DOCKET SECTION
BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268–0001

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POSTAL RATE AND FEE CHANGES, 1997

Docket No. R97-1

UNITED STATES POSTAL SERVICE REQUEST FOR CERTIFICATION OF PRESIDING OFFICER'S RULING AT TR. 33/17361-62 GRANTING NEWSPAPER ASSOCIATION OF AMERICA MOTION TO COMPEL ADMISSION FROM THE UNITED STATES POSTAL SERVICE (NAA/USPS-RFA-1)

Pursuant to Rule 32 of the Rules of Practice and Procedure, the Postal Service requests that the Presiding Officer certify to the Commission an appeal of the Presiding Officer's Ruling at Tr. 33/17361-62 granting the Newspaper Association of America Motion to Compel Admission from the United States Postal Service.

I. INTRODUCTION

On February 17, 1998, NAA filed a request for admissions (RFA) directed to the Postal Service. RFA-1 asks that the Postal Service confirm the existence of a document entitled "United States Postal Service 1998 Marketing Plans."[1] RFA-2 through RFA-6 ask that the Postal Service admit to various statements allegedly quoted from the document. On February 27, 1998, the Postal Service filed a timely objection to the RFA on grounds that it was filed out of time and not within Special Rule 2E. On March 11, 1998, NAA filed its Motion to Compel Admission from the

[1] In its Motion, NAA seeks to compel a response only to its first request for admission, NAA/USPS-RFA-1. NAA/USPS-RFA-1 asks, "[p]lease admit the existence of a document entitled 'United States Postal Service 1998 Marketing Plans' of which the attached is a copy of the cover page. If you cannot completely confirm, please explain."

United States Postal Service ("Motion"). On that same date, NAA filed a copy of a document entitled "United States Postal Service 1998 Marketing Plans" as Library Reference NAA/R97-1 LR-2. One day later, the Presiding Officer issued P.O. Ruling No. R97-1/109, which shortened the time for the Postal Service to respond to NAA's Motion. The Postal Service filed a timely reply to the Motion on March 16.[2] On March 17, the Presiding Officer granted NAA's Motion in a brief oral ruling at Tr. 33/17361-62 (hereinafter "Ruling"). The result is contrary to Commission precedent, the Commission's rules, and procedural due process, and should therefore be reversed.

The document for which authentication is sought (hereinafter NAA/R97-1 LR-2) consists of over 300 pages of detailed market information in several key postal markets, and commercially sensitive ideas and plans for introducing and improving postal products and services. The nature of the contents of NAA/R97-1 LR-2 is highly sensitive, and the Postal Service has long maintained that disclosure of such information would pose serious commercial harm to the Postal Service. Indeed, the Commission has long recognized the commercial sensitivity of such information and has not required disclosure of similar information in Commission proceedings. *See, e.g.*, P.O. Ruling No. R97-1/46; P.O. Ruling No. R97-1/52; P.O. Ruling No. R97-1/60. NAA does not indicate whether it received its copy of NAA/R97-1 LR-2 through official channels. Suffice it so say, however, that the Postal Service has long resisted

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[2] United States Postal Service Answer in Opposition to Newspaper Association Of America Motion to Compel Admission from The United States Postal Service (March 16, 1998) (hereinafter "Answer in Opposition").

disclosing to its competitors documents with contents similar to those in NAA/R97-1 LR-2, and believes that this document and others like it remain commercially sensitive and protected by evidentiary privilege.

II. THE CRITERIA FOR CERTIFICATION ARE SATISFIED.

Rule 32 of the Commission's Rules of Practice and Procedure provides, in pertinent part, that a request for certification of an appeal is appropriate when the ruling for which an appeal is sought "involves an important question of law or policy concerning which there is substantial ground for difference of opinion" and "subsequent review will be an inadequate remedy." As explained below, the Postal Service submits that the result contravenes established Commission precedent regarding the scope of permissible discovery under Special Rule 2E. It also misinterprets and misapplies other clear Commission rules and precedent. Consequently, the instant request raises "an important question of law" upon which there is a "substantial ground for difference of opinion."

In addition, subsequent review will undoubtedly fail to provide an adequate remedy. Authentication of NAA/R97-1 LR-2 will undoubtedly enable participants to move to enter the contents of the document into the record, thereby significantly enlarging the evidentiary record in this docket at this very late stage of the proceeding. It is imperative that the document not be entered into the evidentiary record. Affording record status to the document would taint the record with an unbalanced evidentiary presentation that is highly susceptible to being misused and

misinterpreted by the participants and the Commission, and would thereby create a serious and irreparable risk of reversible error to the extent the document's contents inform the Commission's recommendations. *See Salt River Project Agric. Improvement & Power Dist. v. United States*, 762 F.2d 1053, 1060-61 n.8 (D.C. Cir. 1985). ("When an agency relies on a number of findings, one or more of which are erroneous, we must reverse and remand only when there is a significant chance that but for the errors the agency might have reached a different result."). Accordingly, resolution of this matter by the Commission is warranted at this juncture.

