Postal Rate Commission
Submitted 1/24/2005 4:17 pm
Filing ID: 42743
Accepted 1/24/2005

Before The
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

Periodic Reporting Procedures) Docket No. RM2005-1

OFFICE OF THE CONSUMER ADVOCATE
PROPOSAL OF RULES IN RESPONSE TO
COMMISSION ORDER NO. 1423 (REVISED)
(January 24, 2004)

In its Order No. 1423,[1] the Commission recounts the Postal Service's resistance, and ultimate failure, to comply with an expansion of the Commission's periodic reporting rule. The Commission adopted expanded reporting requirements under Rule 102 in Order No. 1386,[2] by imposing new requirements for "All input data and all processing programs that have changed since the most recently completed general rate proceeding. . . . Each change in attribution principles or methods from the previous report will be identified." Rule 102(a)(1).[3] The Postal Service complied, in part, with these new requirements on May 25, 2004, in support of the FY2003 Cost and Revenue Analysis (CRA). However, the most important foundational documentation, underlying the attribution and distribution of some of the largest postal cost segments – namely cost Segment 3, Clerks and Mailhandlers ($18 billion, nearly 28% of total accrued costs of approximately $65 billion in FY 2003); Segments 6 & 7, City Delivery Carriers (nearly

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1 "Advance Notice of Proposed Rulemaking," issued November 8, 2004.

2 "Final Rule on Periodic Reporting Requirements," Docket No. RM2003-3, November 3, 2003.

3 New documentation requirements are also spelled out: "Spreadsheet workpapers . . . should include the updated factors, and data from the supporting data systems used, including the In-Office Cost System (IOCS), Management Operating Data System (MODS), City Carrier Cost System (CCCS), Rural Carrier Cost system (RCCS), and National Mail Count." Subpart (i) of Rule 102(a)(1).

$15 billion, 22.3% of total accrued costs); and Segment 10, Rural Carriers (nearly $5 billion, 7.5% of total accrued costs), were not provided in full. The Attachment to Order No. 1423 contains a list of materials that the Postal Service refused to provide, among them:

- MODS input data used to estimate mail processing cost variabilities
- IOCS data for FY2003 used to distribute attributable mail processing costs to classes of mail
- SAS computer programs showing how FY2003 attributable mail processing costs were estimated and distributed to mail classes
- CCCS data for FY2003 used to distribute attributable city carrier costs to classes of mail
- RCCS data for FY2003 used to distribute attributable rural carrier costs to classes of mail
- National Mail Count data for FY2003 used to determine attributable rural carrier costs

The Postal Service's Professed Position and Its True Position

One of the chief justifications proffered by the Postal Service for its refusal to provide the remaining materials under expanded Rule 102 is:[4]

> [T]he Commission has expressed its intention to place all periodic reporting information on its Internet Web site, even when no case is pending.

and

> [T]he Commission would indiscriminately place all of the materials on the Internet. Not only would mandatory disclosure of such materials be inconsistent with the protections in the PRA for commercial information when it is not required in rate cases, it simply would not be necessary. The Commission has not satisfactorily explained why, now, after many years of the Postal Service providing limited information under the old periodic

[4] Letter from Mary Anne Gibbons, General Counsel, U.S. Postal Service, to Steven W. Williams, Secretary, U.S. Postal Rate Commission, September 8, 2004, at 1 and 3, respectively.

> reporting rules, this additional material needs to be publicly available through the Internet.

Both in the letter cited above, and in an earlier letter from Dan Foucheaux,[5] the Postal Service indicated a willingness to release the materials required under the expansion of Rule 102, but only in a non-public manner, under the control of the Postal Service:

> In [a letter sent to the Commission on February 20, 2004], we offered to provide the Commission and any other interested parties with pertinent data and other materials relating to the carrier cost study briefing, although we also stated our preference that the Postal Service remain the source of such materials, and therefore requested that any information obtained not be posted on the Internet or otherwise publicly distributed. In response to our offer, we have heard from neither the Commission, nor any other party. Nevertheless, the offer made in my letter of February 20th remains open, and you or others can contact me to arrange for transfer of specific materials.[6]

and:

> When the Commission requested that it be furnished data and computer programs underlying the [city carrier cost] study, in February of this year, the Postal Service offered to make such materials available to the Commission, or to any interested member of the public. It merely requested that the Postal Service remain the source of the information, and that inquiries from the public to have access be directed to it, rather than having the materials placed on the Commission's Internet Web site. The Commission did not respond to this offer, nor did any member of the public request the materials.[7]

OCA decided to act upon what it believed to be a Postal Service offer to furnish access to the remainder of the Rule 102 materials in the manner described in the

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[5] Letter from Daniel J. Foucheaux, Jr., Chief Counsel, Ratemaking, USPS, to Steven W. Williams, May 25, 2004,

[6] Id.

[7] Cited letter from Ms. Gibbons.

Gibbons and Foucheaux letters.[8] OCA sought both materials required under Rule 102 (but withheld) and additional materials needed to prepare OCA's direct case for the upcoming omnibus rate case. The materials sought included 3 items specifically listed in Order No. 1423, i.e., (1) MODS input data, (2) SAS programs that were used to attribute Segment 3 costs and distribute the attributable costs to classes of mail, and (3) CCCS data. Other materials sought were the unscrubbed City Carrier data comprising the data set that Dr. Bradley evaluated before making his final selection of data; materials used to split total street costs between Segments 6 and 7; materials used to split Segment 7 costs among components; and updates of Docket No. R2001-1 Library References and POIR responses that could be used by an OCA consultant to prepare current testimony for filing in the upcoming omnibus rate case. It must be noted that OCA's letter contained an "an unqualified commitment not to post any of the information on the Commission's website or to disseminate it publicly via any other medium."

The Commission granted a postponement of the due date for filing the instant response to Order No. 1423 so that the Postal Service would have ample time to consider OCA's request.[9]

OCA received a reply to its December 2 letter to Mr. Foucheaux on January 14, 2005.[10] Mr. Foucheaux writes that his May 25 letter was limited to materials underlying Dr. Bradley's new econometric analysis of city carrier costs and the distribution of city carrier costs to classes of mail. Mr. Foucheaux restates the Postal Service's position

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[8] See Attachment 1 to the instant document, Letter from Shelley Dreifuss, Director, OCA, to Mr. Foucheaux, December 2, 2004.

