

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

EXPERIMENTAL PERIODICALS
CO-PALLETIZATION DROPSHIP
DISCOUNTS FOR HIGH EDITORIAL
PUBLICATIONS, 2004

Docket No. MC2004-1

REQUEST OF THE UNITED STATES POSTAL SERVICE
FOR RECONSIDERATION OF SCHEDULE ESTABLISHED FOR DISCOVERY
(April 5, 2004)

In Presiding Officer's Ruling No. MC2004-1/1 (March 29, 2004) in this docket, the Presiding Officer determined that it would be appropriate to employ the Commission's rules and specialized procedures applicable to requests for experimental classification changes (39 C.F.R. §§ 3001.67-67d) in considering the Postal Service's proposal. The Ruling also affirmed a determination made at the Prehearing Conference to set a deadline of May 24, 2004, for discovery against the Postal Service. In light of the circumstances and the Postal Service's previous request for expedition, the Postal Service hereby requests reconsideration of this discovery deadline.¹

¹ See United States Postal Service Request for Expedition and Establishment of Settlement Procedures (February 25, 2004). That pleading requested expedition because the proposed experimental classification is straightforward, of limited scope and duration, could reduce postal costs, and would have an insignificant effect on the Postal Service's overall volumes, revenues, and costs. Also, there is a distinct possibility of settlement, especially once discovery is finished. Finally, expedited recommendation and implementation of the proposal would fill a gap in the current co-palletization experiment, making the entire co-palletization experiment more likely to gain customer participation and obtain needed data.

At the Prehearing Conference, Chairman Omas noted that:

the Postal Service asked that its request be considered pursuant to Rule 67 and the rules applicable to requests involving experimental changes. When the Commission agreed to utilize these rules, it undertakes to establish a schedule that will allow for a decision in no more than 150 days. No participant directly opposed using the rules applicable to experimental classification changes.

Tr. 1/9. The Chairman noted, however, that American Business Media (ABM) and Time Warner, Inc. (TW) had filed requests for lengthy discovery, and asked ABM and TW counsel to explain why they needed a lengthy discovery period.² In response, ABM counsel stated that:

We are certainly willing to do our part to expedite, and we certainly would not object if the Commission established a procedural schedule with not much more than 150 days in it, with the understanding that if the parties get bogged down, through no fault of the intervenors, in discovery, that the Commission is always free, as I understand it, to extend the 150 days.

Tr. 1/11. TW Counsel added that:

like Mr. Straus, I would say that we are prepared to cooperate with an expedited schedule, and we would like a fair opportunity for discovery and for at least a couple of rounds of discovery. But beyond that, we are certainly willing to do whatever we can to cooperate and expedite in this case.

Tr. 1/13.

Undersigned Postal Service counsel then agreed to provide expedited responses to discovery, within 10 days, and proposed a discovery period typical of other experimental cases (43 days from the filing of the Request). Tr. 1/16-17.

In response, Chairman Omas stated that, while the Commission is committed to expediting these cases to the extent feasible, the Postal Service had not shown any

² *Id.* See Request for Deferred Hearing in Response to Order No. 1392 of American Business Media (March 22, 2004); Comments of Time Warner Inc. on the Need for a Hearing (March 22, 2004).

justification for extraordinary speed in this case.³ Discovery was then scheduled to end May 24, 2004, one day less than 3 months after the filing of the Request. Tr. 1/19.

While the Postal Service understands that the Commission concluded that there is no need for extraordinary speed, it is unclear why a discovery period substantially longer than usual has been established. Opportunity for nearly three months of discovery from the time of filing is significantly longer than the discovery periods established in omnibus rate cases, with a 10-month deadline, and much longer than those in other proceedings to consider experiments. Based on the comments at the Prehearing Conference, neither ABM nor TW seemed to require such a long discovery period.

Furthermore, Rule 67d states that:

The Commission will treat cases falling under §§ 3001.67 through 3001.67d as subject to the maximum expedition consistent with procedural fairness. The schedule for adoption of a recommended decision will therefore be established, in each such case, to allow for issuance of such decision not more than 150 days from the determination of any issue as to the propriety of experimental treatment under § 3001.67(b) and (c) in a sense favorable to such treatment, or from the date of a filing of the request, whichever occurs later.