III. THE RULING CONTRAVENES LONGSTANDING COMMMISSION PRECEDENT ON THE SCOPE OF PERMISSIBLE DISCOVERY UNDER SPECIAL RULE 2E.

The Ruling provides in part that the Postal Service "has an ongoing obligation to answer discovery requests . . . ." Tr. 33/17361. Liberally construed, it appears that the Ruling interprets Special Rule of Practice 2E to permit unlimited discovery upon the Postal Service through February 17, 1998. The Ruling's conclusion in this regard is at odds with years of established Commission precedent regarding the proper scope of Special Rule 2E. Special Rule 2E creates an exception to the general rule that discovery against a participant is scheduled to end prior to the receipt into evidence of that participant's direct case, by allowing participants to obtain, up to 20 days prior to the due date for filing rebuttal testimony, "information (such as operating procedures or data) available only from the Postal Service."[3]

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[3] The time for submitting discovery to the Postal Service under Rule 2E expired on February 17. P.O. Ruling No. R97-1/54.

The Ruling departs significantly from well-established Commission precedents limiting the scope of discovery under Rule 2E. Rule 2E does not, as the Ruling apparently concludes, create "an ongoing obligation to answer discovery requests." To the contrary, the purpose and scope of discovery under Rule 2E is narrowly circumscribed. Up until now, the longstanding rule was that Special Rule 2E is intended for the specific purpose of *developing rebuttal testimony*, not for other, more far-reaching purposes. This was clearly set forth a decade ago in P.O. Ruling No. R87-1/138,[4] where the Presiding Officer explained:

> To qualify for th[e] exception [under Special Rule 2E], the interrogatory must seek information that is obtainable only from the Postal Service, address areas not explained in the Postal Service's direct case, and *be needed to prepare the discovering party's evidence.*

P.O. Ruling No. R87-1/138 at 2 (emphasis added).[5] The purpose and scope of Rule

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[4] Special Rule 2E in Docket No. R87-1 was the same in material respects to Special Rule 2E in the instant docket. *See* Docket No. R87-1/3, Attachment B at 3-4.

[5] In P.O. Ruling No. R87-1/108, the Presiding Officer explained the underlying reason for such limitations:

> Special Rule 2.E was not intended to extend unlimited discovery against the Postal Service for an unreasonable period of time. Rather, its purpose is to *enable parties to prepare evidentiary presentations for submission to the Commission.* . . . While parties may have to begin to develop evidentiary presentations prior to the appearance of Postal Service witnesses, it would be unusual for a party to have completed preparation of its evidence before the Postal Service direct case has become evidence. As a result, parties generally are preparing evidence after the Postal Service has completed presentation of its direct case. *While preparing that evidence*, participants are likely to encounter areas where additional information from the Postal Service is necessary. Such information may include data maintained by the Service, or involve the methods used by the Postal Service to prepare regularly reported data or perform certain operations; in other words, relevant facts which have not yet become part of the record.

2E was reaffirmed by the Presiding Officer in this docket. As clearly explained in P.O. Ruling No. MC97-1/85, the purpose for which participants may avail themselves of discovery under Special Rule 2E is quite narrow. Special Rule 2E "enable[s] a participant to obtain information available only from the Postal Service for the purpose of developing rebuttal testimony." P.O. Ruling No. R97-1/85; *see also* P.O. Ruling No. R97-1/89.[6] If this sort of discovery were permitted to continue after the close of discovery on the Postal Service's case-in-chief, "the discovery cutoff date would have little meaning." *See* P.O. Ruling No. R97-1/85 at 4.[7]

Here, as the Postal Service demonstrated in its Answer in Opposition, NAA has

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P.O. Ruling R87-1/108 at 1-2 (emphasis added). The burden of establishing that the purpose of the discovery request is for the development of *testimony* rests with the party conducting discovery. In Ruling No. R87-1/118, the Presiding Officer warned parties of this responsibility:

> parties seeking to rely on 2.E should be aware that upon Postal Service objection, it is their burden to demonstrate how the requested information is to be used in the party's testimony. . . . Otherwise, it would be possible for Special Rule 2.E to evolve into another round of discovery against the Service.

P.O. Ruling No. R87-1/118 at 2.

[6] *See also* P.O. Ruling No. MC96-3/36 at 3 (Special Rule 2E "is limited to when a participant needs data available only from the Postal Service *in order to prepare testimony to rebut participants other than the Postal Service.*" (emphasis added)); Presiding Officer's Ruling No. MC96-3/21 similarly provides that:

> Rule 2.E was generally intended to extend the otherwise applicable discovery period for information that can be obtained only from the Postal Service that is *needed to prepare rebuttal testimony.*

P.O. Ruling No. MC96-3/21 at 2 (emphasis added).

