the Postal Service apparently indicated not only that it couldn't answer those questions, but that it could not even put together a group of individuals likely to be able to address knowledgeably the ramifications of the issues touched on by the ANM questions.

Directing the Service to provide the information sought in these four interrogatories would certainly delay the Commission recommendation by many months, especially since participants would presumably need additional time to

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<sup>5</sup> Compare the four interrogatories at issue here with ANM/USPS-27, a recent follow-up interrogatory exploring the same general topic by seeking information that should be available at headquarters and which focuses on national statistics.



evaluate any collected data for the preparation of testimony and rebuttal. The general tenor of the Service's statements concerning the scope of the data sought leaves the strong indication that much of the requested information does not exist, and that information gleaned from a nationwide investigation, or even one conducted at random offices, would not provide a reliable representation of the scope of any real or implied problem. In any event, an inquiry of this scope could have and should have been launched at a much earlier stage of this proceeding.

In 1976, Congress established the 10-month deadline for Commission rate recommendations in amendments to the Postal Reorganization Act. Congress clearly and intentionally chose prompt decisions which would ensure Postal Service financial stability in preference to extended inquiry which might or might not refine the accuracy of the data used to develop rates. In light of this clear Congressional preference, and in the absence of any indication that the ANM questions will generate usable, probative information, we will not disturb P.O. Ruling R97-1/86.

The Commission is cognizant of its obligation to use accurate and reliable cost estimates in developing rates. The problem hypothesized by ANM might seriously impact on the reported unit costs of Standard (A) Nonprofit mail. The Commission also notes a separate, follow-up discovery request submitted by ANM, ANM/USPS-27, is the subject of a pending Objection.<sup>6</sup> That interrogatory appears to seek data and information which should be available from headquarters personnel to explore this issue. Rather than waiting for motions practice and appeals concerning that question, or waiting for the Service's filing of surrebuttal testimony which might or might not address ANM witness Haldi's testimony on this issue, the Commission now orders the Service to respond to ANM/USPS-27 within seven days.

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<sup>6</sup> Objection of the United States Postal Service to Interrogatory of the Alliance of Nonprofit Mailers (ANM/USPS-27), filed January 30, 1998.

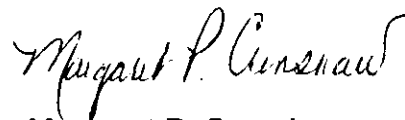
It is ordered:

1. The Appeal of the Alliance of Nonprofit Mailers from Presiding Officer's Ruling No. R97-1/86, filed January 16, 1998, is denied.

2. The Postal Service is directed to respond to ANM/USPS-27 as specified in the body of this order.

By the Commission.

(S E A L)



Margaret P. Crenshaw  
Secretary

**ANM/USPS-20:**

- (a) Please state how many mailings, pieces, and pounds of mail prepared for entry at Standard A (formerly third-class) nonprofit rates were in fact entered at commercial rates during each of the following periods because the Postal Service determined, before or during entry of the mail, that it did not qualify for Standard A (or third-class) nonprofit rates:
- (i) the period from May 5, 1995, through the end of Fiscal Year 1995,
  - (ii) Fiscal Year 1996, and
  - (iii) the period from the beginning of Fiscal Year 1997 through March 8, 1997.

If any of the data requested are unavailable for the entire period, please provide all data currently available and indicate the period(s) to which such data apply.

- (b) For each mailing identified in response to part (a), please state whether the Postal Service required the mailer to correct the permit imprint, meter stamp, or postage affixed to the mail to reflect the fact that the mail was ultimately entered at some rate other than Standard A Nonprofit Rates.

**ANM/USPS-21.** Please state how many mailings, pieces, and pounds of mail originally entered at Standard A (formerly third-class) nonprofit rates later generated back postage payments to the Postal Service during each of the following periods after the Postal Service found that the mail was ineligible for commercial rates:

- (a) from May 5, 1995, through the end of Fiscal Year 1995,
- (b) during Fiscal Year 1996, and
- (c) from the beginning of Fiscal Year 1997 through March 8, 1997.

If any of the data requested are unavailable for the entire period, please provide all data currently available and indicate the period(s) to which such data apply.

**ANM/USPS-25.** This question concerns mailings entered at standard A (formerly third-class) nonprofit rates between May 5, 1995 through March 8, 1997, but later assessed additional postage under another rate class or subclass.

(a) For how many of the mailings did the Postal Service revise the Form 3602s or the data reported on the Form 3602s?

(b) What revisions were made?

(c) Please produce all Postal Service rules, regulations, operations manuals, handbooks and similar documents governing revision of Form 3602, or data reported on Form 3602, in these circumstances.

(d) Please produce all data, studies, analyses or similar documents concerning the actual rate of compliance with the procedures specified in response to part (b).

**ANM/USPS-26.** This question concerns mailings which the mailer attempted to enter at standard A (formerly third-class) nonprofit rates between May 5, 1995 through March 8, 1997, but which the Postal Service refused to accept for entry without payment of additional postage under another rate class or subclass.

(a) For how many of the mailings did the Postal Service revise the Form 3602s or the data reported on the Form 3602s?

(b) What revisions were made?

(c) Please produce all Postal Service rules, regulations, operations manuals, handbooks and similar documents governing revision of Form 3602, or data reported on Form 3602, in these circumstances.

(d) Please produce all data, studies, analyses or similar documents concerning the actual rate of compliance with the procedures specified in response to part (b).