

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

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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

POSTAL RATE AND FEE CHANGES, 2000

Docket No. R2000-1

RESPONSE OF THE UNITED STATES POSTAL SERVICE
TO INTERVENOR PLEADINGS RELATED TO NOTICE OF INQUIRY NO. 3
(July 27, 2000)

In accordance with Presiding Officer's Ruling No. R2000-1/95 (July 24, 2000), the United States Postal Service hereby responds to the following intervenor pleadings related to Notice of Inquiry No. 3: the July 24, 2000, Major Mailers Association Supplement to Objection; the July 18, 2000, Notice of Office of the Consumer Advocate (OCA) of Intent to File Rebuttal Testimony; and the July 19, 2000, Comments of American Bankers Association and National Association of Presort Mailers (ABA&NAPM).

Background

In the course of preparing responses to two OCA interrogatories filed in late March, 2000, Postal Service witness Fronk (USPS-T-33) discovered an error in his First-Class Mail test year revenue estimate and determined that his approach to forecasting First-Class Mail single-piece additional ounces in the test year was flawed. As a result of these discoveries, it became necessary to make two changes in his testimony (USPS-T-33).¹ One change incorporated revenue adjustment factors into the First-Class Mail revenue forecast for the first time in any docket. The second involved a methodological change in the calculation of test year single-piece additional ounce

¹ Witness Fronk was unaware of the need for the changes in question until they were brought to his attention by the OCA's interrogatories. Tr. 34/16851.

volumes.² As soon as these necessary changes were reviewed internally, the Postal Service did what it was obliged to do as soon as possible. On April 17th, it filed notices of corresponding changes in witness Fronk's testimony, his workpapers and his responses to earlier interrogatories.

On that date, parties were on notice concerning the changes and had an adequate opportunity to conduct follow-up discovery and to cross-examine witness Fronk about these matters when he testified on April 26th.

The Commission's rules set a high standard which the Postal Service strives to meet as it prepares the testimony and documentation supporting an omnibus request for changes in rates. Preparation of a such a request is a tremendously complex undertaking, paralleled only perhaps by the preparation of a recommended decision. No matter how diligently vetted and double-checked the testimony and supporting documentation filed in support of an omnibus rate request may be, it is inevitable that errors will be detected through the process of adversarial scrutiny which is made possible by the Commission's rules of procedure. Granted, the discovery of such errors may increase the burden associated with analyzing complicated rate filings. However, that is an unavoidable aspect of rate litigation which all parties, including the Postal Service, earnestly strive to minimize. The Commission's deliberations, as it prepares a recommended decision, are aided by the adversarial scrutiny of the evidentiary record that takes place during its proceedings. Such scrutiny increases the Commission's

² For a summary description of the changes, see either the April 17th response of the Postal Service to institutional interrogatory OCA/USPS-106(d) or the July 17th response of witness Fronk to NOI No. 3, at 2-4.

ability to ensure that it will have a reliable and accurate basis for the recommendations it will make to the Governors.

The Commission's rules incorporate a number of safeguards which seek to ensure fairness and procedural due process in its proceedings. These rules permit any party, acting with a reasonable degree of diligence, to request relief when it considers that it has been prejudiced, for instance, by the filing of material corrections in a witness' testimony. Parties can request additional discovery or insist that a witness be recalled for further cross-examination after that witness' scheduled appearance. Intervenors can even request additional time to file their own testimony, such as that which was due on May 22nd, in order to address what they consider to be late changes to Postal Service testimony. All of these options were available to the parties in the instant case. None was exercised. Moreover, the parties also elected not to address the April 17th changes in their own testimony filed on May 22nd.

On June 30, 2000, the Commission issued Notice of Inquiry No. 3. That inquiry invited parties which had not taken advantage of the aforementioned opportunities to address the raised by the April 17th changes. The NOI reflected an analysis of those changes and asked parties to either file responsive comments or testimony no later than July 17th, to address historical trends in additional ounce volumes and revenues, as well as more recent FY 1999 and partial FY 2000 data. In the form of a response by witness Fronk, the Postal Service filed testimony responsive to NOI No. 3 on July 17th. Despite being offered a second chance to present testimony addressing the April 17th changes and the other issues raised in NOI No. 3, no intervenor elected to do so.

