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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

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

SPECIAL SERVICES REFORM, 1996 | Docket No. MC96-3

OPPOSITION OF THE UNITED STATES POSTAL SERVICE TO OFFICE OF THE CONSUMER ADVOCATE MOTION TO COMPEL RESPONSES TO INTERROGATORIES OCA/USPS-77 (Parts d and e) AND 84 (Part d)
(October 10, 1996)

The United States Postal Service hereby responds to the Office of the Consumer Advocate Motion to Compel Responses to Interrogatories OCA/USPS-77 (Parts d and e) and 84 (Part d), filed on October 3, 1996 (*"OCA Motion"*). The OCA has not made any arguments which persuasively demonstrate that the information should be produced. Accordingly, the OCA's Motion must be denied.

OCA/USPS-77(d) and (e) request that the Postal Service state whether the employee sampling rates reflected in the attachment to the response to OCA/ USPS-58 are the same for FY 1996 and FY 1997 and, if not, to provide a table for each of those respective years showing the rates. The primary reason asserted by the OCA as justification for production of the requested information is that it would not be burdensome to provide answers. This is hardly germane. Ease of production has nothing whatsoever to do with relevance. The only thing the OCA has to say about relevance is that subparts (d) and (e) "are clearly relevant for the purpose of verifying the Service's response to parts (a) and (b) of the same interrogatory." *OCA Motion at 4*. This is a *post hoc* rationalization. Certainly, when the OCA initially asked the interrogatory, it could not have known what the answers to subparts (a) and (b) would be. Thus, the OCA could not have intended subparts (d) and (e) to "verify" the then non-existent responses to subparts (a) and

(b).[1] Further, the OCA does not even attempt to demonstrate that the employee sampling rates for FY 1996 and FY 1997 have any bearing on any issue in this case. Why are they needed? What purpose do they serve? What, if anything, will they demonstrate about the FY 1995 IOCS data, which are the data used in this case? The OCA remains oddly silent.

The Postal Service is prepared to answer 84(d), although the answer will be the same as the recent response to 54(e)—that the Postal Service is not able to provide the requested information.[2] Despite providing this answer, the Postal Service still does not concede that the requested information is relevant. The OCA does not seem to understand that CAG costs reflect all offices in a CAG, regardless of the number of offices. The OCA indicates that it needs a response to subpart (d) to test the extent to which the assumption that the sample offices in each CAG represent an equal probability sample is incorrect. *OCA Motion at 5.* Even assuming for the sake of argument that the assumption is incorrect, the OCA still cannot demonstrate that this would have any impact on the classes and subclasses of mail in general, much less on the special services that are the subject of this docket.

Moreover, the information sought by interrogatories 77(d) and (e) and 84(d) is not proper discovery under Special Rule 2.E.[3] That rule provides in full:

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[1] In addition, the responses to subparts (a) and (b) are based on recent previous years and may not necessarily have a bearing on future years where circumstances might change.

[2] *See Response of United States Postal Service to Interrogatories of the Office of the Consumer Advocate (OCA/USPS-54(c) and (e) and 56(c)), October 7, 1996.*

[3] The OCA says it is "equally desirous of a ruling on this issue" and further claims that it "has refrained from filing motions to compel with respect to numerous (continued...)

> *E. Discovery to Obtain Information Available Only from the Postal Service.* Rules 25 and 27 allow discovery reasonably calculated to lead to admissible evidence during a noticed proceeding with no time limitations. Generally, through actions by the presiding officer, discovery against a participant is scheduled to end prior to the receipt into evidence of that participant's direct case. An exception to this procedure shall operate when a participant needs to obtain information (such as operating procedures or data) available only from the Postal Service. Discovery requests of this nature are permissible up to 20 days prior to the filing date for final rebuttal testimony.

The OCA's basic argument seems to be that this rule allows for all manner of wide-ranging discovery aimed at developing "evidence" unrelated to any testimony. *See OCA Motion at 3.* The OCA is wrong on several counts.