[9] Order No. 1427, "Order Granting Joint Motion to Postpone," December 22, 2004.

[10] Attachment 2 to the instant pleading.

that its "customary practice" is not to disclose data and study documentation expected to be used in an upcoming rate case. He adds that the materials sought are not currently available and the Postal Service "is not prepared or staffed to respond to such rate-case-type discovery requests."

Not surprisingly, OCA is greatly disappointed with the Postal Service's persistent refusal to comply with the expanded reporting requirements of Rule 102. In light of OCA's commitment not to post provided information on the Internet or disseminate it publicly, and the Postal Service's rejection of OCA's request despite the unequivocal commitment of OCA, it is now apparent that the Commission's placement of materials provided under Rule 102 on its website does not constitute the Postal Service's chief objection to providing the required materials. Rather, the Postal Service's position is just as characterized by the Commission in Order No. 1386.

In Order No. 1386, the Commission summarizes the Postal Service's primary aims in opposing the expansion of Rule 102 (and its subsequent refusal to comply with the rule established over its objections):[11]

- One of the Postal Service's main objections to the rule is that it gives the Commission and the intervenors the ability to respond to the Postal Service's rate filings more quickly and competently.
- The Postal Service's withholding of complex rate case material until the filing of the request gives intervenors little time to prepare alternative rate proposals.
- The Postal Service emphasizes its view that it should have "all the time that it needs to prepare for litigation" but that the Commission and intervenors should have none.
- The Postal Service insists that this procedural advantage is intended by the Postal Reorganization Act (PRA).

[11] Order No. 1386 at 14.

- The Postal Service opposes changes that facilitate the Commission's performance of its functions during rate cases and those that would make it easier for intervenors to comprehend and respond to rate filings.

Indeed, shorn of its claimed concerns about publicizing material on the Internet, the Postal Service is left with its true position fully exposed – the Postal Service has an overwhelming, one-sided litigation advantage that it will not willingly give up.[12]

Given the Postal Service's Refusal to Cooperate in the Commission's Moderate Attempts to Manage Complex, Voluminous Rate Case Filings, What Is an Appropriate Course of Action?

In Order No. 1423, the Commission seeks input from interested commenters on how to proceed in light of the Postal Service's refusal to comply with Rule 102. The changes adopted by the Commission in Order No. 1386 are a modest expansion of the Postal Service's previous obligation under Rule 102. As the Commission points out in Order No. 1386, the Periodic Reporting Rule has not been modified in 17 years.[13] In Docket No. R87-1, for example, the Postal Service accompanied its Request with the testimony of 20 witnesses. By Docket No. R2001-1, however, the number had approximately doubled. More importantly, the Postal Service now introduces in rate cases:[14]

> elaborate cost variability models in the mail processing, transportation, and carrier cost areas. Also in each area, it has developed new, more complex methods of distributing attributable costs to subclasses. The ongoing data collection systems that the Postal Service used to develop

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[12] The Postal Service cynically articulates this advantage as: "Disclosure before the Postal Service was able to develop and present its case to the Commission could compromise the Postal Service's position as a litigant by creating an unfair advantage for participants who might oppose the Postal Service in the litigation." "Substantive Comments of the United States Postal Service," RM2003-3, July 2, 2003, at 32.

[13] Order No. 1386 at 27.

[14] Id.

> these new attribution models and distribution methods were not used for these purposes, or did not exist, when the rule was last updated.

OCA observes that the moderate approach taken by the Commission, one highly dependent on Postal Service cooperation, has not achieved the results sought. In response to the Commission's invitation to formulate "suggestions for adjustments to Commission rules designed to reconcile the conflicting interests outlined in th[e] Notice,"[15] OCA proposes three sets of rules to achieve the Commission's goals of placing the Commission and intervenors in a state of greater readiness when the Postal Service files an omnibus rate case and to develop procedures that allow the voluminous material that has been filed by the Postal Service at the outset of recent rate cases to be divided up sensibly among rulemaking (or classification) proceedings. Placing attention on particular types of issues in focused proceedings will result in thoughtful, thorough treatment as opposed to the frenetic examination that necessarily attends the "everything but the kitchen sink" kind of omnibus rate case that the Postal Service has chosen to file previously. OCA proposes new Commission rules that separate the econometric, and other causation, analysis that is the linchpin of the Commission's attribution of costs, as well as the distribution of attributable costs, from the pricing decisions that must be made when the Postal Service requests additional revenues to fund its operations. Also, proposed changes to the Domestic Mail Classification Schedule (with the exception of the rates and fees changed in the rate case) would be excluded from consideration in an omnibus rate case. Finally, in light of the interest of many of the Postal Service's business customers in developing methods for phasing rate increases, OCA proposes the establishment of a rulemaking proceeding to resolve

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[15] Order No. 1423 at 2.

the fundamental approach that will be taken (if the Postal Service does choose to propose phased rates) in subsequent omnibus rate cases.

OCA finds itself in agreement with the views expressed by earlier commenters in this proceeding – the Major Mailers Association and United Parcel Service,[16] but finds its views particularly in accord with those articulated by Valpak.[17] OCA heartily endorses the recommendations made in Valpak's comments.

Valpak identifies two types of issues that add greatly to the technical complexity of rate cases: (1) **analytic methodologies** and (2) **classification changes**.[18] Valpak points out that the Postal Service gains a significant tactical advantage by overloading omnibus rate cases with issues that are unlimited in type, number, and complexity. Intervenors with limited resources find that these resources are spread too thin to mount serious challenges to all, or even most, of the issues presented that importantly affect their interests. To date, the Postal Service has argued that the Commission lacks the authority under the PRA to expand the Periodic Reporting rules in the manner adopted by the Commission. Now the Postal Service defies the newly promulgated rules by withholding important materials that are essential to understanding the CRA disposition of some of the largest cost segments (segments summing to approximately half of all accrued costs).

