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

Postal Rate and Fee Changes, 1997) Docket No. R97-1

OFFICE OF THE CONSUMER ADVOCATE
REPLY IN SUPPORT OF MAJOR MAILERS ASSOCIATION'S MOTION
TO COMPEL ANSWERS TO CERTAIN INTERROGATORIES
September 10, 1997

The Office of the Consumer Advocate ("OCA") files this reply in support of the Major Mailers Association's ("MMA") Motion to Compel Answers to Certain Interrogatories, filed September 8, 1997. MMA's motion arose from a series of objections filed by the Postal Service on August 25, 1997.[1]

Before analyzing the Postal Service argument, OCA wants to make it plain that it, too, would benefit from receipt of the information MMA seeks. This is without question the most complicated rate case in Commission history, made more so by the introduction of a revolutionary costing methodology and the Postal Service's

[1] Objection of United States Postal Service to Major Mailers Association Interrogatories MMA/USPS-T5-1 and 6(b), MMA/USPS-T25-1(B) and (C), MMA/USPS-T30-3(A) through D, 4(A) through (D), 6, 7(A)(2) and 8(C)(1) through (3), and MMA/USPS-T32-15(B) ("Objection").

fragmented and vague presentation of its case.[2] The parties need the Commission's assistance in compelling the Postal Service to provide guidance out of the informational thicket we find ourselves in. The Postal Service has every right to champion a new way of looking at things, but that right carries with it a responsibility to explain *completely* how the new order differs from the old.

It should also be noted that all parties to this proceeding are at a firepower disadvantage when it comes to analyzing Postal Service data and arguments. Most of the parties have diverse interests and their positions are such that pooling of resources would be impractical or even improper (owing to conflicts of interest). In contrast, the Postal Service has disclosed 40 witnesses in direct support of the case, and doubtless there are many more contributing to the discovery process. It is likely that most parties have but a handful of personnel to analyze this complex submission.

The Postal Service arguments are easily disposed of; OCA finds itself in agreement with much of MMA's analysis. First, Rule 54 requirements do *not* govern the discovery rules. Rule 25 governs this aspect of the case. The question is simple -- is

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[2] As OCA noted in a recent pleading, formerly "the Postal Service would usually present well-organized evidence, with clear referrals to supporting evidence (such as library references), and with each witness addressing an entire subject area. Lately, and especially in this proceeding, we have observed that Postal Service witness presentations are highly fragmented, so that one cannot assess proposed changes in a discrete area without looking at a number of other witnesses' presentations. Further, references to underlying documentation are often vague, requiring participants to use up valuable time during discovery merely to ascertain where certain evidence can be found." [footnote omitted] Docket No. R97-1, OCA Reply to the Motion of the United States Postal Service for Reconsideration of Additional Part of Presiding Officer's Ruling No. R97-1/7, filed August 22, 1997 ("Reply"). *See, e.g.*, Response of witness Daniel to OCA/USPS-T29-1, where witness Daniel provides voluminous cross-references omitted from her originally filed exhibits and appendices. She also notes numerous erroneous numbers from her testimony.

what MMA is seeking non-privileged information "which appears reasonably calculated to lead to the discovery of admissible evidence?" That is the narrow question to be answered. From the perspective of another party trying to piece together the evidence in this case, MMA's analysis seems the correct one.

Perhaps answering a more fundamental question -- "What is the purpose of discovery?" – will enlighten the result over the MMA-Postal Service dispute. Before modern discovery, each side was protected to a large extent against disclosure of its case under the "philosophy that a judicial proceeding was a battle of wits rather than a search for the truth . . . ."[3] Or, as the Supreme Court has noted in a leading case:[4]

> The various instruments of discovery now serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties *to obtain the fullest possible knowledge of the issues and facts before trial.* [emphasis added.]

OCA believes that granting MMA's Motion will enable MMA, and all parties, to ascertain necessary facts and narrow issues in a way that will expedite hearings and enable the parties to contribute more meaningfully to the Commission's hearings.