Alternatively, MMA and the OCA elected to file brief comments which generally disparaged witness Fronk and urged the Commission to reject his April 17th testimony corrections.

In accordance with NOI No. 3, on July 18th, the Commission scheduled hearings on the July 17th testimony of witness Fronk for July 21st. In its July 18th Notice of Intent to Conduct Cross-Examination, the OCA appended a notice of its intent to file NOI No. 3 "rebuttal" testimony on August 14, 2000. On July 19th, ABA&NAPM also filed comments.³ At the July 21st hearing, MMA objected to the receipt of witness Fronk's NOI No. 3 testimony into evidence and, by operation of Presiding Officer's Ruling No. R2000-1/95, was given an opportunity to supplement its objection with a pleading filed July 24th.

Major Mailers Association Supplement

When the Commission considers that a proceeding would benefit, it can issue a Notice of Inquiry which identifies particular issues for further exposition – either in the form of comments or testimony by the parties. This is precisely what the Commission did on June 30th with NOI No. 3. In that document, the Commission offered a summary of witness Fronk's April 17th changes, presented an analysis of historical and recent additional ounce trends, raised questions for review by the parties, and explicitly solicited comments or testimony. Under the instant circumstances, an NOI is the very essence of due process. Even when a party fails to exercise due diligence with respect

³ To which the Postal Service responds below.

to a particular issue in an earlier phase of a proceeding, an NOI can give it a later opportunity to do so. Such was the case with NOI No. 3.

MMA moves that the Commission not admit into evidence the April 17th changes to witness Fronk's testimony and that it strike from the record his NOI No. 3 testimony.⁴ MMA's motion is based on the argument that it was denied due process by virtue of the timing of the April 17th changes, coming as they did three months after the filing of the Postal Service request. MMA apparently also argues that it was prejudiced by the fact that combined effect of the two changes was reported, instead of the separate effect of each change. MMA Supplement at 6. MMA claims that it was denied a fair opportunity to conduct discovery on the April 17th changes, that it was denied a reasonable chance to conduct cross-examination when postal witnesses testified in April and May, and that it was deprived of the ability to file testimony responsive to the corrections on May 22nd. MMA Supplement at 7.

There is no basis for MMA's claims that it was denied or deprived of a fair opportunity to do anything. The seven Postal Service filings on April 17th which relate to the changes were a loud and clear signal that an error had been corrected, that a methodological change was necessary, and that witness Fronk was changing his testimony, workpapers and interrogatory responses affected by these changes.⁵ The Postal Service categorically rejects the notion that it did not do enough to put diligent parties on notice.

⁴ Thus, the Revenue Adjustment Factor error would stand uncorrected and the Additional Ounce Volume Methodology change would be negated, leaving witness Fronk's testimony where it stood on January 12, 2000.

interrogatories brought their necessity to light. MMA does not say how it was prejudiced. MMA argues that if the impact of the two changes had been presented separately instead of combined, it would have been on notice about them and been better able to comprehend and respond to them.

These claims are without merit. The revised response to ABA&NAPM-T33-7 filed on April 17th clearly highlighted the separate impact of the change in the additional ounce forecasting method for the test year. The revised response shaded the five numbers that had changed from the original response. The total number of additional ounces on an after rates basis in TY 2001 went from 23.5 billion to 22.2 billion. The corresponding additional ounce revenue went from \$5.1 billion to \$4.8 billion. Had there been some incomprehensible or impenetrable aspect of the manner in which the Postal Service reported the combined impact of the two changes, any party who examined the April 17th changes in a reasonably diligent manner had an opportunity to request relief as soon as possible after April 17th and before May 22nd.⁶

The Postal Service considers that the Commission should deny MMA's request that witness Fronk's April 17th testimony changes be disallowed. If the MMA motion were granted, it would send a signal to all future witnesses in Commission proceedings that, above all, they should avoid correction of material errors in their testimony or alerting the Commission to necessary changes in methodology made evident by adversarial scrutiny. In other words, even if adversarial testing leads a witness to find a

⁶ But again, parties who do not examine the April 17th workpaper revisions until July 20th are better off focusing attention on alleged violations of due process than their own failure to exercise due diligence.

material flaw in his testimony, should that witness wait to see if other parties or the Commission specifically find that flaw before the witness acknowledges it? The Postal Service thinks not. The ratemaking process is better served by an approach which encourages parties to make every effort as expeditiously as possible to lead the Commission away from approaches and methods those parties discover to be flawed or erroneous, even if it means confessing error.