The Postal Service has not argued, nor can it argue defensibly, that the Commission lacks the authority to promulgate rules for the management of the cases

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[16] "Initial Comments of Major Mailers Association," December 6, 2004; and "Comments of United Parcel Service in Response to Advance Notice of Proposed Rulemaking on Periodic Reporting Procedures," December 6, 2004.

[17] "Comments of Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. in Response to Order No. 1423," December 6, 2004.

that it uniquely oversees under §§3622, 3623, and 3624 of title 39. In particular, under §3624 the Commission must conduct its proceedings with "utmost expedition" and "procedural fairness" to the parties. The Commission may adopt rules for the conduct of proceedings "*without limitation.*" (Emphasis added). In subpart (b)(4) of §3624, the Commission is authorized to limit testimony.

Section 3603 reinforces the Commission's broad authority to manage its proceedings by promulgating rules, regulations, and procedures that the Commissioners "deem necessary and proper to carry out their functions." "Such rules, regulations, procedures, and actions shall not be subject to any change or supervision by the Postal Service."

OCA proposes new rules that constitute an exercise of the Commission's authority to exclude from omnibus rate cases changes to attribution and distribution approaches previously approved by the Commission either in a rulemaking proceeding (also addressed in new rules) or a previous omnibus rate case. OCA would allow attribution or distribution changes for the smallest cost segments (below 4% of total accrued costs) in an omnibus rate case because of the minimal impact they tend to have on particular rates. If the Postal Service or other Applicant wishes to propose a new attribution or distribution approach, OCA proposes rules for the conduct of such rulemaking proceedings. The Commission's decision in such rulemaking cases would be added to the Commission's rules and automatically function as a pricing platform in subsequent omnibus rate cases. Of course, the Postal Service need not modify a previously approved attribution/distribution approach if it does not want to initiate a rulemaking proceeding.

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[18] Id. at 4.

As in the case of new attribution/distribution approaches for relatively large cost segments, OCA's proposed rule excludes classification changes (with the exception of rate and fee changes) from omnibus rate cases.

OCA also proposes new rules for the phasing of omnibus rate requests. All of the concerns voiced by the Commission and earlier commenters on minimizing the complexity of omnibus rate cases are applicable to the question of phased rates. PostCom Vice-President, Kate Muth, expressed similar concerns in a recent editorial.[19] She underscores: "NOW is the time for discussions on phased rates. Not after the case is dropped on the Postal Rate Commission's doorstep." OCA wholly supports this view. OCA's proposed rules for phasing represent our best effort to simplify the process of phasing and leave mailers subject to phasing, mailers not subject to phasing, the Postal Service, and the U.S. Treasury in a state of indifference to phasing, i.e., not disadvantaged by phasing as compared to the conventional approach of recommending non-phased rates.

Proposed Rules

[New] ***Rule 52a. Exclusion from §3622 Omnibus Rate Requests of Changes to Attribution or Distribution Methods for Major Cost Segments; Allowance in §3622 Omnibus Rate Requests of Classification Changes Limited to Increases or Decreases in Rates or Fees***

Requests by the Postal Service for an omnibus change in rates, pursuant to section 3622 of title 39, shall be based upon (1) methods of attribution and distribution approved by the Commission in either the §3622 omnibus proceeding immediately precedent to the instant request or (2) attribution and distribution methods approved by the

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[19] "To Phase or Not to Phase," January 19, 2005; http://www.postcom.org/public/articles/2005articles/To%20Phase%20or%20Not%20To%20Phase.htm

Commission in a rulemaking proceeding under Rules 191 and 192, whichever methods are most recent. A limited exception to this requirement is set forth in part b. below.

a. In addition, in §3622 omnibus rate proceedings, the Commission will only consider requests for changes in the Domestic Mail Classification Schedule that increase or decrease a rate or fee. Other types of classification changes, such as those involving a new service, or a change in the terms or nature of an existing service, shall be considered only in non-omnibus rate or classification proceedings.

b. Requests for changes to attribution and/or distribution methods shall be considered in §3622 omnibus rate proceedings only for particular cost segments whose accrued costs comprise less than 4% of the total allocable costs of the base year used in the omnibus rate request.

[New] ***Subpart L – Rules Applicable to Changes in Attribution and Distribution Methods***

3001.191. ***Requests for Changes to Attribution or Distribution Methods***

The Postal Service and other Applicants may seek changes to attribution and/or distribution methodologies established in previous §3622 omnibus rate proceedings or Rule 191 proceedings only by petitioning the Commission under this Rule (with an exception noted in part b. below).

a. If the Postal Service and/or other Applicant wishes to effect a change in a previously established attribution methodology or distribution methodology, the Postal Service or Applicant shall petition the Commission to establish a rulemaking proceeding for the consideration of the change.

b. This rule operates as a requirement for changes to the attribution and/or distribution methods for cost segments whose accrued costs exceed 4% of the total allocable costs approved by the Commission in the most recent §3622 omnibus rate proceeding. Cost segments whose accrued costs comprise 4% or less of the total accrued costs of the base year in a §3622 omnibus rate proceeding may be the subject of a request for a change in attribution or distribution method in a §3622 omnibus rate proceeding or they may be filed under the instant rule, at the option of the Postal Service or Applicant.

3001.192. ***Filing of Prepared Direct Evidence in Support of Proposed Changes to Attribution and/or Distribution Methods; Additional Procedures***

a. The Postal Service or Applicant must submit all evidence upon which it intends to rely to support a change in attribution or distribution methodology. The Postal Service or Applicant shall offer such evidence in the form of witness testimony.

b. Subpart A of these Rules shall apply in Rule 191 proceedings.

c. Subpart B of these Rules shall apply in Rule 191 proceedings as appropriate.

d. The Commission shall establish additional procedures that it deems appropriate in particular proceedings.

