ORIGINAL

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

REVISIONS TO LIBRARY REFERENCE RULE

Docket No. RM98–2

INITIAL COMMENTS OF THE UNITED STATES POSTAL SERVICE
AND REQUEST FOR INFORMAL CONFERENCE
(October 14, 1998)

As the Commission's August 27, 1998 Notice of Rulemaking in Docket No. RM98-2 indicates, the Postal Service took the position in Docket No. R97-1 that the difficulties experienced in that case relating to the use of library references might not necessarily require amendments to the Commission's rules. See Order 1219 at 6. The Postal Service maintains that view.

What happened in Docket No. R97-1 may be fairly characterized as a situation in which a relatively small number of library references, a tiny proportion of the total number filed, created controversy on issues such as whether the parties were being afforded adequate opportunity to test the results and conclusions drawn from such library references, and whether the Commission could rely on testimony which was directly sponsored by witnesses but which, in turn, relied upon materials contained in such unsponsored library references. Ultimately, those library references, as well as many others, were sponsored as evidence by postal witnesses.

The Commission in Order No. 1219 has proposed specific revisions to its rules on library references. The Postal Service has considerable reservations regarding the Commission's proposals. From one perspective, it may be argued that the proposed rules are substantially overinclusive, and would introduce delay and

procedural complexities that would be unnecessary in the vast majority of instances in which they would be required. From another perspective, it could be argued with equal validity that the proposed rules are underinclusive, to the extent that their proposed scope is limited strictly to library references, when a more comprehensive examination of the role of documentary material in rate cases may be warranted.

It seems fairly clear that there currently exists an inconsistency between the practices that might be expected from a literal reading of the Commission's rules on documentary evidence, most particularly Rule 31(b), and practices that have actually been employed by the parties as they have presented their cases to the Commission in recent proceedings. As the Postal Service suggested in several of its pleadings during Docket No. R97-1, this situation did not develop overnight. In most respects, the inconsistency is the product of basically reasonable responses to changes in the complexity of rate cases (i.e., the number of specific rate elements which must be examined, and for which supporting cost, revenue, demand, and similar information must be presented), and technological changes in the way information is created, stored, retrieved, manipulated, transferred, and reproduced.

The approach to the current situation reflected in the rules proposed by the Commission constitutes one of a variety of potential approaches that could be adopted. While the proposed rules might have some merit in a narrow context, however, the full range of problems that arose in Docket No. R97-1 arguably might benefit from a more comprehensive approach. In this regard, the Postal Service suggests that a useful next step might be to develop a more complete catalog of the obstacles that were encountered by parties in Docket No. R97-1. One way this might be accomplished would be for the Commission to convene an informal conference in which all interested parties are invited to exchange views on these matters. If at

such time there appears to be substantial agreement that the framework contemplated by the proposed rules allows adequate consideration of all or most of the relevant issues, the Commission could proceed on that basis. If, however, it appears that an alternative framework should be considered, it might be worthwhile to entertain specific additional proposals, either from the Commission or participants, and conduct an additional round of comments.

The Postal Service requests that the Commission convene such an informal conference to allow the parties the opportunity to focus more sharply the scope and direction of this proceeding. To suggest some of the types of issues that could be discussed at such a conference, as well as to provide some preliminary response to the proposals made in Order No. 1219, the Postal Service also provides the following comments:

1. It may be worthwhile to reexamine Rule 31(b) in its entirety.

In both its current and proposed forms, Rule 31(b) on documentary material in general begins by stating that "[d]ocuments and detailed data and information shall be presented as exhibits." In fact, however, this statement bears little resemblance to current practice. Most parties, including the Postal Service, structure their cases around written direct testimony. In some instances, attachments to such testimony are labeled as exhibits, while in other instances, they are labeled as something else. In either case, the testimony is handed to the witness in the hearing room and, after verification that it was prepared by the witness, is handed to the reporter to be transcribed and entered into the record. This material appears in the certified record, and is considered evidence.