[7] With the exception of discovery on selected library reference material, discovery on the Postal Service's case-in-chief was to be filed by September 17, 1997. P.O. Ruling No. R97-1/4 Attachment A; P.O. Ruling No. R97-1/55 Attachment A.

failed to meet its burden. Even assuming that the RFA was designed to elicit "information or data" available only from the Postal Service, in order for the RFA to fall within the scope of Special Rule 2E at this stage of the proceeding, consistent with P.O. Ruling No. R87-1/118, NAA has the burden of showing that its discovery was intended to elicit information to develop rebuttal testimony. Nowhere in its pleadings did NAA represent that this was its purpose. As such, the Ruling cannot rely upon Special Rule 2E as a basis for granting NAA's Motion.[8] [9]

IV. THE ABSENCE OF A RECORD OF THE FILING OF A RESPONSE OR OBJECTION TO INTERROGATORY NAA/USPS-10 DOES NOT SERVE AS A

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[8] It is also inconsequential that NAA's discovery request is framed in the form of a request to authenticate a document through a request for admission. All discovery requests, including requests for admission under Rule 27, are expressly made subordinate to the Special Rules of Practice. Special Rule 2A makes clear that "[s]ections 25, 26, and 27 of the rules of practice apply during the discovery stage of this proceeding *except when specifically overtaken by these special rules*." P.O. Ruling No. R97-1/4 (emphasis added). There is nothing exceptional in the fact that NAA's discovery request is a request for admission. Like any other discovery request, it is plainly out of time, and does not fall within the scope of permissible discovery under Special Rule 2E. It is accordingly of no consequence that NAA has framed its discovery request under Rule 27.

[9] Although not cited by the Presiding Officer in the Ruling, Rule 31(d) would also fail to serve as a proper basis for the Ruling. Rule 31(d) permits participants to offer into evidence "public documents," which can include reports, decisions, opinions, or published scientific or economic statistical data issued by executive branch agencies and legislative bodies. The offeror, however, has the burden of showing that the document is "reasonably available to the public . . . " NAA/R97-1 LR-2 is clearly not a "report, decision, opinion, or published scientific or economic statistical data." Its contents rather consist of sensitive market information and marketing plans that an entity would not voluntarily disclose to the public. In addition, the Postal Service does not concede that this document is one of which the Commission could take official notice under its Rule 31(j) procedures. Any attempt to create evidentiary status through any other means should fail because neither the Postal Service nor any other party is sponsoring the document.

PROPER BASIS FOR THE RULING.

The Ruling also errs in relying upon the absence of a record indicating whether a response or objection was filed to interrogatory NAA/USPS-10 as a justification for granting NAA's Motion. As explained in the Postal Service's Answer in Opposition, the instant controversy bears no relationship to the circumstances surrounding interrogatory NAA/USPS-10.

The Ruling apparently adopts NAA's erroneous contention that this controversy is somehow linked to interrogatory NAA/USPS-10. Specifically, the Ruling states that the Postal Service "has an ongoing obligation . . . to correct the answers to discovery." Tr. 33/17361. In its Motion, NAA stated that it is unable to locate an answer or objection to interrogatory NAA/USPS-10, which asked the Postal Service a series of questions about market share. NAA propounded interrogatory NAA/USPS-10 more than 6 months ago, on August 29, 1997. The Postal Service and its witnesses answered thousands of questions from the participants, and it is quite possible that, in the crush of discovery, this interrogatory was overlooked or misplaced.[10]

The circumstances surrounding NAA/USPS-10 do not serve as a justification for the Ruling. The circumstances of NAA/USPS-10 would only bear on the instant controversy if two assumptions were true, namely: (i) identification, authentication, or production of NAA/R97-1 LR-2 by the Postal Service was required in response to

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[10] In its Motion, NAA freely admitted that it "did not recognize until recently the Postal Service's lack of response to NAA/USPS-10." NAA Motion at 6 n.3.

NAA/USPS-10 and (ii) NAA/USPS-10 was not objectionable, and, had an objection been filed, NAA would have undertaken to move to compel a response to it, and been successful in this effort. Nothing supports the Ruling's adoption of these unproven and speculative assumptions.

First, nothing in NAA/USPS-10 requires the production or identification of NAA/R97-1 LR-2. Interrogatory NAA/USPS-10 is *not* a request for production; rather, it consists of a series of focused questions on market share. No question asks for the production of any documents; only subpart 10(b) asks for the *identification* of a source for market share data in key lines of the Postal Service's business. NAA/R97-1 LR-2 is not a primary source document, but rather consists of a compilation of information from a variety of sources. As such, any one of the underlying sources of NAA/R97-1 LR-2 could have served as a source for market share data information. Thus, the Ruling incorrectly assumes that identification of NAA/R97-1 LR-2 was required in response to NAA/USPS-10.