[New] ***Subpart M – Rules Applicable to §3622 Requests for Phased Rate Changes***

3001.201. ***§3622 Requests for Phased Rate Changes***

Requests for phased changes in rates may be included as part of a §3622 omnibus rate proceeding only in accordance with Rules set forth in Subpart M. The purpose of

Subpart M is to resolve outside of §3622 omnibus rate proceedings most of the issues presented by a request for phased rates.

3001.202. ***Phased Rate Requirements***

a. The period of time permitted for phases is a full year. Phasing in fractions of a year shall not be permitted.

b. Requests for two one-year phases, three one-year phases, and four one-year phases are permitted.

c. Phased rates must be proposed under a binding implementation schedule. The length of time for phases shall be part of the Commission's recommendation to the Governors. Phased rates shall go into effect for all classes and rate categories of mail on the same date.

d. The Postal Service may propose rates for particular classes or rate categories of mail that are not phased while proposing in the same request phasing for other classes or rate categories of mail. Rates that are subject to a single rate increase are defined as "non-phased." Non-phased rates shall go into effect on the same date as one of the phases proposed for phased classes or rate categories of mail. For example, if the Postal Service proposes rate increases in two phases, the first phased increase occurring on January 1 of the first year and the second increase occurring on January 1 one year later, the non-phased rates shall go into effect either on January 1 of Year One or January 1 of Year Two, but not on any other date.

e. The Postal Service shall first calculate the entire amount of the needed increase to revenues to break even at the end of a single test year. This amount

shall be divided into phases. That portion of revenues scheduled to be raised after the first phase shall be viewed as a loan from the Postal Service to the ratepayers whose full increase is deferred to a later period. The interest on this "loan" shall be added to the revenue increase that has been deferred to a later phase. If the Postal Service proposes two phases, then the portion of the revenue increase in Year One has no interest added, but the portion of revenue increase in Year Two (the deferred portion) shall have one year of interest added. If the Postal Service proposes three phases, then the portion of revenue increase in Year Three shall have two years of interest added.

f. Non-phased rates, for which the entire amount of additional needed revenues is scheduled for recovery in Year One, shall have no interest applied to the estimated needed revenue amount.

g. Non-phased rates, for which the entire amount of additional needed revenues is scheduled for recovery in Year Two, shall have a full year of interest added to the estimated needed revenue amount.

h. Non-phased rates, for which the entire amount of additional needed revenues is scheduled for recovery in Year Three, shall have two full years of interest added to the estimated needed revenue amount.

i. Non-phased rates, for which the entire amount of additional needed revenues is scheduled for recovery in Year Four, shall have three full years of interest added to the estimated needed revenue amount.

j. The phasing schedule proposed by the Postal Service must achieve a breakeven position by the end of the last year of phasing.

k. *Neither the Postal Service nor the U.S. Treasury shall be made worse off (compared to no phasing) as a result of phasing.*

The Postal Service's Unwillingness to Release Information Useful to the Commission and Intervenors Portends the Exclusion of Mailers, Competitors, and the Public from Proceedings Conducted under Postal Reform Legislation

The Postal Service's failure to comply with the Commission's lawful expansion of Periodic Reporting Requirements[20] is a harbinger of Postal Service actions under postal reform, as currently written. The Postal Service appears to have been emboldened by postal reform legislation recently approved by the House Committee on Government Reform and the Senate Committee on Governmental Affairs.[21] The Postal Service's decision not to comply with the periodic reporting requirements is contained in Ms. Gibbons' letter of September 8, 2004. The date of that letter corresponds to the day the Committee on Government Reform issued House Rept. 108-672, and follows by two weeks Senate Rept. 108-318 from the Committee on Government Affairs, concerning the Postal Accountability and Enhancement Act.[22]

The respective committee reports explain substantially similar legislative language concerning future treatment by the proposed Postal Regulatory Commission

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[20] PRC Order No. 1386 (Periodic Reporting Rules).

[21] *See* Postal Accountability and Enhancement Act, H.R. 4341, reported by the House Committee on Government Reform, May 12, 2004; and, Postal Accountability and Enhancement Act, S. 2468, reported by the Senate Committee on Governmental Affairs, June 2, 2004.

[22] *See generally* H.R. Rept. No. 672, 108th Cong., 2nd Sess., September 8, 2004, herein "House Report"; and, S. Rept. No. 318, 108th Cong., 2nd Sess., August 25, 2004, herein "Senate Report".

of certain financial and operational information provided in connection with Postal Service annual reports and in response to subpoenas from the proposed Commission.[23]

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[23] *Compare* SEC.204. REPORTING REQUIREMENTS AND RELATED PROVISIONS, in H.R. 4341 and S. 2468, respectively; *to wit*

H.R. 4341, SEC.204. REPORTING REQUIREMENTS AND RELATED PROVISIONS:
“§3651. Annual reports by the commission
"(f) CONFIDENTIAL INFORMATION. —
"(1) IN GENERAL.— If the Postal Service determines that any document or portion of a document, or other matter, which it provides to the Postal Regulatory Commission in a nonpublic annex under this section or pursuant to subsection (d) contains information which is described in section 410(c) of this title, or exempt from public disclosure under section 552(b) of title 5, the Postal Service shall, at the time of providing such matter to the Commission, notify the Commission of its determination, in writing, and describe with particularity the documents (or portions of documents) or other matter for which confidentiality is sought and the reasons therefor.
"(2) TREATMENT.— Any information or other matter described in paragraph (1) to which the Commission gains access under this section shall be subject to paragraphs (2) and (3) of section 504(g) in the same way as if the Commission had received notification with respect to such matter under section 504(g)(1).

And;
S. 2468, SEC.204. REPORTING REQUIREMENTS AND RELATED PROVISIONS:
“§3651. Annual reports by the commission
" (f) CONFIDENTIAL INFORMATION. —
"(1) IN GENERAL.—If the Postal Service determines that any document or portion of a document, or other matter, which it provides to the Postal Regulatory Commission in a nonpublic annex under this section or under subsection (d) contains information which is described in section 410(c) of this title, or exempt from public disclosure under section 552(b) of title 5, the Postal Service shall, at the time of providing such matter to the Commission, notify the Commission of its determination, in writing, and describe with particularity the documents (or portions of documents) or other matter for which confidentiality is sought and the reasons therefor.
"(2) TREATMENT.—Any information or other matter described in paragraph (1) to which the Commission gains access under this section shall be subject Io paragraphs (2) and (3) of section 504(g) in the same way as if the Commission had received notification with respect to such matter under section 504(g)(1).