Depending on the nature of its contents (e.g., quantitative or not), testimony in many instances is supported by material which is not part of the testimony/exhibit packet handed to the reporter. Hard-copy and electronic versions of foundational material, often furnished pursuant to Rule 31(k), are made available either as workpapers, library references, or both. Even in the context of studies which directly form the basis for testimony, it would be much more consistent with current practice to state that "detailed data and information" are presented in workpapers and library references, rather than as exhibits. The exact evidentiary status of this nontestimonial material may, however, be unclear. For example, officially designated workpapers typically do not appear in the certified record of Commission proceedings. On the other hand, as long as such material is plainly linked with the testimony of a witness, and is the work product of that witness, this uncertainty regarding its formal status has to date not been the source of significant controversy. In any event, past practice buttresses the notion that certain materials may still be "relied upon" even if they do not appear in the certified record.

Once the link with a particular witness becomes more tenuous, however, the exact status of such material might become more tenuous as well. In an organization the size and scope of the Postal Service, an enormous portion of the information upon which rates are based (e.g., costs, revenues, pieces, weights, etc.) ultimately will not be the work product of an exclusively identified group of individuals who appear as witnesses. The building blocks of most postal ratemaking analyses come out of the Postal Service's data reporting systems, which employ the efforts of

thousands of postal workers, and there has always been an institutional dimension to the presentation of the outputs of those systems.[1] Once again, however, material which directly relates to the Postal Service's data collection systems (and the customary reports thereof) generally has not been the source of any significant procedural controversy, even though this material's exact formal evidentiary status (when filed as a library reference, for example) may have been ambiguous.

Supporting documentation thus could be characterized as a continuum. At one end there is material actually prepared by the witness when developing his or her testimony, and at the other end there are published official reports of the Postal Service, prepared every year in the ordinary course of business. At either end, whether presented as library references, workpapers, testimony, or exhibits, these materials largely do not present due process problems when relied upon by ratemaking participants.

Less clarity exists near the middle of this continuum however. For example, when witnesses begin to rely on the results of "cuts" or "breakouts" of official reporting system data performed by someone else (not working under their supervision), how much scrutiny of such efforts is necessary? At certain times such analyses are essentially mechanical; at other times particular operating assumptions

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[1] The Postal Service, of course, has typically presented data systems witness in rate cases. Yet the relationship between, for example, the RPW witness and the reported RPW data for a given year is quite different from the relationship between a costing witness and a piece of costing testimony which reports the results obtained from a discrete study conducted by that witness using given input data and applying specific analytic methodologies.

drive the results. In the absence of clear guidelines, deciding whether to incorporate these materials as evidence can be problematic, and sometimes the outcomes are affected by resource availability and other considerations.

Thus, it is apparent that the "exhibit" nomenclature of Rule 31(b) no longer provides much useful guidance when addressing these matters. While it may be easy to say that the existing rule would work well if the Postal Service would just provide a witness to "sponsor" every item of material, whether those items are called "exhibits" or "library references," it is difficult to believe that anyone would really find that approach workable, when over 200 library references were filed initially with most recent rate cases. It may be useful therefore to step back and reexamine Rule 31(b) in its entirety.

2. The proposed motion process does not appear to resolve any of the more troubling aspects of the matter.

Under current practice, a party wishing to file a library reference furnishes a copy to the Commission, and serves a notice on all parties. Under the proposed rules, the same party would need to file a detailed motion, other parties would have the opportunity to file oppositions, and the Presiding Officer would be required to rule on each and every motion.[2] When that process is complete, however, the material

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[2] Purely as a matter of editorial structure, the Commission may wish to consider renumbering the proposed revisions. The overall section of the rule in question is Rule 31(b), relating to "Documentary material." The first subsection is 31(b)(1), relating to documentary material in general. Everything thereafter relates to the general topic of library references, which indeed is the heading of Rule 31(b)(2). Logically, therefore, one might expect that all of the following new provisions relating to library references would be further subdivisions of 31(b)(2). Instead, in the

which was the subject of the successful motion would have no different role or status within the ratemaking process than material currently furnished with an accompanying notice to the parties. Under the proposed rules, the only apparent tangible result of a favorable ruling on a library reference motion is authorization to file the material as a library reference. Proposed Rule 31(b)(7) would appear to explicitly preclude the grant of such a motion from having any effect on the evidentiary status of the contents of the library reference, and would leave open the potential for further disputes over that status.