Secondly, the date the response to NAA/USPS-10 was due *predates* the marketing plan. NAA/R97-1 LR-2 bears a date of October 1997 on its cover, which is well after September 12, 1997, when the response to NAA/USPS-10 was due. Thus, the response to NAA/USPS-10 would not have included any references to NAA/R97-1 LR-2, since that document was not issued until October 1997, when the response to NAA/USPS-10 was due.

Thirdly, the Ruling improperly adopts NAA's speculative and unproven assumption that interrogatory NAA/USPS-10 was not objectionable and that the

Presiding Officer would have compelled a response to that interrogatory had an objection to that interrogatory been lodged. The Ruling errs in accepting this outcome, particularly since the discoverability of the subject matter of NAA/USPS-10 was never litigated. Since there is no basis to conclude that interrogatory NAA/USPS-10 would have been answered, it is simply wrong to conclude that the absence of a record of an answer or objection to interrogatory NAA/USPS-10 compels the Postal Service to respond to discovery upon NAA/R97-1 LR-2.

Finally, NAA makes no representation that it would have filed a request for production seeking its disclosure in a timely filed follow-up discovery request. Indeed, it is far from clear that it would have done so, since NAA freely admits to having been overwhelmed by the "rush of this docket's procedural schedule." NAA Motion at 6.

In sum, the absence of a record of the filing of a response or objection to interrogatory NAA/USPS-10 bears no relationship to the instant controversy, and it is improper to rely upon it as a basis for granting NAA's Motion.

V. THE RULING FAILS TO ADDRESS THE HARM TO THE POSTAL SERVICE OCCASIONED BY DISCOVERY AT THIS LATE STAGE OF THE PROCEEDING.

The Ruling fails to address the Postal Service's argument in its Answer in Opposition that responding to NAA's discovery would result in unfair prejudice that would substantially outweigh any probative value the document may have. In particular, it gives the Postal Service less than 32 hours to offer a statement that NAA/R97-1 LR-2 is "not authentic or . . . not an accurate reproduction . . . ." Tr. 33/17362. The Postal Service submits, however, that far more than a statement

challenging the authenticity of the document is needed to protect its procedural due process interests. As the Postal Service explained in its Answer in Opposition, what is required is an opportunity to explain the contents of the document in a manner that would prevent misinterpretation and mischaracterization of its contents. This measure would be the only means of protecting the Postal Service's procedural due process interests. *Cf. Ohio Bell Tel. v. Public Utils. Comm'n*, 301 U.S. 292 (1937); *Ralpho v. Bell*, 569 F.2d 607, 628 (D.C. Cir. 1977) ("[A]n opportunity to meet and rebut evidence utilized by an administrative agency has long been regarded as a primary requisite of due process."). Given that NAA/R97-1 LR-2 consists of more than 300 pages and covers so many topics, the Postal Service simply cannot prepare a meaningful explanation of its contents within the time frames of the compressed schedule of this proceeding, especially given the responsibilities that persons involved in the litigation of this case must now bear.

There being no further opportunity for the submission of testimony, admission of the contents of NAA/R97-1 LR-2 at this late stage of the proceeding would be highly prejudicial to the Postal Service, by tainting the record with an unbalanced evidentiary submission and posing a serious risk that participants and the Commission may misinterpret and misuse the contents of NAA/R97-1 LR-2. Indeed, discussions of NAA/R97-1 LR-2 in the trade press demonstrate that there is a serious risk of misinterpretation of its contents. *See USPS Explains Conflicting Data for International Services*, BUSINESS MAILER'S REVIEW, March 9, 1998, at 1. In the absence of an opportunity to explain the contents of the document, if the document is

authenticated and its contents become part of the record, the participants, and the Commission, rely upon it at their peril, and to the detriment of the Postal Service's procedural due process interests.

VI. THE RULING FAILS TO ADHERE TO THE PRESIDING OFFICER'S PREVIOUS PRONOUNCEMENTS REGARDING PROCEDURAL DEADLINES.

The Presiding Officer has emphasized that this proceeding "must move forward with deliberate speed as we are operating on a compressed schedule. Therefore, discovery cutoff dates must be respected . . . ." P.O. Ruling No. R97-1/89 at 3. Inexplicably, the Ruling contravenes the Presiding Officer's clear and unequivocal directive that discovery deadlines be observed.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Postal Service respectfully requests that the Presiding Officer certify an appeal of the Ruling to the Commission.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day 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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