

ORDER NO. 1359

UNITED STATES OF AMERICA
POSTAL RATE COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners:

George Omas, Chairman;
Dana B. Covington, Sr., Vice Chairman;
Ruth Y. Goldway; and Tony Hammond

Experimental Rate and Service Changes
To Implement Negotiated Service Agreement
With Capital One Services, Inc.

Docket No. MC2002-2

ORDER ACCEPTING CERTIFICATION OF QUESTIONS
AND DISPOSING OF MOTION FOR DECLARATORY RULING

(Issued February 3, 2003)

In Ruling No. MC2002-1/17, the Presiding Officer in this proceeding certified questions arising from a pleading filed by intervenor and co-proponent Capital One Services, Inc. ("Capital One" or "COS"). Presiding Officer's Ruling No. MC2002-2/17, January 17, 2003. That pleading gives notice of Capital One's intention to object to admission of certain portions of the direct case filed by the Office of the Consumer Advocate in this case, and requests issuance of a declaratory ruling stating that the rate proposals advanced in the OCA testimony to which it objects will not be considered by the Commission in this proceeding. Notice of Intention to Object to Admission of OCA Testimony and Request for Declaratory Ruling, January 8, 2003 ("Notice and Request").

The Presiding Officer found that Capital One's Notice and Request involves important due process and other legal issues that may affect the ultimate outcome of this proceeding. For this reason, he exercised his discretion under section 23(a)(8) of the rules of practice [39 C.F.R. § 3001.23(a)(8)] to certify the questions raised by that document to the full Commission for its consideration and disposition.

In this Order, the Commission accepts certification of the questions raised by Capital One's Notice and Request, which we also find to be significant, and offers guidance on the matters raised therein. For reasons presented below, the Commission will not grant movant's request for a declaratory ruling that would preclude considerations of the substantive mail classification and rate proposals advanced by the OCA in this proceeding.

Legal Bases of Capital One's Notice and Request. Capital One bases its objection and request for extraordinary relief, preclusion of the testimony of another participant from the evidentiary record in advance of hearings, on a no less extraordinary ground: that the Commission lacks authority to recommend the substantive rate and classification changes proposed in that testimony.

Capital One's legal argument is grounded in a constrictive view of the proper scope of this proceeding. According to its perspective, the ambit of this case is limited by the Governors' determination to limit its Request in this case to rate and classification changes that would implement the terms of a Negotiated Service Agreement with Capital One. Therefore, it argues, the scope of the Commission's deliberations is limited to assessing the merits of the joint USPS-Capital One proposal, subject to specific recommended changes. Notice and Request at 3. Inasmuch as the OCA's rate and classification proposals arguably go beyond "variations of, or enlargements or contractions of the Capital One proposal[,]" *ibid.*, Capital One asserts that the Commission would exceed its authority by recommending them. Capital One relies on two pillars of judicial authority in postal ratemaking and mail classification

jurisprudence, the *Dow Jones*¹ and *Governors v. Postal Rate Commission*² decisions, to support this argument.

Capital One also argues that consideration of the challenged OCA testimony would violate notice requirements. It asserts that nothing in the Commission's Order³ initiating this proceeding would give mail users or other affected parties notice that a general classification change of the kind proposed by OCA would be considered in the case. Notice and Request at 4.

Positions of Other Participants. The Postal Service supports the relief sought in Capital One's Notice and Request, stating that it "strongly agrees that the Commission's consideration ... should be limited to the Postal Service's own proposals ... based on the Negotiated Service agreement (NSA) with Capital One." Comments of United States Postal Service on Capital One's Notice of Intention to Object to Admission of OCA Testimony and Request for Declaratory Ruling, January 15, 2003, at 1. While the Service states that there is merit in Capital One's legal argument based on the *Dow Jones* decision, it bases its position primarily on practical and procedural considerations it finds important in this case. *Id.*, fn. 1.

The Postal Service represents that it could not implement OCA's proposal at this time, citing practical problems in expanding no-fee address correction beyond the limited test pursuant to the NSA with Capital One. Under these circumstances, the Service asserts that consideration of the proposal would be "an imprudent use of the Commission's and the participants' time." *Id.* at 2. In view of the OCA proposal's broader implications for mailer participation, effects on mailers, and effects on postal operations and finances, the Service also argues that the procedural issue of notice "should keep the Commission from allowing this proceeding to be expanded beyond its natural contours." *Ibid.*

¹ *Dow Jones v. United States Postal Service*, 656 F.2d 788 (D.C. Cir. 1981).

² *Governors of U.S. Postal Service v. U.S. Postal Rate Commission*, 654 F.2d 108 (D.C. Cir. 1981).

³ Order No. 1346, Notice and Order on Filing of Request for Establishment of Experimental Rate and Service Changes for Qualifying First-Class Mailings, September 24, 2002.

