

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

REPOSITIONABLE NOTES PROVISIONAL SERVICE

Docket No. MC2004-5

OPPOSITION OF UNITED STATES POSTAL SERVICE
IN RESPONSE TO MOTION OF DIRECT MARKETING ASSOCIATION
FOR PERMISSION TO CONDUCT CROSS-EXAMINATION
(September 27, 2004)

Direct Marketing Association's untimely and unjustified motion to conduct oral cross-examination of the Postal Service's witnesses¹ should be denied. The Commission on August 16 had set the deadline for filing motions to conduct oral cross-examination at "seven days after all answers to discovery requests are received." That date worked out to be September 2. DMA then waited three weeks to file the instant motion, which seems to combine a motion to conduct cross-examination and a motion for late acceptance thereof. But DMA's motion both fails to support the proposition that cross-examination is needed and provides no explanation of its long delay in filing the motion. The long delay is particularly egregious in light of the expedited nature of the procedural rules under which the Commission is conducting this docket.

DMA's only attempt to support its motion appears to relate to a quotation from Commission Order No. 1417, which denied the joint motion of DMA and others to dismiss summarily the Postal Service's Request in this docket. That quotation notes the Commission's statement that the issue of "whether [RPN] mail "has 'value' or

¹ Direct Marketing Association Motion for Permission to Conduct Limited Cross-Examination of Postal Service Witnesses Holland and Kaneer (September 22, 2004). By Order No .1419, the Commission set today as the deadline for responses.

‘desirability’ that should be reflected in classifications and rates is something that should be examined in a proceeding where there is an opportunity to make a record, rather than be determined in summary fashion in the outset.”² DMA attempts to support its motion by reporting that it “reviewed the USPS testimony in light of Order No. 1417” and concluded that certain “key aspects” of the Postal Service’s testimony would benefit from “elucidation.” This purported justification for the late motion has no merit.

On a substantive basis, nothing in the Order, including the portion DMA quotes, can be said to have interpreted the Postal Service’s Request in a way that DMA could not have anticipated when the Request was filed on July 16. The issue of whether “value” or “desirability” of the mail should be reflected in classifications and rates was not some new gloss that the Commission put on the case, but rather was an issue evident from the time the request and testimony were filed. DMA was on notice from the beginning of this docket that this issue would be addressed.

Even if, on August 30, Order No. 1417 had somehow alerted DMA to an issue it could not have previously been aware of, for whatever reason, prior to that date, the deadline for motions for hearings was still three full business days later, on September 2. DMA provides no explanation of why that was not sufficient time simply to request a hearing. And even if, for some reason, three days was not sufficient, DMA, at that time, should have filed a motion to conduct additional discovery and/or to extend the September 2 deadline for requesting hearings. Instead, DMA did nothing, allowing an additional three weeks, out of the Commission’s 90 days, to elapse.

² DMA Motion at 1, quoting Order No. 1417 (August 30, 2004), at 5.

DMA also seeks to turn the normal order of proceedings on its head by indicating its desire to “elicit the views of the USPS witnesses on several critical portions of the testimony filed [on September 21] by the National Newspaper Association.”³ This is objectionable for a number of reasons. It would usurp the Postal Service’s right to determine whether to offer rebuttal testimony and by whom it should be presented. It would also deprive NNA of having the Postal Service’s case-in-chief fully set forth before it offers its own.⁴

Granting DMA’s untimely and radical motion is not needed to ensure the completeness of the record. This concern can be better addressed through other means. The Postal Service will gladly engage in informal discussions with DMA, as it has with other participants, to supplement or clarify to record as needed.⁵ As part of such a process, it is not unusual for participants to provide the Postal Service with informal discovery questions, and then, if appropriate, the answers can be submitted for the record. Such an approach could result in expedited responses provided more quickly than if hearings needed to be noticed and conducted. It is consistent with the Commission’s longstanding policy of encouraging informal resolution of issues. It

³ DMA Motion at 2.

⁴ Although the Postal Service is not seeking to cross examine NNA’s witness in this instance, if it were, DMA’s seeking to have the Postal Service’s witnesses comment on NNA’s testimony would force the proceedings to be held out of normal order. In order not to deny the Postal Service the opportunity to cross-examine NNA’s witness before it develops its own rebuttal positions on the matters raised in his testimony, hearings on NNA’s testimony would have to be held before the hearings on the Postal Service’s testimony that DMA now seeks.

⁵ The Postal Service and several other participants have been engaged in such discussions throughout this proceeding. The Postal Service is hopeful that those discussions will bear some fruit and will be reporting the results to the Commission as appropriate.

maintains the appropriate order of proceedings. It allows for the creation of additional record material for the Commission's ultimate consideration. It does not encourage parties to seek relief from situations that are entirely of their own making at the expense of other participants' due process rights.⁶ And it assists the Commission in maintaining an expedited schedule in this proceeding.

Accordingly, the Postal Service urges the Commission to deny DMA's motion, and to encourage DMA to engage in informal discussions.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

Daniel J. Foucheaux, Jr.
Chief Counsel, Ratemaking

Scott L. Reiter

475 L'Enfant Plaza West, S.W.
Washington, D.C. 20260-1137
(202) 268-2999; Fax -5402
Scott.L.Reiter@usps.gov
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⁶ The litigating positions of the Postal Service and other participants, and the Commission's efforts to conduct a lawful proceeding on a very expedited time schedule should not be jeopardized by the inconsistent postures DMA has taken in this case. DMA is in an awkward position, but not one that engenders sympathy. DMA took the position that this docket could not be lawfully litigated at all and, apparently for that reason, did not participate in discovery. Now it seeks to take part in the purportedly unlawful litigation and to do so without regard to deadlines set by the Commission. One is tempted to accuse DMA of wanting to have its cake and eat it too, but it is perhaps more accurate to say that DMA first denied there was actually a cake in the oven, and is now complaining that it didn't get a piece after others sat down to eat it.

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.

Scott L. Reiter

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