Postal Rate Commission
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UNITED STATES OF AMERICA
Before the
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

Periodic Reporting) Docket No. RM2003-3

OFFICE OF THE CONSUMER ADVOCATE
REPLY COMMENTS
(July 11, 2003)

On January 8, 2003, the Commission proposed several amendments to its periodic reporting requirements [39 CFR § 3001.102]. Proposed section 102(a)(1) would, in effect, require the Postal Service to produce sufficient information to replicate each year's CRA. Proposed section 102(a)(2) would, in effect, require the Postal Service to produce sufficient information to replicate each year's Cost Segments and Components Report. In comments filed on July 2, 2003, the Postal Service vigorously opposes these proposed rules. As an obvious beneficiary of these rules, the Office of the Consumer Advocate (OCA) vigorously supports their adoption.[1]

One can smell the fear. The Postal Service fears that shoddy work will be exposed, and that participants in ratemaking proceedings will stand closer to equal footing with the Service. Whether the Commission and intervenors have a legitimate need for the information identified in the proposed rules is not the real issue as far as the Postal Service is concerned. Rather, preserving adversarial advantages and hiding errors motivate the Service's opposition to the new rules.

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[1] *See* Office of the Consumer Advocate Comments on Notice of Proposed Rulemaking to Revise the Commission's Periodic Reporting Rule, February 10, 2003.

The Postal Service goes so far as to accuse the Commission and its staff of bias against the Postal Service. The accusation is based solely on the possibility that the new information could "enable the Commission or other parties to conduct hypothetical exercises involving alteration of key inputs and reanalysis of underlying cost behavior."[2] The Service raises the specter of a rogue Commission, whose staff is secretly[3]

> replicating, validating, and otherwise manipulating the fundamental financial and operating information sought in this rulemaking [and] inevitably forming impressions and conclusions from their investigations[.] [W]hat is to prevent those impressions and conclusions from influencing the outcome before anyone has had their opportunity to persuade? No safeguards exist which would prevent such contamination of the hearing process . . . .

Knowledge may be power, but it is not bias. The Postal Service's speculation as to the Commission's impure motives is disrespectful and borders on insult.

In a recent op-ed piece in the *Washington Post* entitled "Jurors Must Be Impartial. They Shouldn't Be Clueless," Charles H. Whitebread, a law professor at the University of Southern California, writes,[4]

> It has become an article of faith that an "untainted" jury is an essential ingredient of a fair trial and that the ideal juror is unadulterated, as though newly hatched from an opaque, soundproof bubble.
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> Initially, American colonial courts . . . gave preference to jurors who knew the facts before trial. By the end of the 18th century, Americans had incorporated the notion of impartiality into jury selection.
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> But impartiality only means without bias. *It does not mean without knowledge.* The courts have long recognized that jurors can set aside what they might know about a case, and that it's preferable to have jurors who are tuned into the world around them than ones who are hermits.

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[2] Substantive Comments of the United States Postal Service, July 2, 2002, at 6 ("Substantive Comments").

[3] Id. at 17.

[4] Sunday, June 22, 2003, page B1 (emphasis added).

Likewise, knowledgeable Commissioners are preferable to blank slates.

The Postal Service, however, would prefer the Clueless Rate Commission; even better, the three ancient monkeys. The Service argues that a Commission that can replicate a CRA is biased, while a Commission that can only read a CRA is not. The silliness of this argument is difficult to exaggerate. Significant changes in costing methodology are readily apparent to a reader of the CRA. Reasons for the changes can be deduced from analysis of prior years' CRAs or from reading the trade press. A Commission that does not like the effect of changes to the CRA can become just as "biased"—if not more so—as a Commission that is informed of the bases and techniques underlying the changes. Or, to be more positive, there is no reason to expect knowledge to produce bias.

In addition to the bias charge, the Postal Service raises due process concerns.[5] Apparently, only the Postal Service is entitled to due process in Commission proceedings. Or, to be more precise, the Postal Service is entitled to procedural advantages that effectively deny due process to other participants. The notion that a fair APA hearing requires due process for *all* participants has escaped the Service's notice. But even the OCA is entitled to due process.[6] And providing due process to all participants within a ten-month time period is "a compelling and legitimate Commission

[5] "[T]he Commission is not authorized to go off on its own, outside the constraints of formal, on-the-record, APA proceedings, and tinker with the fundamental cost and revenue information of the Postal Service in ways that could compromise the legitimacy of its recommended decisions, and, potentially, make vulnerable to attack the final ratemaking decisions of the Governors." Substantive Comments at 12.

[6] 39 U.S.C. § 3624(a).

function."[7] Yet the Postal Service finds that the ten-month deadline trumps *all* other statutory provisions with which it might conflict.[8]

> Hand in hand with the Board's power to initiate rate cases is the requirement that the Commission issue its rate recommendations within 10 months. The potential undermining of this statutory constraint posed by the proposed rule is apparent. If the Commission were to possess year-round the types of financial and operations information heretofore provided only in support of Postal Service rate requests, the 10-month limitation on rate case activity would effectively evaporate.

The OCA would ignore this silly argument were it not for the contempt displayed by the Postal Service for the due process rights of other participants. The Postal Service apparently views the ten-month deadline as something to be shortened, regardless of any negative impact on other participants.[9] If a new Commission reporting requirement fails to shorten proceedings, then it is worthless.[10] Indeed, not only is the proposed rule worthless, but it could lead to—horror of horrors—"increasingly detailed evidentiary presentations by participants *requiring rebuttal*"![11] By viewing this rulemaking solely as a tug of war between the Commission and itself, the Postal Service fails to address the most important issue: Will participants be better able to present their cases and rebut the Service if the new rule is adopted? This possibility never enters the Service's calculus.

As a participant in rate cases, the OCA has watched the complexity and sophistication of Postal Service presentations rise exponentially. The "lead" time

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[7] Substantive Comments at 13.

[8] Id. at 15.

[9] But the motivation behind the ten-month deadline was to ensure the rights of participants to a *meaningful* hearing before postal rates changed. Prior to the institution of the deadline, the Postal Service could raise rates temporarily after 90 days. These "temporary" rates became *de facto* permanent rates. The ten month deadline was designed to balance participants' need for a hearing *before* rates changed against the Service's need for additional revenue. The proposed reporting requirements represent an attempt to restore that statutorily mandated balance.

[10] Id. at 16.

required by the OCA (or any other participant) to match the level of the Service's evidence has also increased exponentially. But the Postal Service seeks to preserve its lead-time advantage of "six months"[12] while denying *any* lead time to participants. At some point (already passed, as far as the OCA is concerned) the advantage to the Postal Service becomes overwhelming, and due process evaporates. Whatever may have motivated the Commission to propose the new periodic reporting rules, the effect of their implementation will be to level the litigation field for participants other than the Postal Service. This is a legitimate (and statutorily mandated[13]) goal for the Commission to pursue, and the Postal Service has failed to show that this goal is counter-balanced by paranoid perceptions of possible bias on the part of the Commission.

Respectfully submitted,

Emmett Rand Costich
Attorney

Shelley S. Dreifuss
Director
Office of the Consumer Advocate

1333 H Street, N.W.
Washington, D.C. 20268-0001
(202) 789-6830; Fax (202) 789-6819

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[11] Id. (Emphasis added.)

[12] "The burden of producing this information is so heavy that the Postal Service must begin its preparation approximately six months in advance of a case filing in order to ensure that it is ready for the filing." Id. at 21.

[13] *See* note 5, *supra.*