See also SEC. 502. AUTHORITY FOR POSTAL REGULATORY COMMISSION TO ISSUE SUBPOENAS, in H.R. 4341, and SEC. 602. AUTHORITY FOR POSTAL REGULATORY COMMISSION TO ISSUE SUBPOENAS, in S. 2468; *to wi*t

H.R. 4341, SEC. 502. AUTHORITY FOR POSTAL REGULATORY COMMISSION TO ISSUE SUBPOENAS:
“§504(g)(1) If the Postal Service determines that any document or other matter if provides to the Postal Regulatory Commission pursuant to a subpoena issued under subsection (f), or otherwise at the request of the Commission in connection with any proceeding or other purpose under this title, contains information which is described in Section 410(c) of this title, or exempt from public disclosure under section 552(b) of title 5, the Postal Service shall, at the time of providing such matter to the Commission, notify the Commission, in writing, of its determination (and the reasons therefor).
"(2) No officer or employee of the Commission may, with respect to any information as to which the Commission has been notified under paragraph (1)—
"(A) use such information for purposes other than the purposes for which it was supplied; or
"(B) permit anyone who is not an officer or employee of the Commission to have access to any such information.

Significantly, the legislative language provides that where "the Postal Service determines requested information is proprietary . . . the [Postal Regulatory] Commission may use the information only for the purpose for which it is supplied and must restrict access to the information to Commission officials."[24] While the legislative language does "not prohibit the Commission from publicly disclosing relevant information" provided to it by the Postal Service, confidentiality for such information is required, as the Commission must adopt "procedures for ensuring appropriate confidentiality for information furnished to any party."[25]

"(3) Paragraph (2) shall not prevent information from being furnished under any process of discovery established under this title in connection with a proceeding under this title. The Commission shall, by regulations based on rule 26(c) of the Federal rules of Civil Procedure, establish procedures for ensuring appropriate confidentiality for any information furnished under the preceding sentence."

And;
S. 2468, SEC. 602. AUTHORITY FOR POSTAL REGULATORY COMMISSION TO ISSUE SUBPOENAS:
"§504(g)(1) If the Postal Service determines that any document or other matter it provides to the Postal Regulatory Commission under a subpoena issued under subsection (f), or otherwise at the request of the Commission in connection with any proceeding or other purpose under this title, contains information which is described in section 410(c) of this title, or exempt from public disclosure under section 552(b) of title 5, the Postal Service shall, at the time of providing such matter to the Commission, notify the commission, in writing, of its determination (and the reasons therefore).
"(2) Except as provided in paragraph (3), no officer or employee of the Commission may, with respect to any information as to which the Commission has been notified under paragraph (1)—
"(A) use such information for purposes other than the purposes for which it is supplied; or
"(B) permit anyone who is not an officer or employee of the Commission to have access to any such information.
"(3)(A) Paragraph (2) shall not prohibit the Commission from publicly disclosing relevant information in furtherance of its duties under this title, provided that the Commission has adopted regulations under section 553 of title 5, that establish a procedure for according appropriate confidentiality to information identified by the Postal Service under paragraph (1). In determining the appropriate degree of confidentiality to be accorded information identified by the Postal Service Under paragraph (1), the Commission shall balance the nature and extent of the likely commercial injury to the Postal Service against the public interest in maintaining the financial transparency of a government establishment competing in commercial markets.
"(B) Paragraph (2) shall not prevent the commission from requiring production of information in the course of any discovery procedure established in connection with a proceeding under this title. The Commission shall, by regulations based on rule 26(c) of the Federal Rules of Civil Procedure, establish procedures for ensuring appropriate confidentiality for information furnished to any party."

[24] Senate Report at 56.

[25] §504(g)(3).

It is clear that the combined effect of this legislative language is to impose significant limitations on the general public to access a broad range of information in the Postal Service's possession. This limiting effect is at odds with the stated goal of the postal reform legislation that "the Postal Service must be subject to a high degree of transparency, including in its finances and operations . . . [which] is a key foundation for ensuring fair treatment of both customers and competitors."[26]

It is equally clear from the Postal Service's failure to comply with the Commission's Periodic Reporting Rules that the Postal Service has prematurely arrogated unto itself the determination of what information is relevant and necessary to the Commission in the conduct of its duties and, by extension, limited access to such information by the Commission, interested parties and the general public. In effect, it appears the Postal Service seeks to dictate an outcome that is supported by proposed legislative changes – changes not applicable to the current regulatory regime. Moreover, the Postal Service's noncompliance with the Periodic Reporting Rules portends how the Postal Service will behave under the proposed regulatory regime after postal reform with respect to disclosure of financial and operational information.

There are sound reasons under current law for the Postal Service to report periodically additional information. In adopting the Periodic Reporting Rules, the Commission identified several areas where the Commission, interested parties and the general public would benefit from additional information. In general rate cases, the need for discovery would be reduced, making it possible to shorten hearings since "litigants and the Commission would already be familiar with the standard cost and

[26] House Report at 5.

revenue reports" underlying such cases.[27] In addition, the Commission found that between general rate cases, the Commission and the public would benefit from being able to "analyze the accuracy of cost, volume, and revenue projections on which current rates are based."[28] Where cost data shows that "cross-subsidy or other rate inequity exists, affected parties would have a basis for asking the Commission" to initiate a complaint proceeding under §3662 of the Act.[29]

These benefits of additional reporting arise because Postal Service financial information and data sources have become increasingly complex and difficult to analyze in the limited time available for postal rate, classification and other proceedings.[30] In adopting the Periodic Reporting Rules, the Commission also found that data sources and estimating techniques used by the Postal Service "change unpredictably," creating a "'state of the art' [that] is a moving target to the outside world" with respect to the CRA.[31] As a result, there is no way for the interested public (or the Commission) to interpret the results of the Postal Service's routine financial reports "because they have no way to distinguish between what appear to be changes in cost, volume and revenue behavior, from changes in methods that the Postal Service uses to measure that behavior."[32] Moreover, the Postal Service possesses virtually all the relevant data. Because interested parties do not have basic data with which to develop models

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27 Periodic Reporting Rules (Order No. 1386) at 2.