If additional motions practice is to be imposed on the parties and the Commission in the midst of already compressed procedural scheduled, the results should provide some guidance or effect with respect to the status of the materials entered. An example of potential improvement could be the creation of a rebuttable presumption that material which has successfully complied with the motions procedure can be relied upon by the Commission for purposes consistent with its use within the case of the moving party.[3]

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proposed structure, they appear as separate section 31(b)(3) through 31(b)(7). While this configuration does not appear to create any substantive problems, it may contribute to some confusion among readers.

[3] There are several promising avenues that could be explored to determine exactly what relief might be most appropriately granted in response to a library reference motion. For example, current Commission Rule 31(j) provides that "[o]fficial notice may be taken of such matters ... peculiarly within the general knowledge of the Commission as an expert body," provided that parties shall be afforded an opportunity to show the contrary. If a party moves for leave to provide a relatively minor link in the case in support of its proposed rates by filing a library reference rather than testimony, it would not seem unreasonable if the order granting such a motion also served to provide a basis for the Commission to rely on the

In this regard, reliance on unsponsored library references might seem inconsistent with the direction of rulings and events involving these matters in Docket No. R97-1. Yet, in recent practice the Commission has often entered into evidence unsponsored institutional interrogatory responses. Moreover, this practice is consistent with what has occurred in Commission proceedings for many years, without the benefit of any formal framework to govern the process.[4] For a discussion of examples of this practice, see pages 11-15 of the "Response of the United States Postal Service to Motions of NDMS and NAA to Strike or Oppose Admission of Specific Portions of Testimony and For Other Relief" (Docket No. R97-1, Oct. 24, 1997).

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material facts identified in the library reference, as long as parties were afforded an opportunity to show the contrary. Alternatively, Federal Rule of Evidence 703 states that facts or data upon which an expert bases an opinion or inference need not be admissible in evidence if of a type reasonably relied upon by experts in that field. Perhaps the grant of leave to file material as a library reference could be considered to establish a presumption that the data and facts in question are of a type reasonably relied upon by experts to base opinions or draw inferences. Of course, the greater the importance of the relief at a stake in the motion, the lower the threshold of opposition needed to cause the rejection of such a motion and to require the appearance of a witness.

[4] In reality, one need go no further than the Newsweek case to discover that the practice is neither unprecedented, nor necessarily inconsistent with due process. In Newsweek, Inc. v. US Postal Service, 663 F2d 1186 (2d Cir 1981), the court upheld the Commission's reliance upon a study submitted as a library reference and obtained by the parties through discovery. Despite the lack of a sponsoring witness, the court found that production of the study's model and data during the hearings provided the parties with sufficient time for analysis and cross-examination to meet the requirements of section 3624(a). Id. at 1208-09. In these instances, the court's due process inquiry clearly focused on the timing of when the material in question became available to the parties, and whether or not discovery and cross-examination were available.

Even if the Commission chooses to limit the scope of this rulemaking to library references, it might be worthwhile to consider rules under which those library references which have gone through a motion procedure are presumptively afforded some measure of reliability. Admittedly, given the large number of library references, such a process could still be cumbersome. Fortunately, however, all library references are not the same, and, with a little effort, it might be possible to establish guidelines by which the minority of library references that need to be subjected to a motions procedure can be distinguished from the majority that do not. In fact, as discussed next, regardless of what relief is at stake in a motion, entire categories of material could and probably should be excluded from the scope of the proposed rule.