The Commission also should deny MMA's request that witness Fronk's NOI testimony be stricken. What basis does the MMA offer for striking witness Fronk's NOI testimony? Nothing more than that the assertion that if it is stricken, the Commission can avoid having to address whether to give the OCA a third opportunity to file testimony on matters about which it elected not to file testimony on either May 22nd or July 17th. As explained below, the Postal Service agrees that the OCA should be denied a third chance to file testimony, but for reasons altogether different than those advanced by MMA.

Meanwhile, MMA's complaint about the manner in which the impact of the two changes was presented on April 17th -- combined instead of separated -- is frivolous. On pages 9-10 of its Supplement, MMA requests that parties be prohibited from "showing the impact of correcting two or more errors in a combined fashion" and that they be required to "calculate and show separately the impact of each such change." This request seeks relief in a case where none is necessary.

Establishment of a "hard and fast" rule, as requested by MMA, would be ill-advised. It is not uncommon, in response to a deluge of discovery, for a witness to uncover more than one mathematical (or other) error in an exhibit, appendix or

workpaper, while preparing responses to multiple interrogatories due at about the same time. In the interest of economy -- both for the witness and for the parties following that witness' testimony -- it often makes sense for the witness to separately identify or describe each particular error, but then execute all of the necessary mathematical corrections simultaneously, in order to avoid filing (simultaneous or near simultaneous) multiple sets of revisions. In the various April 17th Postal Service notices of errata, the changed pages were listed. On each revised page (hard copy and electronic), the changed numbers were shaded. With electronic spreadsheets, such as those contained in witness Fronk's original and revised workpapers, it is relatively simple for diligent and interested analysts to follow and isolate all of the changes (and their separate impacts) which are identified. This seems apparent from the ease with which the Commission was presumably able to do so for purposes of crafting NOI No. 3. It also seems to be apparent from the ease with which MMA was able to craft cross-examination exhibit MMA-XE-NOI3-1. See Tr. 34/16573.⁷ The MMA request appears more to be a solution in search of a problem.

Office of the Consumer Advocate Notice

In its July 18th Request to Conduct Oral Cross-Examination on the Postal Service's NOI No. 3 testimony, the OCA appended a Notice Of Intent To Submit Rebuttal Evidence concerning NOI No. 3 on August 14th, notwithstanding the fact that such testimony was due to have been filed on July 17th. At the hearings on July 21st, the OCA indicated that it was willing to file its July 17th testimony as early as July 31st.

⁷ Only hours after examining the revised version of witness Fronk's workpaper for the first time on July 20th, according to MMA.

Tr. 34/16530. Since then, the Postal Service has been given reason to anticipate that this revised notice of intent may be further amended by a proffer of OCA testimony as early as today.

On July 18th, the OCA offered no explanation for why it should have an additional 28 days to file testimony in response to NOI No. 3. The NOI afforded the parties an extraordinary opportunity to address -- on the record -- the changes in witness Fronk's testimony which they all declined to address in testimony filed on May 22nd. On July 21st, the OCA offered no explanation for why it should be permitted to file testimony responsive to NOI No. 3 two weeks late. The Postal Service is unaware of any compelling basis for the OCA being allowed to file such testimony 10 days late.

The core issues the OCA claims now to be interested in addressing were a matter of record as early as April 17th. The OCA was silent on May 22nd. Rather than file testimony responsive to NOI No. 3 on July 17th, the OCA elected to submit a few disparaging comments about witness Fronk. That the OCA was capable of analyzing and addressing the issues raised in the NOI is self-evident by the scope and extent of its cross-examination of witness Fronk on July 21st.