In typical practice under these rules, a schedule allowing for a decision within 150 days would encompass all phases of the proceeding, including discovery, hearings and briefs. Ruling No. MC2004-1/1 stated that a schedule of 150 days would be established counting from the date of the ruling, even though no issue had arisen regarding the

³ At the prehearing conference, the Postal Service presented three reasons why it seeks expedition in this case. First, the proposed discounts in this docket would close a gap in the current co-palletization experiment (Docket No. MC2002-3), specifically for high-editorial publications. Second, some publishers are eager to use the proposed discounts. Third, the Postal Service wants to obtain data from the experiment as soon as possible so that they can be used in preparing a future case, such as the omnibus rate case. Tr. 1/17-18.

propriety of relying upon the experimental rules. The practical effect of interpreting Rule 67d as beginning the count from the date of the Commission's determination to apply the specialized procedures, in this docket when no participant ever indicated that the experimental rules should not apply, is to automatically add onto the discovery period against the Postal Service the time it takes for the Commission to announce that an unopposed motion for experimental status would be granted.⁴ Moreover, this application of Rule 67d apparently eliminates that part of the rule which allows the 150-day period to commence when the case is filed, because no request for an experiment can do more than explain the need for expedition, and propose an experiment that all participants agree can be considered under the experimental rules. In this case, this situation results in a discovery period at least three weeks longer than those encountered in omnibus rate cases. Furthermore, the scheduled discovery period is far out of proportion to the scale and scope of the Postal Service's proposal.

Even counting 150 days from the issuance of Ruling No. MC2004-1/1, a May 24 deadline for discovery against the Postal Service will leave only a little over three months to schedule the remaining stages of the litigation. The Ruling also identifies the June 14 through 25, 2004, time frame as the period for scheduling hearings on the Postal Service's direct testimony, and a July 1 deadline for the filing of intervenor testimony. Assuming that timing, less than two months would be left for discovery against intervenors, hearings on intervenor testimony, filing of rebuttal testimony, hearings on rebuttal, briefs, reply briefs, Commission review of the record, deliberations, and drafting an opinion and recommended decision.

⁴ Three participants, including ABM, TW, and the Office of the Consumer Advocate, began discovery before the Prehearing Conference and the issuance of Presiding

It is possible that the determination on discovery reflects an optimism that this proceeding will be settled, and that reasonable time need not be reserved for the later stages of the litigation within the 150-day schedule. The instant proposal builds on the similarly modest proposal for an experimental classification designed to induce co-palletization in Docket No. MC2002-3. That proceeding was settled in a fairly short period of time. In this regard, the Postal Service would prefer to settle, and will work diligently to pursue that result. Nevertheless, the comments expressed by counsel at the Prehearing Conference would not support an expectation of settlement. Even if they did, the possibility of settlement would not justify an inordinately long formal discovery period. To the contrary, an ongoing discovery period might delay serious settlement discussion. Legitimate inquiries that would promote settlement can be more easily pursued informally off the record. The availability of a lengthy discovery period would only provide excuses to delay and would, accordingly, impede productive settlement efforts in the near term future.

The Postal Service therefore requests reconsideration of Presiding Officer's Ruling No. 1, so that an earlier discovery deadline can be established. The Postal Service believes that, in experimental cases for which the experimental status is not contested, the discovery period should be established to permit a recommended decision within 150 days of the filing of the Request.⁵ The Postal Service requests a shorter discovery period, not only to expedite consideration of its proposal in this

Officer's Ruling No. MC2004-1/1.

⁵ Under Presiding Officer's Ruling No. 1, the discovery period would push the deadline for intervenor testimony back to July 1, leaving just 3½ weeks in the 150 days following the filing of the Request.

docket, but also to increase its ability to plan for significant expedition in future experimental filings.⁶

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

Daniel J. Foucheaux, Jr.
Chief Counsel, Ratemaking

David H. Rubin

475 L'Enfant Plaza West, S.W.
Washington, D.C. 20260-1137
(202) 268-2986; Fax -6187
April 5, 2004

⁶ The experimental rules do not, of themselves, require any showing of a need for expedition. The Postal Service has also been advised that a printer interested in using the co-palletization discounts requested in this docket, in part as a means of facilitating use of the existing Periodicals co-palletization discounts, as soon as possible will be communicating these interests to the Commission directly via letter in the very near future.

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.

David H. Rubin

475 L'Enfant Plaza West, S.W.
Washington, D.C. 20260-1137
April 5, 2004