28 Id.

29 Id.

30 *See generally* Periodic Reporting Rules (Order No. 1386) at 22-23.

31 Id. at 6.

32 Id. at 7.

between rate or classification cases, the Commission concluded that their ability and right to develop an opposing case is unnecessarily limited and "more theoretical than real."[33]

The Commission would benefit in less obvious ways from the additional information made publicly available under the Periodic Reporting Rules. In general rate proceedings, the Commission must base its recommended decisions on an evidentiary record. To complete its work within the allotted time, the Commission relies on the broad understanding of Postal Service finances and operations by many interested parties to identify service issues, spot changes in finances and financial trends, and provide other insights, which are incorporated into the evidentiary record. The existence of this broad knowledge base has developed over years through the public availability of Postal Service information presented in periodic rate, mail classification and new product proceedings. The general availability of information on postal finances and operations made possible by the Periodic Reporting Rules would further enhance the collective understanding of interested parties and the Commission by permitting productive exchanges outside the context of formal proceedings, such as public conferences and academic research.

Similarly, under the postal reform legislation, the new Postal Regulatory Commission is charged with specific oversight and compliance responsibilities that require general public participation. As in the current regulatory regime, the new Postal Regulatory Commission would benefit from the general availability of Postal Service financial and operational information.

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[33] Id. at 8.

The postal reform legislation approved by the House and Senate committees requires the Postal Service to file an annual report "demonstrating that the rates in effect for all products during the year are in compliance with the requirements of this title and that established service standards are being met."[34] After receipt of the annual report, the Postal Regulatory Commission must provide an opportunity for public comment and, "within 90 days, make a written determination as to whether any rates or fees were not in compliance with the law or whether any service standards were not met."[35] Similarly, the reform legislation authorizes "interested persons" to file complaints with the Postal Regulatory Commission where such persons believe the Postal Service is not operating in conformance with the requirements of the law.[36] The Postal Regulatory Commission must initiate a proceeding or dismiss a complaint within 90 days.[37] The House committee legislation provides a further requirement for "notice and an opportunity for a public hearing and comment," where the average rate increase for a market-dominant product would increase at a rate greater than the annual increase in the CPI.[38] Under such circumstances, the Postal Regulatory Commission cannot permit such an increase to take effect unless it has provided such an opportunity, and it has "determined that such an increase is reasonable and equitable and necessary to enable the Postal Service, under best practices of honest, efficient, and economical

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[34] Senate Report at 47.

[35] Id. at 48.

[36] *See* S. 2468, SEC. 205 COMPLAINTS; APPELLATE REVIEW AND ENFORCEMENT. "§3662. Rate and service complaints." In addition, the Senate Committee bill, at "§3623(f) COMPLAINTS," specifically authorizes complaints under §3662 by any person who believes that a negotiated service agreement (NSA) does not conform with the requirements of the section permitting NSAs.

[37] Senate Report at 48.

management, to maintain and continue the development of postal services of the kind and quality adapted to the needs of the United States."[39]

However, the combined effect of several provisions of the postal reform legislation will, over time, largely preclude a broad understanding of postal finances and meaningful public involvement. This is because under the reform legislation the Postal Service on its own volition can determine what information is proprietary and therefore non-public, thereby limiting availability to the Postal Regulatory Commission. In turn, the Postal Regulatory Commission's authority is severely limited as it may only permit disclosure of such information in furtherance of its duties or where the Commission initiates a proceeding, and then only to interested parties under "appropriate confidentiality" conditions. The likely result of this provision is to limit disclosure and diminish the effectiveness of the Postal Regulatory Commission's oversight as interested parties and the public generally have less financial and operational information with which to independently judge Postal Service compliance and thereby assist the Commission.

In addition, the reform legislation limits public participation to much briefer time periods than under current law. The reform legislation requires action by the Commission with respect to rate and service complaints, and public comments in response to annual Postal Service reports, within 90 days. Under such circumstances, the ability of interested parties and the general public to marshal effectively Postal

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[38] House Report at 7.

[39] Id.

Service financial and operational information so as to demonstrate Postal Service noncompliance with rate and service requirements would be more theoretical than real.

Thus, the postal reform legislation advantages the Postal Service with respect to disclosure of postal financial and operational information – a clear departure from current law. As discussed previously, the Postal Service decides what information is proprietary and disclosure is limited generally to discovery in formal APA proceedings "under rules to protect the confidentiality of such information."[40] Pursuant to current law, this Commission has found that "Congress did not expressly exempt the Postal Service from disclosure of commercially sensitive materials" outside the context of an FOIA request.[41] Nor did Congress under current law "expressly make the Postal Service the arbiter for what materials should be considered commercially sensitive."[42] In fact, the Commission observed that it is "not aware of any government monopoly that has been granted absolute power to decide for itself what its disclosure policy will be."[43]

For these (and other) reasons, the House and Senate committee-approved postal reform legislation is viewed by the White House as failing to meet the President's reform principles. According to the Association for Postal Commerce, as reported on November 18, 2004,[44] both House and Senate bills "lack meaningful reforms in the areas of transparency – to prevent cross-subsidization of competitive products with monopoly product revenue; . . ." As a result, the Administration asks that the postal

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40 Senate Report at 56.

41 Periodic Reporting Rule (Order No. 1386) at 72.

42 Id.

43 Id. at 73.

44 *See* the PostCom website at www.postcom.org, reporting postal news for November 18, 2004.

reform legislation include a provision to: *Allow the Postal Regulatory Board to determine whether materials submitted by the Postal Service are to be deemed confidential and exempt from public disclosure*.