In a pleading primarily directed toward appropriate procedural scheduling, intervenor American Postal Workers Union, AFL-CIO (APWU) addresses the controversy regarding adequate notice, and suggests that the OCA testimony at issue may properly be admitted for a limited purpose. Response of American Postal Workers Union, AFL-CIO to Motion of Postcom et al. to Schedule Rebuttal Testimony, January 8, 2003. APWU states that it believes OCA witness Callow's testimony "is helpful in evaluating the merits of this NSA" but that his proposal of a niche classification "should require a general public notice and opportunity for additional parties to intervene." *Id.* at 1. Because the Commission's recommendation of the niche classification "might lead to unintended consequences and procedural questions regarding due process" APWU recommends that the Commission forestall these potential effects by declaring that witness Callow's testimony be "accepted for the limited purpose of evaluating the merits of the NSA." *Ibid.*

In its response to Capital One's Notice and Request, the Office of the Consumer Advocate challenges both the factual premises and legal conclusions of its arguments. Office of Consumer Advocate Answer to Request of Capital One Services, Inc. for a Declaratory Ruling, January 15, 2003. OCA argues that the *Dow Jones* and *Governors* decisions are inapposite here because the rates and termination provisions it proposes are identical to those incorporated in the USPS-Capital One agreement; only OCA's proposed eligibility provisions differ from those in the agreement. *Id.* at 2. OCA further argues that more pertinent legal authority can be found in the *MOAA*⁴ decision, which recognizes the Commission's authority to "propose a classification change that was a variation of one proposed by the Postal Service"⁵ provided the Postal Service is given an opportunity to show that the proposed change may unreasonably interfere with postal management's plans. At this stage of the proceeding, OCA argues, there is no basis for anticipating that the Commission will recommend a decision based on insufficient evidence, or will deny

⁴ Mail Order Association of America v. USPS, 2 F.3d 408 (D.C. Cir. 1993).

⁵ Mail Order Association of America v. USPS, *supra*, at 424, n. 13.

the Service an opportunity to demonstrate that recommending OCA's proposal would unduly interfere with management of the Postal Service. Therefore, OCA asserts, it would be premature to rule on the propriety of OCA's proposed expansion of eligibility for the NSA's terms at this time. *Id.* at 2-3.

OCA addresses the issue of notice in a separate responsive pleading. Office of Consumer Advocate Comments on Need for Public Notice of OCA Proposals, January 13, 2003. OCA states that it has no objection to issuance of a further notice in this case. However, it considers such an additional notice to be unnecessary because "interested parties who saw the Commission's original Notice of this proceeding could have anticipated the possibility of the Commission's recommending classification language that differed from that requested by the Postal Service." *Id.* at 2.

Commission Analysis and Conclusions. Capital One reminds the Commission that its actions must comport with the institutional responsibilities assigned to it by the Reorganization Act, including the requirement of procedural due process, as those responsibilities have been interpreted by the courts. However, the Commission finds nothing in those pronouncements that would require the requested preclusion of OCA's testimony from the record of this proceeding.

As OCA has argued, the posture of this case is quite unlike the set of circumstances before the court in the *Dow Jones* litigation. There, the proceeding under review had been initiated by the Commission unilaterally, pursuant to its mail classification authority under 39 U.S.C. § 3623, to consider "a possible surcharge for red-tag second-class service (or, equivalently, on a discount for non-red-tag second-class service)."⁶ No Postal Service request to change any rate for second-class mail preceded the Commission's inquiry into a possible rate change. Lacking this legal

⁶ *Dow Jones v. United States Postal Service*, *supra*, at 788, quoting Commission Order No. 228, January 4, 1979.

prerequisite under 39 U.S.C. § 3622(a), the court found the Commission's ultimate rate recommendation to be procedurally defective.⁷

By contrast, this proceeding was initiated by a Postal Service Request to change certain currently applicable rates and fees for First-Class Mail and Address Correction Service.⁸ Thus, the procedural defect that was the sole basis for the court's decision in *Dow Jones* cannot be found here, regardless of what OCA or any other party might propose as an alternative to the Postal Service-Capital One proposal.

OCA describes witness Callow's testimony as "present[ing] proposed experimental DMCS provisions that make the desirable features of the proposed NSA available to more mailers (including Capital One)." Office of the Consumer Advocate Trial Brief, December 20, 2002, at 2. Witness Callow cites the statutory factors of fairness and equity that the Commission is directed to consider by 39 U.S.C. §§ 3622(b)(1) and 3623(c)(1) as supporting OCA's broader proposals. OCA-T-2 at 28-29, 31-32. Thus, the Commission is called upon to assess whether these statutory considerations would better be served by recommending classification and rate changes that are more inclusive than the proposed Postal Service-Capital One NSA. However, the Commission is mindful that recommending this more expansive approach might have the effect of intruding into the realm of the Postal Service's managerial authority, contrary to the institutional considerations on which the court based its decision in the *Governors* case.

