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

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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

SPECIAL SERVICES REFORM, 1996

Docket No. MC96-3

ANSWER IN OPPOSITION TO MOTION OF DOUGLAS F. CARLSON
TO COMPEL RESPONSES TO INTERROGATORIES DFC/USPS-1-6

The United States Postal Service hereby responds to the Motion of Douglas F. Carlson to Compel Responses to Interrogatories to United States Postal Service (DFC/USPS-1-6) ("Motion"), filed December 16, 1996.

On November 14, 1996, Douglas F. Carlson filed interrogatories DFC/USPS-1-6 to the Postal Service. On November 25, 1996, the Postal Service filed general and specific objections to those interrogatories.¹ By motion filed December 10, 1996, Mr. Carlson requested an extension of time to file a motion to compel responses to those interrogatories,² and on December 16, 1996, Mr. Carlson's Motion to Compel was filed with the Commission. The Postal Service's response to Mr. Carlson's Motion to Compel on the Postal Service's general objection to DFC/USPS-1-6 is presented first, followed by Mr. Carlson's arguments challenging objections specific to individual interrogatories.

GENERAL OBJECTION

Interrogatories DFC/USPS-1-6 seek institutional responses from the Postal Service on a variety of topics ranging from historical postal card issues to return receipt delivery operations. Mr. Carlson claims interrogatories 1-6 fall within the

¹ Objection of United States Postal Service to Interrogatories of Douglas F. Carlson (DFC/USPS-1-6) (filed Nov. 25, 1996) ("Objection").

² Douglas F. Carlson Motion for Extension of Time to Respond to United States Postal Service Objection to Interrogatories DFC/USPS-1-6 (filed Dec. 10, 1996).



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scope of Special Rule of Practice 2E ("Special Rule 2E"). That rule 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." The time for submitting discovery to the Postal Service under Rule 2E expired on November 15, 1996. P.O. Ruling No. MC95-3/3, Attachment A.

The Postal Service's general objection to these interrogatories stemmed from the fact that Mr. Carlson has already prepared and submitted his testimony in the second phase of this proceeding,³ and his interrogatories were not intended for the preparation of rebuttal testimony. Objection at 1-2. The Postal Service does not dispute that, under certain conditions, participants were eligible to direct discovery requests under Special Rule 2E to the Postal Service until November 15, 1996, or that Mr. Carlson's interrogatories were filed one day before the deadline. The Postal Service does contest, however, Mr. Carlson's mistaken interpretation of Special Rule 2E to permit "institutional interrogatories until November 15, 1996, *to clarify issues on subjects related to participants' rebuttal testimony.*" Motion at 4 (emphasis added). Mr. Carlson's interpretation of Special Rule 2E conflicts with well-established

³ The procedural schedule contemplates three phases of hearings, with each successive phase limited in scope by the previous one. According to the Procedural Schedule, P.O. Ruling No. MC96-3/3, Attachment A, and the Amended Procedural Schedule, P.O. Ruling MC96-3/15, the first phase of this proceeding ended with the receipt into evidence of the Postal Service's case-in-chief on September 11, 1996. The second phase of this proceeding began with the filing of participant's cases-in-chief (including rebuttal to the Postal Service) on September 30, 1996, and ended with the receipt into evidence of those direct cases and rebuttal, on November 25, 1996. The third phase of this proceeding began on December 6, 1996, with the filing of testimony rebutting participants' presentations in the second phase, and continued through their respective appearances on the stand. The procedural schedule does not contemplate the later filing of any additional testimony.

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Commission precedents limiting the scope of discovery under the rule; consequently, his argument that interrogatories 1-6 fall within the scope of the rule is incorrect.

As clearly explained in P.O. Ruling No. MC96-3/21, the purpose for which participants may avail themselves of discovery under Special Rule 2E is narrow:

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). The Presiding Officer's holding in P.O. Ruling No. MC96-3/21 is consistent with prior rulings that Special Rule 2E is intended for the specific purpose of *developing rebuttal testimony*, not, as Mr. Carlson suggests, for the more far-reaching purpose of *clarifying participant's rebuttal presentations*. This is clearly set forth 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). In Ruling No. R87-1/108, the Presiding Officer elucidated 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

⁴ Special Rule 2E in Docket No. R87-1 was substantially identical to Special Rule 2E in the instant docket. See Docket No. R87-1/3, Attachment B at 3-4.