It seems clear, therefore, that goal of the postal reform legislation for a "high degree of transparency" in postal finances and operations and the requirement for pubic hearings and informed comment in determining Postal Service compliance would be largely thwarted by the combined effect of specific provisions of the reform legislation: Postal Service authority to determine what financial and operational information is commercially sensitive, limited disclosure only under conditions of appropriate confidentiality, and very short time limits for public involvement and decision-making by the Postal Regulatory Commission.

Conclusion

The Commission, in proper exercise of its authority under the Postal Reorganization Act, has promulgated an expansion of the Periodic Reporting rules so that the Commission and intervenors can better monitor fluctuations in postal costs and enter omnibus rate cases with a better understanding of the Postal Service's most current attribution and distribution methods. Although the Postal Service has partially complied with the new requirements, it refuses to furnish to the Commission and the intervenors some of the most essential documentation that affects the largest cost segments. The Postal Service's previous remonstrations concerning publication of materials filed under the rule expansion have been exposed as a ruse. OCA's offer to protect the confidentiality of requested materials (several of which are required under Rule 102) did not trigger their release.

OCA urges the Commission to exercise its powers to manage the conduct of omnibus rate proceedings by limiting the issues that can be raised in such proceedings. Changes to previously approved attribution and distribution approaches (for larger cost segments) would not be permitted in omnibus rate cases, nor would classification changes other than rate and fee changes. Changes to attribution and distribution methodologies would be permitted only in rulemaking proceedings. The phasing of rates would be permitted only after rules have been established that resolve a multitude of execution and fairness issues.

OCA explains why it views the Postal Service's refusal to comply fully with the Commission's modest expansion of Periodic Reporting requirements as a portent of its likely behavior under proposed postal reform legislation.

Finally, OCA asks the Commission to permit pleadings responsive to OCA's instant pleading. Nearly all of contents of the instant document are new material and interested persons should be allowed to reply. OCA will defer to the Commission's more expert judgment on the length of time to allow for replies. OCA adds as a final note that it views its proposed rules as a preliminary attempt to improve the conduct of omnibus rate cases, making them simpler and fairer, and quite possibly more amenable to early resolution. OCA welcomes the improvements that may be suggested by other interested persons who favor changes of the type suggested by OCA.

Respectfully submitted,

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SHELLEY S. DREIFUSS
Director
Office of the Consumer Advocate

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ATTACHMENT 1

December 2, 2004

Mr. Daniel J. Foucheaux, Esq.
Chief Counsel, Ratemaking
United States Postal Service
475 L'Enfant Plaza, SW
Washington, DC 20260-5000

Dear Dan,

The purpose of this letter is to request documentation and data that the Office of the Consumer Advocate (OCA) needs to prepare its direct case for submission in the next omnibus rate case. It has become clear that the Postal Service and the Commission have been unable to reach agreement on whether to make available to the public documentation covered by the expansion of Commission Rule 102. Hence I request the needed information informally. I make an unqualified commitment not to post any of the information on the Commission's website or to disseminate it publicly via any other medium.

On May 25, 2004, you transmitted most of the material covered by the expanded Rule 102. In a cover letter addressed to Steven Williams that accompanied the transmittal, you alluded to a letter sent to Mr. Williams on February 20, 2004. I have never seen the letter, but based on your description of it in paragraph 4 of the May 25 cover letter, I gather that the Postal Service is willing to provide the Commission "and any other interested parties" with "pertinent data and other materials relating to the carrier cost study briefing." You added that the Postal Service has a "preference" that it "remain the source of such materials." In addition, you requested that the information provided "not be posted on the Internet or otherwise publicly distributed." Finally, you held open the offer made in the February 20 letter and stated that interested parties could contact you to arrange for transfer of specific materials.

I would like to act upon the offer made in your May 25 letter. OCA's request encompasses some data covered by expanded Rule 102 and data/documentation beyond the scope of Rule 102. I am sure that it will come as no surprise that OCA is very interested in learning more about Dr. Bradley's new econometric analysis of city

carrier costs. Our first order of business is to try to understand what Dr. Bradley has done and see if we have any questions about it. Next, we will determine if alternative analyses devised by OCA might produce a marginal cost analysis that, in our opinion, is sounder technically or theoretically. It is entirely possible that we will find Dr. Bradley's approach preferable to our own attempts. If so, OCA will either encourage the Commission to adopt his approach or, at the very least, not oppose its use.

OCA staff (Jed Smith, Rand Costich, and Pam Thompson) have thoroughly examined the materials submitted under Rule 102 with respect to the attribution and distribution of city carrier costs. They have advised me that the following materials would be necessary to advance their understanding of Dr. Bradley's work and devise alternative analyses. I therefore ask that the Postal Service provide, informally (not for public dissemination), the following materials:

<u>Data and Documentation for Dr. Bradley's Econometric Models</u>

1. The sample design protocol, including statements of the reasons for the sample design choices.

2. The carrier selection and training procedure materials.

3. The study database, unscrubbed, and any other data collected but not used.

4. A statement of the reasons for scrubbing specific items of data.

5. The study database disaggregated by carrier route (with a specification of the type of carrier route; with a cross reference to the ZIP codes) in an electronic format that is compatible with software that runs in a PC environment. Also, an identification system (e.g., based on the matching of routes and ZIP codes in the two databases already furnished) for each route in the databases so that an analyst can see whether data from some routes were used as inputs for more than one econometric model. For example, would the data for flats and letters have been gathered in some cases on the same day/route/ZIP codes as the data for accountables and large packages? In addition to the two econometric models presented by Dr. Bradley, one could hypothesize a model in which data for accountables and large packages were modeled along with letters, flats, etc. at the ZIP code or possibly even route level. We do not know whether such an approach would be fruitful, but the requested data would be necessary in order to examine this potential approach.

6. The PC SAS computer programs, including econometric models, that were rejected in favor of those finally selected by Dr. Bradley.