OCA previously has addressed the Postal Service's hoary argument that "answering questions about and providing further analyses of the Commission's cost

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[3] Wright, Miller & Marcus, 8 Federal Practice and Procedure, at 40.
[4] Hickman v. Taylor, 329 U.S. 495, 500 (1947).

model will interfere with the Postal Service's ability to support and defend its proposals in this case." In a Rule 54 context, OCA argued:[5]

> The Commission is not requiring the Postal Service to adopt a litigating position against its interests. It is merely requiring the Postal Service to present data in two forms – one using a tried and true methodology and one of the Postal Service 's own choosing – to enable the Commission and the participants to compare the economic effects of the Postal Service's proposal. (This is analogous to the requirement that the Postal Service present data for a base year and test year.) In truth, the Commission in no way impedes the Postal Service from introducing any proposed costing methodology, as one can witness by the far reaching changes in methodology the Postal Service has advanced in this proceeding.

In a discovery context, the Postal Service would have the Commission say, in essence, that the Postal Service should never have to produce information that might be adverse to its interests. This turns the notion of discovery on its head.

The Postal Service's "burden" argument is without merit. In evaluating whether a "burden" is fair, one must look at relative burdens. The relative burdens of producing or analyzing evidence cannot be assessed merely by looking at one party's complaint about the time and labor necessary to respond to a discovery request. One must look at the context in which the information request arose. Here, it is the Postal Service that has proposed a radical change in costing methodology, not MMA. The proponent of sweeping change should have the burden of making the ramifications of that change clear to the parties. It bears repeating what we said a short while ago in this case:[6]

> The Postal Service has been granted the greatest gift a firm can have in our economy – a government mandated monopoly as to the lion's share of its business. It is little to ask that the proponent of change [footnote omitted] file evidence that is correct, complete

[5] Reply at 3-4.
[6] Id. at 3.

and understandable in order to protect the due process rights of the participants in Commission proceedings.

Further, the Presiding Officer, in evaluating the Postal Service's burden argument, should consider what is happening in the discovery process as a whole. In Docket No. MC97-2, the proceeding that was the antecedent of the instant one, OCA raised a number of objections about the way in which the Postal Service responded to discovery requests.[7] Many of the same problems have already surfaced in this case.

For example, it is edifying to look at the Postal Service's responses to OCA's interrogatories concerning the Postal Service's Prepaid Reply Mail ("PRM") and Qualified Business Reply Mail (QBRM") proposals, as presented by Postal Service witness Fronk. These are critical proposals, for they are the Postal Service's response to the Commission's recommendation in Docket No. MC95-1 that Courtesy Envelope Mail ("CEM") "remains worthy of consideration as a discounted category of First-Class Mail."[8] We direct the Presiding Officer to witness Fronk's initial set of responses to OCA's interrogatories.[9] Under the pretext of not understanding the question, witness Fronk provided no responses to many of the interrogatories.[10] A simple phone call from Postal Service counsel might have clarified the interrogatories and obviated the need to send a new series of questions to the witness. As of the date this pleading is being

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[7] *See generally* Response of the Office of the Consumer Advocate to the Notice of Withdrawal of Request for a Recommended Decision and Motion to Close Docket, and Comments Pursuant to Presiding Officer's Ruling No. MC97-2/7, filed April 24, 1997.
[8] Docket No. MC95-1, Opinion and Recommended Decision, at V-36.
[9] Responses of United States Postal Service Witness Fronk to Interrogatories of the Office of the Consumer Advocate (OCA/USPS-T32-19, 22-26, 31, 33-36a-c, 37, 41, 42, 44, 48, 49), filed August 29, 1997.
[10] See his responses to OCA/USPS-T32-19, 33, 34 and 48.

filed, we have not received timely responses to all of our first set of interrogatories to witness Fronk, though it is well past the August 29, 1997 due date for such responses.[11]

An efficient discovery process, i.e., one that does not countenance obstructionism, is essential to the due process of parties in Commission rate proceedings. We incorporate by reference our arguments in RM97-1 on this issue.[12] Briefly restating our arguments therein, Congress determined when creating the Commission that there be objective decisionmaking based on full, open and fair proceedings.[13] Congressional intent would be frustrated if public participants were unable to timely assess the Postal Service's cost information.[14] An efficient discovery process also will promote the Congressional intention for expedited proceedings.[15] A discovery process that permits obstructionism is contrary to those goals.

Respectfully submitted,

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[11] A handful of responses have straggled in within the last 24 hours.
[12] Docket No. RM97-1, Comments of the Consumer Advocate to the Postal Rate Commission, filed January 31, 1997.
[13] Id. at 12-13.
[14] Id. at 14.
[15] Id. at 16-18.

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing document upon all participants of record in this proceeding in accordance with section 12 of the rules of practice.

Emmett Rand Costich

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