

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

RATE AND SERVICE CHANGES TO IMPLEMENT
FUNCTIONALLY EQUIVALENT NEGOTIATED
SERVICE AGREEMENT WITH HSBC NORTH
AMERICA HOLDINGS INC.

Docket No. MC2005-2

STATEMENT OF THE UNITED STATES POSTAL SERVICE
REGARDING FURTHER COMMENTS OF THE OCA
(April 28, 2005)

The Postal Service hereby provides the following statement regarding a pleading submitted in this proceeding by the OCA on April 27, 2005, styled as "Office of the Consumer Advocate Further Comments on the HSBC NSA." While that pleading is less than fully clear as to what effect the OCA intends for it to have on the Commission's specific consideration of the NSA proposed in this proceeding, the Postal Service wishes to be very clear that, under basic standards of fairness and due process, it can have no effect on the Commission's deliberations.

An orderly administrative process requires establishment of reasonable procedures and schedules, and adherence to those procedures and schedules by all participants. Presiding Officer's Ruling No. MC2005-2/1 (March 29, 2005) achieved the first of these two requirements. Noting that no party had objected, the Ruling determined that the proposal would be considered under Rule 196 as a request for a

functionally equivalent NSA. It established a deadline for discovery of March 31, 2005, likewise noting that no party had objected when that date was proposed at the prehearing conference. Ruling No. 1 also established a date of April 8 as the deadline for providing any notice of intent to file rebuttal testimony, and set April 15 as the date by which parties were to designate the discovery responses they wished to be incorporated into the evidentiary record. Lastly, the Ruling set April 20 as the deadline for initial briefs, and April 27 as the deadline for reply briefs, once again noting that no party had objected to the briefing date proposed at the prehearing conference.

The OCA was present at the prehearing conference when the proposed discovery deadline was discussed, but made no objection. The OCA filed all of its discovery requests in this proceeding before the March 31 deadline, and the Postal Service and HSBC filed timely responses to all of its questions. The OCA filed no notice of any intent to submit testimony in this proceeding, either before April 8 or at any other time. On April 15, the OCA designated the discovery responses it wished to be included in the evidentiary record, but made no reference to any additional material of any type. The OCA chose not to file an initial brief, instead filing a document styled as "Office of the Consumer Advocate Comments on the HSBC NSA." In those comments, the OCA explicitly stated that it did not oppose the HSBC NSA. On April 25, in Ruling No. MC2005-2/2,

the Presiding Officer granted the motions to place the designated materials into evidence, and closed the record.

On April 27, the OCA filed a pleading styled as “Office of the Consumer Advocate Further Comments on the HSBC NSA.” Rather than being confined to legal argument based on appropriate references to record evidence, however, this document consisted of extra-record analysis, based on extra-record information. While beginning with a citation to the portion of Presiding Officer’s Ruling No. MC2005-2/1 establishing April 27 as the date for filing reply briefs, the document made no pretense of being filed in reply to anything. Rather, in its first paragraph, the new pleading was described as an amplification of views “express by OCA in its initial comments.” In other words, the OCA was simply replying to itself.

Essentially, the OCA’s Further Comments seek to inject new evidence into this proceeding, after the opportunity to do so under the procedures established by the Presiding Officer has expired.¹ Of course, the possibility of new information becoming available with the inevitable passage of time during an administrative process is in no way a unique circumstance, or even an unusual one. Litigation, however, can not be conducted on a moving target. That is particularly the case if the

¹ The evidentiary nature of the submission is underscored by the OCA’s further filing today of OCA-LR-1, a library reference containing the spreadsheets on which the extra-record analyses were developed, by person or persons unknown. Obviously, for the same reasons that the Further Comments must be excluded from consideration in this docket, OCA-LR-1 must likewise be excluded.

accelerated review called for by Rule 196 (the application of which the OCA likewise did not oppose) is to have any substance. The evidentiary record in this case closed on April 25, without objection by the OCA or any other party.

In the Commission's consideration of the co-proponents' request for a recommended decision on the HSBC NSA, fundamental fairness, to say nothing of legal due process, requires that no consideration whatsoever be given to the extra-record material filed by the OCA on April 27. Such treatment of those materials, furthermore, would apparently not be inconsistent with the views expressed by the OCA itself. The OCA's Further Comments at pages 3-4 profess to express concerns only about "future NSAs," rather than the instant proposal. Those statements should be taken at face value, and the new materials should be disregarded for all purposes in Docket No. MC2005-2.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

Daniel J. Foucheaux, Jr.
Chief Counsel, Ratemaking

Eric P. Koetting

475 L'Enfant Plaza West, S.W.
Washington, D.C. 20260-1137
(202) 268-2992, FAX: -5402
April 28, 2005

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing document in accordance with Section 12 of the Rules of Practice and Procedure.

Eric P. Koetting

475 L'Enfant Plaza West, S.W.
Washington, D.C. 20260-1137
(202) 268-2992, FAX: -5402
April 28, 2005
eric.p.koetting@usps.gov