7. Postal Service plans for updating the city carrier street time study database or revising the econometric model.

OCA would also like to develop an understanding of how the results of Dr. Bradley's study are used to distribute costs to categories of mail. Therefore, we request the following with respect to the distribution of Segment 7 costs:

Data and Documentation for Distribution of City Carrier Costs

8. The City Carrier Cost System (CCCS) data for FY 2003 used to distribute attributable city carrier costs to classes of mail in the CRA. (Listed in Order No. 1423).

9. A description of how total street costs are split between Segments 6 and 7. (We recall Dr. Bradley saying that the cost of mail sorting activities performed at the carrier's vehicle go to Segment 6.) Also, the workpapers that perform this split and any data used.

10. A description of how total Segment 7 costs are split among Components. Also, the workpapers that perform this split and any data used.

11. A description of each split (allocation, distribution) in the order in which it is performed.

You may recall that OCA retained an econometrician, Dr. Mark Roberts, in Docket No. R2001-1 to evaluate witness Bozzo's econometric analysis and perform an alternative analysis. At the present time, OCA hopes to retain Dr. Roberts' services for the next omnibus rate case. Since Dr. Roberts has time-consuming teaching responsibilities at Pennsylvania State University, OCA would like to obtain MODS data and other data Dr. Roberts used previously in estimating the volume variability of mail processing costs well in advance of the next rate case. This would allow Dr. Roberts to perform his work over a longer, less concentrated, period of time. To this end, OCA also requests the following materials pertinent to an evaluation of Dr. Bozzo's econometric model and to an update of Dr. Roberts' model.

Data and Documentation for Mail Processing Analysis

12. MODS input data used to estimate mail processing cost variabilities by activity. (Listed in Order No. 1423).

13. SAS computer programs showing how FY 2003 attributable mail processing costs were estimated and distributed to mail classes in the CRA. (Listed in Order No. 1423).

14. For fiscal years 2000-2004, data analogous to that provided in the following filings from Docket No. R2001-1. If complete data are not available, please provide available data and describe any omissions. FY 2000 data are requested to confirm that data provided now are analogous to (can be merged with) data provided in R2001-1.

a. J-209, response to OCA/USPS-T14-7 (as described in file LR-J-209.doc)

b. J-206, response to POIR No. 6, Q.11(a) (as described in file LR-J-206.doc)

c. J-190, response to UPS/USPS-T14-2 (as described in file LR-J-190.doc)

d. J-186, response to POIR No. 5, Q.7 (crosswalk: hard copy at http://www.prc.gov/docs/30/30698/usps-lr-j-186.pdf)

e. J-179, response to OCA/USPS-172 (as described in file LR-J-179-1.doc)

f. J-161, response to OCA/USPS-91(c) and (f), and 94 (revised) (as described in file LR-J-161.doc)

g. J-56, two (2) diskettes (filed January 14, 2002) and one (1) CD (filed September 26, 2001)

Thank you for considering OCA's request. I look forward to hearing from you.

Sincerely,

Shelley S. Dreifuss
Director, Office of the Consumer Advocate

ATTACHMENT 2

CHIEF COUNSEL, RATEMAKING

January 14, 2005

Shelley S. Dreifuss
Director, Office of the Consumer Advocate
1333 H Street, NW
Washington, DC 20268-0001

Dear Shelley:

This responds to your letter dated December 2, 2004, in which you requested the Postal Service to provide to the OCA informally a large number of specific documents and data sets underlying Dr. Bradley's new econometric analysis of city carrier costs and the distribution of attributable city carrier costs to classes of mail in the current CRA. You also requested current data and documentation to enable the OCA's econometrician to analyze the attribution and distribution of mail processing costs for fiscal years 2000-2004. Your letter indicates that your requests are made in anticipation of, or in connection with, discovery in the next general rate case. You state that you believe these requests to be responsive to a Postal Service offer to provide certain costing information directly to requesting parties, an offer you believe was made in a May 25, 2004 letter to the Secretary of the Commission.

Before responding to your specific requests, I would like to clarify the communications upon which they are based. Although the May 25th letter did refer to an earlier offer to provide to requesting parties certain data and programs underlying the new city carrier cost study, it should not be construed as an open-ended invitation to request materials beyond those specifically mentioned in the offer. In fact, the original offer alluded to in the May 25th letter encompassed only the input data and computer programs used to perform the new carrier cost analysis. These materials, moreover, were provided to the Commission along with the May 25th letter. Against the preferences of the Postal Service, the Commission promptly posted the data and programs on the Commission's public web site. The OCA, and other interested individuals and organizations, thus have had access to these materials for some time now. I should also note that disclosure of these materials, and the public briefing that proceeded it, were limited exceptions to the customary

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practice of not publicly disclosing data and study documentation expected to be used in an upcoming rate case, until the case is filed.

The materials requested in your letter fall outside the limited set of information earlier offered and provided. They consist of detailed documentation of more than one cost segment, and are the type of information that the Postal Service ordinarily prepares only in anticipation of formal rate litigation. Moreover, the requests go beyond even the broad scope of the Commission's new periodic reporting rules, which, as you recognize in your letter, the Postal Service opposes. As you acknowledge in your letter, your requests essentially represent anticipatory discovery prior to the next omnibus rate proceeding.

After careful consideration, the Postal Service has determined that we must deny your request. As noted above, the Postal Service has not offered to provide such information to parties in advance of future rate proceedings. Furthermore, most of the information you have requested is not currently available. Drafting, compilation and presentation of such information ordinarily is completed only shortly prior to the filing of a Postal Service Request for changes in rates, fees and classifications. Preparing the materials for disclosure in an intelligible form that would not entail considerable follow-up explanation would require substantial time and effort that we are not currently in a position to undertake. In general, the Postal Service simply is not prepared or staffed to respond to such rate-case-type discovery requests outside of and prior to anticipated rate filings.

The Postal Service is confident that the documentation it will provide in support of upcoming rate requests will be sufficiently detailed and accessible to enable the OCA and all other interested parties to quickly come up to speed and participate fully and meaningfully in future proceedings. We look forward to working cooperatively with the OCA in such proceedings.

Sincerely,

Daniel J. Foucheaux Jr.

Daniel J. Foucheaux, Jr.
Chief Counsel, Ratemaking