First, a logical reading of the rule indicates otherwise. The fact that the deadline for Rule 2.E requests is set with respect to final rebuttal testimony does not appear to be mere coincidence. Rather, this strongly suggests that Rule 2.E requests are supposed to be targeted at developing testimony. Second, a recent Presiding Officer's Ruling from Docket No. MC95–1 specifically ties requests under the rule to the ability of participants to develop testimony. In Presiding Officer's Ruling No. MC95–1/73, an OCA motion to compel a response to an interrogatory asking for further explanation of library reference materials used in Postal Service witness Tolley's volume projections was denied. The Presiding Officer held:

> *This situation does not bring into play special rule 2.E, which allows for discovery of information available only from the Postal Service in order to enable participants to develop rebuttal testimony.* The time for

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[3] (...continued)
discovery requests pending a ruling on the Service's 2.E objections." *OCA Motion at 2–3.* If the OCA plans on filing motions to compel outside of the time prescribed by Special Rule 2.B, it can expect vigorous opposition from the Postal Service.

> submitting evidence rebutting Postal Service testimony has passed. OCA/ USPS-147 does not appear reasonably calculated to lead to the production of evidence in rebuttal to the direct case of a participant other than the Postal Service.

Presiding Officer's Ruling Denying OCA Motion to Compel, Presiding Officer's Ruling No. MC95–1/73, September 21, 1995 (emphasis added).

A later Presiding Officer's Ruling in Docket No. MC95–1 (No. MC95–1/79), which held, in different circumstances, that the earlier ruling (No. MC95–1/73) did not control, is clearly distinguishable from the instant situation. The later ruling was squarely limited to the particular situation presented there—where specific discovery was tied to specific Notices of Inquiry. As the Presiding Officer stated:

> I disagree with the Postal Service's argument that Ruling No. MC95–1/73 should control the outcome of this dispute. *The crucial difference is the issuance of the Notices of Inquiry cited by OCA.* Commission initiatives of this nature can reasonably be expected to affect the interests and needs of participants in a proceeding, including potential "needs to obtain information...available only from the Postal Service." Consequently, there is no justification for concluding that the ambit of Special Rule 2.E does not extend to discovery requests of the kind at issue here.

Presiding Officer's Ruling Denying OCA Motion to Compel Responses to Interrogatories OCA/USPS-152, 156 and 157, Presiding Officer's Ruling No. MC95–1/79, October 5, 1995 (emphasis added). In the instant docket, there are no Notices of Inquiry. Further, it should also be noted that, despite the fact that the MC95-1 discovery might not have been precluded by Special Rule 2.E, it was still disallowed as irrelevant and burdensome.[4]

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[4] The OCA had argued that the requested information would permit meaningful (continued...)

Presiding Officer's Ruling No. MC95-1/73 is consistent with earlier, contemporaneous interpretations. When Special Rule 2.E was adopted in Docket No. R87-1, the Presiding Officer explained the rationale behind the rule, stating, "Finally, questions eliciting information on Postal Service operating methods or data which may be necessary to enable a participant to prepare rebuttal evidence will be allowed, but participants are cautioned not to abuse this procedural device." *Presiding Officer's Ruling Publishing Proposed Special Rules and Schedule, Presiding Officer's Ruling No. R87-1/3, May 21, 1987, at 2.* Later in that docket, the Presiding Officer again stressed that the rule applied to discovery situations tied to preparation of testimony. The Presiding Officer said:

> 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.

Presiding Officer's Ruling Granting New York State Consumer Protection Board Motion to Compel, Presiding Officer's Ruling No. R87-1/108, September 11, 1996, at 1-2.

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[4] (...continued)
responses to the Notices of Inquiry, would enable evaluation of certain aggregated cost differences, and would allow the Commission to recommend increased worksharing discounts under the extant classification structure. *Office of the Consumer Advocate Motion to Compel Responses to Interrogatories OCA/USPS-152, 156, and 157, September 25, 1995, at 3–4.* In that instance, the Presiding Officer found the relevance of the requested information "somewhat attenuated." *Ruling No. MC95–1/79, at 2.* The relevance of the information requested here by the OCA is completely attenuated, given that the OCA has made no credible argument demonstrating that the information has anything to do with the issues in this case.