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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.

P.O. Ruling R87-1/108 at 1-2 (emphasis added). The burden of establishing that the purpose of the interrogatories 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. Placing the burden on the discovering party is manifestly reasonable, for only it is capable of revealing the purpose for which its interrogatories are intended.

In this case, Mr. Carlson has utterly failed to meet his burden. He claims only that interrogatories 1-6 are "related to the OCA's rebuttal testimony," Motion at 6, and therefore are proper cross-examination under Special Rule 2E.⁵ That the OCA has offered rebuttal testimony on topics related to Mr. Carlson's interrogatories does not, however, make them proper written cross-examination under Special Rule 2E. In order for Mr. Carlson's interrogatories to fall within the scope of Special Rule 2E at

⁵ Mr. Carlson's attempt to link his interrogatories to OCA rebuttal testimony is patently disingenuous. Nowhere in his Motion has he shown how interrogatories 1-6 are intended to clarify OCA's rebuttal testimony; at best, he has only demonstrated that some of his interrogatories are related to Postal Service evidence offered earlier in this proceeding.

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this stage of the proceeding, he must show that his interrogatories are intended for the purpose of developing his rebuttal testimony in the third stage. This he has failed to do. Nowhere in his pleadings has Mr. Carlson so much as suggested he would file rebuttal in the third phase, and, of course, the opportunity to do so has long passed. Given, moreover, that the subject matter of the interrogatories involves proposals which were opposed by the OCA, *i.e.*, the stamped card, return receipt, and post office box fee proposals, Mr. Carlson would also have to show that his interrogatories were designed to obtain evidence needed to *rebut* the OCA's testimony. Given that Mr. Carlson's sympathies apparently lie with the OCA's positions, it would seem improbable that Mr. Carlson would rebut the OCA. Consequently, Mr. Carlson's interrogatories are not proper discovery under Special Rule 2E because he has failed to link them with the preparation or filing of rebuttal testimony.

Mr. Carlson's contention that the Postal Service's interpretation of Special Rule 2E would render the rule "useless" and "superfluous," Motion at 3, is erroneous. Mr. Carlson claims the Postal Service's interpretation of Special Rule 2E "would not seem to allow any discovery between September 30 and November 15." That outcome does not flow from a misinterpretation of the rule; it is rather the dynamics of this particular case that have brought about that result. Specifically, the limited use of direct cases filed by parties, and participants' decisions not to rebut the testimony submitted in the second phase, have made it unnecessary for parties to conduct discovery under Rule 2E in this case. This is not to say that Special Rule 2E is of no value after testimony is filed in the second phase. In a typical omnibus proceeding, it

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would not be unexpected for participants to submit direct cases in the second phase favoring adoption of the Postal Service's proposals or presenting proposals of their own. In that instance, consistent with the previous rulings on the proper scope of Special Rule 2E, a participant wishing to submit evidence in the third phase rebutting another participant's second-phase presentation may avail itself of Special Rule 2E to obtain evidence to be used in preparation for the former's third-phase rebuttal presentation. This docket is unlike typical omnibus proceedings, given the relatively light opposition generated by the Postal Service's proposals, and the comparative dearth of direct cases supporting the Postal Service or presenting new intervenor proposals.⁶ In the absence of evidence in the second phase which would form the basis for rebuttal by Mr. Carlson, his reliance on OCA's rebuttal testimony as a springboard for conducting discovery against the Postal Service under Rule 2E is pretextual. Mr. Carlson's ill-conceived and speculative interpretation of Rule 2E would threaten to complicate and delay proceedings by giving participants the opportunity to conduct virtually unlimited discovery until the end of the second phase of the proceeding. Mr. Carlson's view is also plainly contrary to the history and intent of Special Rule 2E, especially the admonition in P.O. Ruling No. R87-1/118 that the rule not serve to create "another round of discovery against the Postal Service." P.O.

⁶ Some of the OCA witnesses supported certain aspects of the Postal Service's proposals in their direct testimonies, such as Dr. Sherman's support for the special delivery proposal, Tr. 7/2283, and Mr. Callow's proposal that Group II post office box service fees be doubled. Mr. Carlson's interrogatories, however, do not address Postal Service proposals supported by the OCA, and he has not indicated any interest in rebutting that presentation.