3. The proposed rule could require a great deal of essentially useless motions practice

The Postal Service alone filed over 350 library references in Docket No. R97-1. It should be possible to create categories of types that do not require a motion to be filed. For example, consider the following categories:

System documentation material. A large number of library references in general rate cases consist of system documentation material relating to various postal data collection systems (e.g., RPW, CODES, IOCS, etc.). These materials are highly technical in nature, often relating to computer programming, and may have been initially created well before commencement of preparations for the particular case in which they are filed. Such library references are filed to fulfill the requirements of certain Commission rules relating to documentation and, in general, they receive very little attention over the course of the proceeding.

Reference material. Library references may also include reports, manuals, handbooks, publications, or other similar materials that were prepared totally independently of the ratemaking process. Examples include items such as

copies of postal financial accounting manuals, management instructions, journal or media articles, and the Postal Service's national collective bargaining agreements. Other library references that can also properly be thought of as reference material are Postal Service documents and periodic reports that may be related to the ratemaking process, but are produced independent of any particular case.[5]

Witness foundational material. Many library references include material which relates directly to the testimony of a specific witness and, in effect, functions as a workpaper. Most often, this is material in an electronic format, such as input data, program listings or spreadsheets, and output data. In general, such material is filed to comply with the Commission's rules regarding the necessary foundation for receipt of results of analyses into evidence. This material is also usually very closely related to the witness' hardcopy workpapers, if there are any.

Interrogatory responses. There are two general reasons why material provided in response to interrogatories might be filed as a library reference. One reason is that what has been requested is information in an electronic format, such as a spreadsheet or a data file. The second reason is that what has been requested is too voluminous to justify service of a complete copy on every party. Obviously, by their very nature, library references serve as vehicles for interrogatory responses only after a case has begun.

This list is not exhaustive. In the main, these types of library references have not created procedural problems.[6] Universally applying the proposed motion process to

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[5] For example, in Docket No. R97-1, the FY 1996 CRA Report, FY 1996 Cost Segments and Components, FY 1996 Summary Description, FY 1996 Billing Determinants, and Postal Service Rate, Volume, and Revenue Histories were all filed as library references for the convenience of the parties, even though most of them had already been filed with the Commission pursuant to the periodic reporting rules. While not strictly "unrelated" to the ratemaking process, the Postal Service prepares each of these (with the exception of the histories) every year, whether a rate case is contemplated or not. Thus, they could all fairly be included in the category of "reference material."

[6] It appears likely that there have been instances in the past in which the testimony of Postal Service witnesses did a less than satisfactory job identifying exactly which library references directly supported that testimony. These problems have not been universal, however. In the last several cases, the testimony of Dr.

these types of materials seems excessive. Any motion requirement should be structured so that it does not apply to these types of material. Alternatively, in certain instances the rule would be triggered only by the complaint of another party, or by some other mechanism to limit the scope of the requirement. This would seem to be a very fertile area for informal discussion among participants at a conference to consider these matters.

When material of this type is excluded from the scope of any rule, what is left is material about which it may be appropriate to apply some type of procedures. A motion procedure of the type proposed would allow early identification of potential disagreements, and would allow resolution of these matters soon enough in the proceeding to avoid disruptions to the procedural schedule. It would respect the due process rights of all parties, because they would have access to copies of the material from the start, they would have information (in the motion) about what the material contains and its intended role in the case, and they would be put on notice that consequences follow if they take no action. (As noted earlier, though, under the procedures as proposed, it is not clear that any consequences flow from inaction by a

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George Tolley has included a separate section identifying all of the material, hard-copy and electronic, library references and workpapers, associated with his testimony. See, e.g., Docket No. R97-1, USPS-T-6, pages 23-25 ("Guide to Testimony and Supporting Documentation"). Adopting such a convention for all its witnesses, which the Postal Service intended to do even prior to commencement of this rulemaking, should go a long way to eliminate any ambiguity surrounding the identity, function, and location of all witness foundational material. In general, as long as a library reference serves as the functional equivalent of a workpaper, is clearly identified as a portion of the foundational material in support of the testimony of a specified witness, and is made available simultaneously with the testimony, there is no apparent reason why it should be treated any differently from a workpaper.

party who later wishes to challenge reliance upon the contents of a library reference.) Properly limited in scope, the process would be more manageable.