The OCA's motives for ignoring the schedule established in NOI No. 3 and delaying the filing of testimony until well after July 17th are unclear. Putting aside for a moment that the NOI raises issues that parties could reasonably have been expected to address in testimony as early as May 22nd, it comes as no surprise that, if given an opportunity to control their destinies, parties would prefer 45, or 31, or 27 days to respond to an NOI, rather than 17. Perhaps, by filing at least 10 days late and nearly a week after the cross-examination of witness Fronk, the OCA seeks the advantages

inherent in preparing testimony which can be strengthened on the basis of earlier-filed testimony and cross-examination, consistent with the usual order of Commission proceedings: first, the Postal Service; then the intervenors. These are advantages that the Commission implicitly denied every party by requiring that every party file testimony or comments on July 17th.

NOI No. 3 was issued for the benefit of those parties which -- for whatever reason -- elected not to or failed to take advantage of the opportunity to address witness Fronk's April 17th changes in their May 22nd testimony. The NOI schedule provided a second opportunity for testimony on a discrete issue to be heard before the parties were overwhelmed with the preparation of rebuttal testimony which is due to be filed on August 14th. The failure of the OCA to twice take advantage of procedural opportunities afforded by the Commission should not have the unfair consequence of imposing upon others who diligently responded to the NOI and who presently are immersed in the preparation of rebuttal testimony due to be filed on August 14th. The OCA has yet to explain what part of "July 17th" it did not understand.

Presumably, the OCA will offer a "solution" to the "problem" created by its lack of diligence and/or cunning litigation strategy. Perhaps, the OCA will suggest (1) that the Commission allow the filing of testimony responsive to the NOI today, (2) that the Commission set hearings for cross-examination on that testimony on a date next week on which hearings already are scheduled, (3) that the Commission invite the Postal Service to conduct cross-examination then, and (4) permit the Postal Service to file "rebuttal" testimony on August 14th. However, in the absence of any compelling basis for granting the OCA a third opportunity to file testimony, such a proposal should be

summarily rejected. The Commission established a very accommodating schedule for the parties to pursue an extra opportunity to file testimony addressing witness Fronk's April 17th changes. They declined to file such testimony. Now, when time for parties to prepare rebuttal testimony in time for filing on August 14th is very limited and most precious, the OCA considers that it can unilaterally declare its intent to amend the schedule that the Commission had the temerity to impose on June 30th in NOI No. 3. The OCA's quest for due process stands due process on its head.

By electing to file comments in response to NOI No. 3 on July 17th, the OCA has waived its right to file testimony responsive to the NOI. The OCA's extensive cross-examination of witness Fronk on July 21st refutes any suggestion that the OCA lacked sufficient understanding of the issues raised in the NOI to file testimony on July 17th.

ABA&NAPM Comments

After characterizing the manner in which the burdens of rate case litigation have been affected by the need to digest additional information the Postal Service has been directed by Commission Order No. 1294 to provide, ABA&NAPM express support for the July 17th comments filed by MMA and the OCA. Otherwise, ABA&NAPM propose that the Commission reject witness Fronk's April 17th methodological change in forecasting First-Class Mail single-piece additional ounces in the test year. However, they offer no reason why the Commission should reject that April 17th change, but accept the April 17th correction of the test year revenue estimate. While some parties have apparently calculated that one change benefits their litigation objectives and another does not, the Postal Service considers that loftier motives should inform the

Commission's judgment. Incorporation of both changes permits the Commission to end up closer to a right answer than an approach which turns a blind eye to half of reality.

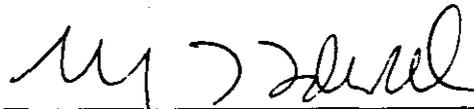
For the same reason, the Postal Service considers that the Commission should reject the second ABA&NAPM proposal that the Postal Service be directed, in further responding to Order No, 1294, to not incorporate its April 17th revised single-piece First-Class Mail additional ounce volume projections. In the absence of any explanation of why the Postal Service should be required to take such an approach, one is left to conclude that ABA&NAPM's proposals are purely result-oriented.

For the foregoing reasons, the various requests for relief should be denied.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorney:



Michael T. Tidwell

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.



Michael T. Tidwell

475 L'Enfant Plaza West, S.W.
Washington, D.C. 20260-1137
(202) 268-2998, Fax -5402
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