Ruling No. R87-1/118 at 2.⁷

In sum, Mr. Carlson's interrogatories are improper cross-examination under Special Rule 2E. On this basis alone, Mr. Carlson's Motion to Compel must be denied.

SPECIFIC OBJECTIONS

Even assuming Mr. Carlson met his burden of proving interrogatories 1-6 are proper discovery under Special Rule 2E, his Motion should still be denied on the grounds that the information sought is irrelevant or privileged, or both.⁸

Interrogatories DFC/USPS-1, 2, and 3

Interrogatory 1 requests information on the underlying bases for decisions long ago by postal management to introduce multi-color postal cards and eliminate single-

⁷ Given the recent ruling extending the scope of follow-up interrogatories to responses to Presiding Officer Information Requests, Tr. 10/3624, the Postal Service is concerned that the scope of discovery will be expanded upon it to such an extent as to deprive of it a fair opportunity to prepare its initial brief, especially in omnibus cases. That ruling also threatens to delay and complicate procedural schedules by reopening discovery on postal witnesses after the first phase. That, in turn, seriously threatens the Commission's ability to control its proceedings, limit the scope of each successive phase, and meet its 10 month deadline, particularly in omnibus proceedings.

⁸ To the extent Mr. Carlson argues that interrogatories 1-6 are follow-up, they are untimely. Special Rule 2D provides that, absent "extraordinary circumstances," follow-up interrogatories must be served within 7 days of the receipt of an answer to the previous interrogatory. The responses to discovery that Mr. Carlson cites as conferring follow-up status to interrogatories 1-6 were filed well after the 7 day period elapsed. Mr. Carlson, moreover, has shown absolutely no "extraordinary circumstances" warranting the late filing of his purportedly "follow-up" interrogatories. Moreover, with respect to interrogatory 3, Mr. Carlson's bare allegation that this is "proper follow-up" to witness Lyons' oral testimony in September, Motion at 8 (citing Tr. 2/184-85) is particularly specious. The Commission's Rules of Practice do not provide for written "follow-up" of oral cross-examination, let alone nearly two months after a witness' appearance.

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color design postal cards. Interrogatory 2 seeks detailed historical information on postal cards issued eleven years ago commemorating Charles Carroll, George Wythe, and Clipper Flying Cloud. In the alternative, the Postal Service is asked to provide detailed, historical, comparative cost information for multi- and single-color postal cards. Interrogatory 3 asks whether the Postal Service has considered producing single-color design postal cards since September 9, 1996.

As explained in the Postal Service's Objection, interrogatories 1, 2 and 3 are objectionable on grounds of relevance. The information sought in these interrogatories is plainly immaterial to the issues before the Commission and would drastically expand the scope of this proceeding. Procedures and policies related to designs for postal stationery are well within the Postal Service's and the Citizen's Stamp Advisory Committee's discretion, which are not properly reviewed by the Commission. See 39 U.S.C. § 401(a)(4); see also POM § 212.1 (establishing procedures for selection of designs for postal stationery). Additionally, much of the information sought in interrogatories 1, 2, and 3 is historical, dating back to the mid-1980s and possibly to earlier decades, and therefore would be of no utility in evaluating the Postal Service's proposal for a stamped card fee. Given its age, moreover, it is uncertain whether any such information exists, and, even if it does, the burden imposed on the Postal Service to search for any existing data would be manifestly undue, particularly given the complete lack of relevance the requested information has on the subject matter of this proceeding. While this information may be of interest to philatelists or hobbyists, it simply has no bearing on the

Commission's evaluation of the classification and pricing criteria of 39 U.S.C. §§ 3622 and 3623.