4. The proposed rules ignore the "parking lot" function of library references.

Over the years, library references have served many functions. One function, perhaps that most consistent with the original intent of the concept, is to simply "park" material that has no where else to go. The most common example is when a party is requested to provide certain material by another party, but has no intrinsic interest in such material itself. The usual practice is to file a library reference and a notice which, in essence, says "here it is." In many such instances, the providing party has actually objected to being required to provide this material at all.

Under the proposed rules, attempting to file this material as a library reference would require the providing party to file a motion. The incongruity of this situation is apparent. If a motion were to be required, however, it would seem that the "requesting party," which hopes to utilize the disputed material in question, should be the one to file it, not the providing party.[7] Therefore, even if the proposed rules were adopted, it seems unlikely that the providing party would make any effort to comply. Some other procedural device would have to be created by which such a party can

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[7] This point is true whether there is any contention about the material or not. If Party A in discovery asks Party B to provide certain material as a spreadsheet on a diskette, requiring party B to bear the burden of filing a motion would seem unwarranted. Quick perusal of the list of Docket No. R97-1 Postal Service library references would show that between 50 and 100 items would fall into this category, which is another reason why it makes sense to exclude interrogatory response items from the motion procedure.

simply "park" the material requested by someone else. The practice would remain the same, it simply would no longer be called a library reference. Attention needs to be given to this aspect of the existing use of library references.

Summary

These comments include preliminary reactions to the proposed rules, identification of certain outstanding issues, and some suggestions. There is an entire continuum of approaches that could be adopted to refine the Commission's rules in this area. We summarize below three possible approaches:

- The Commission could engage in a comprehensive revision of Rule 31(b), which could address the whole range of changes that have occurred over nearly 3 decades of Commission practice in the ways in which the parties prepare and present their documentary evidence. Presumably, such an approach would deal with the fact that exhibits perform only a relatively minor part of the function which the rules would appear to envision. It would also address workpapers and other material (electronic and hardcopy) which relate directly to the testimony of witnesses, which provide the foundation for that testimony, but which can reasonably be treated differently from testimony in terms of service, etc. Lastly, it could create a formal mechanism by which other material, presumably noncontroversial, but not necessarily sponsored by witnesses, could be treated, so as to allow reliance on it by the parties and the Commission.

- The Commission could skip broader-based changes in Rule 31(b), and leave the focus of the revisions exclusively on library references. Nevertheless, a more ambitious approach could be adopted compared with the one reflected in the proposed rules, under which the utility of a library reference to the party trying to file it appears to be the same after the motion is granted as the utility of a library reference under the current practice, in which a mere notice is filed. For example, procedures could be implemented to bestow with the grant of a motion to accept a library reference some limited evidentiary or quasi-evidentiary status on the contents of the library reference. Thus, a party that did not oppose the motion could be precluded from later complaining that reliance on the contents deprived such party of its due process rights.

- At a minimum, even accepting the limited purpose of the Commission's proposed rule changes, some effort is needed to separate, within the range of things that have commonly been filed in the past as library references, those types of materials to which the rules should apply, and those types of materials to which the new rules should not apply. Otherwise, there would simply be a needless increase in motions practice, and a heavier burden on the Postal Service as it strives to prepare rate filings, with (in many instances) absolutely no benefit to anyone. Also at a minimum, it will be necessary to make sure that some procedural vehicle exists for parties to "park" material which in their view is not part of their case, without having to file a motion to do so.

In addition to presenting these initial comments, however, the Postal Service respectfully requests that the Commission convene an informal conference to allow interested parties to exchange views on these matters.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

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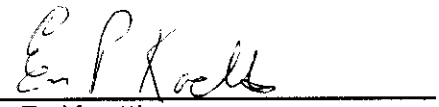

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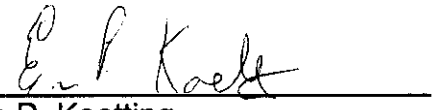

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