As OCA has observed, the more recent decision in the *MOAA* case provides helpful guidance in these circumstances. In that decision, the court faulted the Commission's recommendation in Docket No. R90-1 of a Public Automation Rate (PAR) rate category for First-Class Mail, which was more expansive than the automation rate categories proposed in the Postal Service's Request. The court

⁷ "Because the Postal Service did not request, indeed opposed, the rate change which was approved in the decision under review, this court need inquire no further to find the Governors' decision fatally defective." *Dow Jones v. United States Postal Service*, *supra*, at 790.

⁸ See Order No. 1346, *supra*, at 1-3.

acknowledged the Commission's rationale of extending automation discounts to households and small businesses to advance the interests of fairness and equity, which it found to be "the kind of determination the Commission is allowed, and indeed required, to make."⁹ However, the court also held that "it is not within the Commission's province to recommend rates and classifications in order to accelerate the expansion of Postal Service automation"¹⁰ and remanded the Commission's decision for reconsideration.

The court went on to provide a procedural schematic for the Commission's consideration of more expansive proposals that might trench on the Postal Service's managerial authority. It began by recognizing the Commission's authority and duty to assess the fairness and equity of proposals before it.¹¹ However, the court identified the additional duties of determining whether a competing proposal is "responsive to and within the scope of the Postal Service's request"¹² and "whether this proposal interferes with the management authority."¹³

Should the Commission conclude that recommending a proposal would "unduly interfere[] in the management and direction of the Postal Service"¹⁴ the court found that two options were available. "First, it may conclude that, within the framework of existing Postal Service policies and capabilities, a rate or classification that it had considered unfair or inequitable is, instead, sufficiently fair to be included in the recommended decision."¹⁵ "Second, the Commission may simply decline to recommend a rate or classification that it is convinced is unfair."¹⁶ However, the court

⁹ Mail Order Association of America v. USPS, *supra*, at 423 (citation omitted).

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Id.* at 424.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

concluded, the Commission “may not ... forge ahead with a recommendation that surpasses its ratemaking function and unduly intrudes on management.”¹⁷

Prior to making such determinations, the court also identified the Commission's duty to provide adequate scrutiny of and response to competing proposals in the hearing process. It said:

Had the PAR proposal been presented and aired in the hearings, we would be better able to assess whether the Commission's recommendation unduly interferes with the Postal Service's management decisions or otherwise exceeds the Commission's statutory authority. The record presumably would reveal whether there are overriding operational or policy reasons to distinguish between CEM and non-CEM prebarcoded individual letters, as well as between bulk and nonbulk automation-compatible pieces, or whether, as the Commission claims, it is unduly discriminatory to extend the discount to large-scale mailers and not to the general public. We simply cannot tell on this record.¹⁸

Given this guidance, the Commission finds that it would be premature to conclude that recommendation of OCA's rate and classification proposals would so clearly intrude into the realm of postal management that those proposals should not be heard in these proceedings. Rather, as the court recommended in the *MOAA* decision, the Commission will allow OCA's proposals to be presented and examined in the upcoming hearings, and subsequently allow the Postal Service “to put on evidence ... to demonstrate that [OCA's proposal] is either unworkable or inconsistent with general Postal Service objectives and policies.”¹⁹ Accordingly, Capital One's motion to preclude the challenged OCA testimony from the record of this proceeding shall be denied.

On the related subjects of notice and a possible limitation of the use to which OCA's testimony may be put, the Commission concludes that its Notice and Order of

¹⁷ *Ibid.* (footnote omitted).

¹⁸ *Ibid.*

¹⁹ *Ibid.*

September 24, 2002, was sufficiently expansive to require no further action at this time. While the Postal Service had styled its Request as one “for a Recommended Decision on Experimental Changes to Implement Capital One NSA[,]”²⁰ the Notice and Order published by the Commission was entitled “Notice and Order on Filing of Request for Establishment of Experimental Rate and Service Changes for Qualifying First-Class Mailings.”²¹ Publication of this notice should have been sufficient to inform First-Class Mail users and other interested parties that rate and service changes for some segments of First Class had been proposed to the Commission, and that alternative proposals might be considered. Further, in light of the Commission’s past actions in rate and mail classification cases, there should be a reasonable expectation that the Commission’s ultimate recommendations might not conform exactly to the terms in the original Request. Finally, in making its recommended decision in this docket, the Commission can be expected to limit its recommendations to proposals that are germane to the matters identified in the Notice and Order that initiated this case.

It is ordered:

1. The Commission accepts certification of the questions referred by the Presiding Officer in Ruling No. MC2002-2/17.

²⁰ Request of the United States Postal Service for a Recommended Decision on Experimental Changes to Implement Capital One NSA, September 19, 2002.

²¹ Order No. 1346, *supra*, at 1.

2. The Request of Capital One Services, Inc. for Declaratory Ruling, filed January 8, 2003, is denied.

By the Commission.

(SEAL)

Steven W. Williams
Secretary