Mr. Carlson's insistence that the information sought is relevant to the stamped card fee proposal cannot be taken seriously. The gist of his argument is that the information he seeks in these interrogatories could be used to demonstrate that the cost of producing a single-color design postal card would be less than a multi-color design. Motion at 6. If this is the case, then Mr. Carlson posits that the Commission could use this information to "properly direct the Postal Service to explore less-expensive alternatives to the current postal cards and then return with a revised request in a future case." Motion at 6-7. Mr. Carlson apparently believes the Commission is equipped to second-guess philatelic decisions of the Postal Service, by directing it to "explore less costly" philatelic designs. Mr. Carlson mistakenly confuses the Board of Governors' and the Commission's respective roles. The Court of Appeals has clearly explained that Congress intended "to vest in the Board of Governors exclusive authority to manage the Postal Service." *Governors of United States Postal Service v. United States Postal Rate Commission*, 654 F.2d 108, 114 (D.C. Cir. 1981) ("*Governors*"). The *Governors* court explained that while Congress envisioned the Commission and Board to be partners,

Congress did not intend that the Postal Rate Commission regulate the Postal Service; one partner does not regulate another, and authority to assist in ratemaking and classification does not include authority to interfere in management. It follows that a management decision by the Postal Service may not be overruled or modified by the Rate Commission.

Id. at 115. Consistent with *Governors*, the Commission has wisely recognized that

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postal management's decisions on "what assets to buy, when to buy them, how to finance such purchases, and how to recoup their costs is committed to the discretion of postal management." P.O. Ruling No. R87-1/107 at 5.

Mr. Carlson apparently intends to show that the Postal Service has not exercised proper economy in selecting postal card designs. Even assuming, for purposes of argument only, the truth of that proposition, the Commission is not equipped to provide the relief Mr. Carlson seeks, *i.e.*, a mandate that the Postal Service "explore less-expensive alternatives," Motion at 6. Adoption of Mr. Carlson's argument would require the Commission to engage in a wholesale review of stamped paper procurements and philatelic selections. Such topics lie at the heart of postal management's decisionmaking, and accordingly, fall outside the scope of the Commission's evaluation of the stamped card fee proposal.⁹ Consequently, the information sought in the interrogatories is immaterial to the matters at issue in this proceeding.

Mr. Carlson also challenges the Postal Service's deliberative process privilege objection to interrogatory 3. Surprisingly, Mr. Carlson is unfamiliar with this privilege, and he confesses that he is unable to respond to it. Motion at 7. The substance of that objection therefore remains unchallenged. Notwithstanding, the type of information sought by interrogatory 3 falls within this well-established privilege. It is hornbook law that the deliberative process privilege protects communications that are

⁹ Mr. Carlson still has other means to convey his comments. He may communicate his comments on the selection of philatelic designs through designated channels for receipt of customer inquiries. See DMM § G011.3.0.

part of the decision-making process of a governmental agency. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-152 (1975). The rationale for this privilege, the Supreme Court explained, is to protect the "decision making processes of government agencies" *Id.* at 150 (quoting authorities). This objective is achieved by protecting the contents of predecisional deliberations, so as to ensure candor among decisionmakers:

Manifestly, the ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions. The quality of a particular agency decision will clearly be affected by the communications received by the decisionmaker on the subject of the decision prior to the time the decision is made.

Id. at 151. Interrogatory 3 inquires about the "status" of deliberations that may or may not have taken place regarding prospective postal card issues. Since no final decisions on this topic have been announced, the interrogatory seeks confidential predecisional, privileged information involving policy decisions that are the exclusive province of postal management.

Mr. Carlson's contention at page 7 of his Motion that the Postal Service has somehow waived the deliberative process privilege through witness Lyons' oral testimony is erroneous. Mr. Carlson quotes a passage of witness Lyons' cross-examination at Tr. 2/185 to support this allegation. That passage reveals nothing about decisions on the selection of color designs for postal cards; rather, in that passage, witness Lyons merely expresses the opinion it is a reasonable topic for

postal management to explore.¹⁰ That a postal manager has admitted that a topic is worthy of exploration does not, *ipso facto*, annul the protection afforded to the underlying deliberation. To the contrary, that witness Lyons believed this topic was reasonable to "look at" only demonstrates that the deliberations on this topic should be afforded the protection to which they are entitled so as to avoid chilling subsequent deliberations.

Interrogatory DFC/USPS-4

As explained in the Postal Service's Objection, the nature of the information sought to be elicited in interrogatory 4 is irrelevant to the matters at issue in this proceeding. Interrogatory 4 seeks information on the identity of a postal card manufacturer and its operations and a comparison of prices paid by the Postal Service to contractors for the printing and production of postage stamps.