The OCA's point regarding inclusion into the record of Postal Service institutional responses is likewise uninstructive. The theory behind allowing institutional responses to become "evidence" is founded upon a belief that "[i]t is reasonable that certain items of relevant background information may be known to an institution while not being in the ambit of knowledge of an identified witness." *Presiding Officer's Ruling Establishing Procedures for "Institutional" Interrogatory Responses, Presiding Officer's Ruling No. R94–1/29, June 8, 1994, at 1.* It is neither based on Special Rule 2.E nor on a belief that any and all manner of questions can be directed to an institution regardless of their remote relationship to the specific issues in a case.[5] Additionally, it should be noted that institutional responses do not automatically become evidence. The party desiring inclusion in the record generally must provide written designations, and other participants are provided a chance to lodge objections. *Id. at 1–2.*

Finally, the OCA's function of developing a complete and accurate record has no bearing on the appropriate scope of Special Rule 2.E. This is clear from an examination of a fuller quotation from the policy statement referred to by the OCA. *See OCA Motion at 1–2.* That policy statement provides, in pertinent part:

> 1. The officer of the Commission appointed under 39 U.S.C. 3624(a) shall be appointed from the Office of the Consumer Advocate and shall assist, *using the means and procedures available to parties before the Commission*, to develop a complete and accurate record by:

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[5] If Special Rule 2.E were designed to produce evidence directly rather than through the responses' inclusion in testimony, then the deadline for discovery under the rule probably would have been set at 20 days before briefs were due.

(a) Identifying information or data that are needed in addition to those presented by other parties;

(b) Identifying inaccuracies or fallacies in submitted data or information; and

(c) *Sponsoring relevant and material evidence which presents needed data or information, which critiques record evidence, or which supports proposals of the officer or other participants* not inconsistent with Commission precedents and judicial decisions reviewing Commission precedents....

39 C.F.R., Pt. 3002, App. A (emphasis added). A fair reading of the policy statement indicates that the Office of the Consumer Advocate, in fulfilling its function of developing the record, has the same freedoms and is subject to the same constraints as are other participants in Commission proceedings. It is not a blanket dispensation for the OCA to pursue record development or any other goal, for that matter, outside the normal parameters of a Commission proceeding.

No one can dispute that all participants, as well as the Commission, have a stake in developing a complete and accurate record. Other participants pursue discovery in this regard and the Commission issues various information requests and notices of inquiry toward this end. The OCA, like the other participants, however, is representing particular interests, often in opposition to Postal Service proposals. It should not be exempt from the same rules and standards governing other participants. To allow the OCA to conduct ongoing discovery to develop the record, outside the appropriate confines of Special Rule 2.E, while requiring other participants and the Postal Service to abide by established discovery restrictions,

would negate the principles of fairness which underlie the due process rights of the other participants.

Moreover, the reference in subsection (a) to "information or data that are needed" and the reference in subsection (c) to "relevant and material evidence" further reinforce the point that the OCA is subject to the same constraints as other participants in Commission proceedings. These references make clear that the evidence must be germane to the issues at hand.[6] The OCA, however, has been remiss in linking its discovery questions to issues presented in this docket.[7] If the OCA (or others) are to be allowed to conduct broad-ranging discovery on the most tangential of issues, outside the confines of Special Rule 2.E, then the Postal Service will quickly lose any incentive for pursuing limited cases. Parties can expect even the most minor of rate or classification adjustments and any proposals

[6] If inclusion of maximum evidence in the record is the only goal of any consequence in a Commission proceeding, then all participants should be free to conduct discovery on any issue, relevant or not, throughout the entire course of a proceeding. Obviously, this is an unworkable proposition and would result in a misallocation of resources. If a participant is constantly busy responding to discovery and engaging in the related motions practice, then that participant is not free to focus on directing discovery to others, preparing for and conducting oral cross-examination, and researching and writing briefs. The full panoply of activities in Commission proceedings are important. Balanced attention to all phases of a proceeding will result in the development of a complete and accurate record.

[7] The OCA's examples of the Postal Service's provision of one quarter of TRACS data and the lack of reference to certain employee sampling rates in the IOCS documentation are cases in point. The Postal Service historically has provided one quarter of TRACS data and generally has not made reference to employee sampling rates in the IOCS documentation. Other than intimating that it is developing the record, the OCA never convincingly demonstrates why these are issues now and what they have to do with its own proposals in this docket, much less the proposals of others.

for new offerings to be presented only in the context of omnibus cases, where the time, effort and expense of litigation will be increased. Neither the Postal Service, its customers, nor the Commission stand to profit from such a result.

For all of the foregoing reasons, as well as the reasons cited in its initial objection, the OCA Motion to Compel must be denied.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

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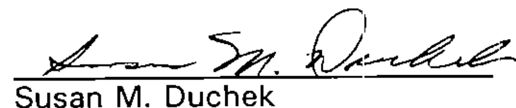
CERTIFICATE OF SERVICE

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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