Mr. Carlson again attempts to link this interrogatory to his flawed understanding of the Commission's and the Board of Governors' respective roles. Motion at 8-9. Mr. Carlson insists that the information sought in interrogatory 4 could show that the Postal Service has "failed to examine its own procurement regulations" or that the Postal Service has not "take[n] steps to lower the cost of producing postal cards." Motion at 9. These findings, Mr. Carlson implies, could be used to show that the Request is "premature, unfair, and not in the public interest."

Again, Mr. Carlson's arguments reveal the interrogatory's irrelevance. As

¹⁰ In response to the Presiding Officer's question, Mr. Lyons stated, "I fully agree that's a reasonable thing to look at." Tr. 2/185.

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explained thoroughly above, following *Governors* and P.O. Ruling R87-1/107, inquiries about managerial decisions are immaterial to the Commission's evaluation of the proposed fee and classification proposals. The decision to select a supplier, and the underlying basis for the award of a contract to a supplier, is strictly a managerial prerogative having no bearing on the proposals at issue here.¹¹ Moreover, the comparative information requested about bids made by *postage stamp* suppliers is completely unrelated to the proposals at issue here, because the Postal Service has made no proposals affecting the price of postage stamps.

Mr. Carlson has failed to rebut the Postal Service's objection to interrogatory 4 on grounds of commercial sensitivity. Subpart (b) asks for a confirmation that:

some postage stamps are produced by outside contractors, rather than the Government Printing Office, because these contractors can produce the stamps at a cost lower than the Government Printing Office would charge.

As explained in the Postal Service's Objection, responding to this interrogatory could require disclosure of *comparative* information about prices charged by contractors to print postage stamps. Release of such information would compromise the Postal Service's procurement of stamp stock by giving prospective bidders substantial additional bargaining power. Even the most basic information about how one supplier's prices compare against another would give prospective bidders valuable information that may compromise future procurements.

¹¹ Independent means for affected parties to explore or protest these and other decisions may exist, but the Postal Reorganization Act provides no means for these decisions to be reviewed in this classification case.

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Interrogatory DFC/USPS-5.

Interrogatory 5 asks whether there has been at least one instance in the past 12 months in which the *Postal Service* has provided return receipt service in a manner contrary to its established procedures. Mr. Carlson's attempt to relate this interrogatory to the fee and classification proposals is futile. In his Motion, Mr. Carlson claims that the proposed fee increase for return receipts is based upon:

a service enhancement--an enhancement that 90 percent of customers previously elected not to purchase. USPS-T-8 at 86; USPS-T8-26.

Motion at 10. The proposed "service enhancement" to which Mr. Carlson refers, and which appears at the citations to Ms. Needham's testimony, is the provision of the address, if different from the address on the piece for which return receipt service is purchased. Mr. Carlson then states that "whether customers will, in fact, receive this service is relevant if the Commission is considering approving the fee hike based on the service justification." Motion at 10.

Mr. Carlson's argument is unsound. Whether customers will receive "address, if different" on return receipts if the classification change is approved is completely unrelated to the question Mr. Carlson poses. Even assuming that, in the past year, there has been a single instance in which the Postal Service left a return receipt for the recipient to complete, that fact would not show that return receipt customers have not received the address information they paid to receive. In sum, Mr. Carlson has failed to demonstrate the interrogatory's relevance.

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Interrogatory 6

Mr. Carlson advised counsel for the Postal Service that since interrogatory DFC/USPS-6 is substantively identical to DFC/USPS-T1-1, he would not require a separate institutional response to interrogatory 6 if witness Lyons provides a responsive answer to DFC/USPS-T1-1. The Postal Service is today filing a responsive answer to DFC/USPS-T1-1; accordingly, Mr. Carlson's motion to compel a response to DFC/USPS-6 is now moot.

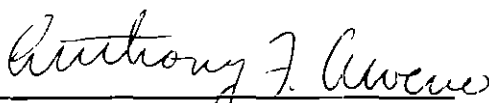
CONCLUSION

For the foregoing reasons, Mr. Carlson's Motion to Compel interrogatories DFC/USPS-1-6 should be denied.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

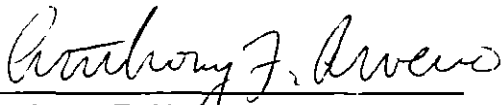
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CERTIFICATE OF SERVICE

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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December 23, 1996