

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

Postal Rate and Fee Changes, 2005)

Docket No. R2005-1

OFFICE OF THE CONSUMER ADVOCATE
MOTION TO COMPEL RESPONSES
TO INTERROGATORIES OCA/USPS-147a. and d. and 148.a.
(July 5, 2005)

The Office of the Consumer Advocate (OCA) hereby moves to compel responses to interrogatories OCA/USPS-147a. and d. and 148.a. These interrogatories request the filing of 75-80 agreements that were cited in the Postal Service's response to interrogatory OCA/USPS-53 and those between the Postal Service and its partners to facilitate vending specific services and products to the public, namely Mailing Online, NetPost Certified Mail, NetPost Card Store, and Electronic Postmark. The Postal Service objects to providing copies of the requested agreements and justifies its refusal on the grounds of relevance, proprietary information, and undue burden.¹ The Postal Service is emboldened to make this sweeping refusal by its self-serving, wholly unproven statement that:²

Since the services in question are all nonpostal, and therefore outside the Commission's jurisdiction, the information sought is not relevant to this proceeding. Specifically, the details of the Postal Service's nonpostal agreements are immaterial to the issues presented by a request for a recommended decision on rates and fees for postal services.

¹ "Objection of the United States Postal Service to Interrogatories of the OCA (OCA/USPS-147a & d, 148a)," filed on June 21, 2005 (hereinafter "Objection").

² Id. at 2.

The question whether these services are “nonpostal” and “outside the Commission’s jurisdiction” has yet to be determined. The 75 – 80 agreements in question may or may not involve the provision of nonjurisdictional services. The Postal Service’s bald assertions about the “nonpostal” character of the 75 - 80 agreements are likely rooted in its oft expressed position that *it* makes the determination of the “postal” character of services it sells to the public, while adamantly denying that the Commission has a statutory role. For example, in Comments filed in the Docket No. *2003 proceeding,³ at 4, the Postal Service contended that:

Congress did not intend for section 3623 to authorize the Commission to conduct investigative hearings for the purpose of adjudicating challenges to the Postal Service's legal determinations, or reviewing and second-guessing its management decisions.

And,⁴

[T]he Commission's reliance on its classification authority does not support review of nonpostal status, either in a complaint proceeding or in a proceeding initiated under section 3623.

The Postal Service also argued that the lack of jurisdiction by the Commission is so patent that the Commission lacks jurisdiction even to determine whether it has jurisdiction to determine the “postal/nonpostal” character of challenged services.⁵ The Postal Service made the further argument that: “where the PRA is concerned, it is by no means clear that the Commission, as opposed to the Postal Service, is entitled to deference.”⁶

³ “Comments of United States Postal Service on Consumer Action Petition,” filed January 30, 2003.

⁴ *Id.* at 27.

⁵ *Id.* at 28.

⁶ *Id.* at 29.

The Postal Service relied upon similar arguments in Docket No. C99-1:⁷

The Commission lacks statutory authority to resolve a challenge to the Postal Service's determination not to seek a recommended decision for a new service alleged to be a "postal" service.

And,⁸

Authority to entertain legal challenges to the validity of independent actions of the Postal Service falls, if anywhere, within the province of the district courts, not the Postal Rate Commission. The Commission should promptly dismiss the UPS complaint on the grounds that the Commission lacks authority to resolve the claims that UPS has made.

The Postal Service's contentions that the Commission lacks authority to determine the "postal/nonpostal" character of unclassified services have been decisively rejected by the Commission every time they are raised. For example, in a recent rulemaking to formulate a definition of a postal service the Commission stated: "[The Commission's] mail classification authority empower[s] it to review the status of services proposed or offered by the Postal Service."⁹

Similar views were articulated in the C99-1 proceeding:¹⁰

Where the subject of a complaint is a new and unreviewed service offering of the Postal Service and its associated rates, as is the case here, it is impossible to conceive how the Commission can perform this required interpretation without considering the "postal" character of the service – which would render it a subchapter II matter - or its "nonpostal" quality, which would put it outside the subchapter's regulatory regime.

* * * * *

In determining whether a previously unreviewed service challenged by the complaint of an interested party is appropriate for consideration under the

⁷ Complaint on Post E.C.S., "Motion of the United States Postal Service to Dismiss," filed November 5, 1998, at 2 (upper case font changed to lower case).

⁸ Id. at 6.

⁹ Docket No. RM 2004-1, Order No. 1389, issued January 16, 2004, at 4.

¹⁰ Order No. 1239, "Order Denying Motion of United States Postal Service to Dismiss Complaint and Notice of Formal Proceedings," issued May 3, 1999, Docket No. C99-1, at 11 and 12.

regulatory procedures specified in subchapter II, the Commission is engaged essentially in exercising its mail classification authority, under which it is assigned primary responsibility for interpreting the status of services either proposed or offered by the Postal Service.

In Order No. 1239, the Commission went on to say that:¹¹

Especially in view of the Commission's judicially-recognized authority on issues of mail classification, it would be unjustifiable to force aggrieved parties to elect a judicial remedy by declining to consider such complaints.

OCA does not dispute the Postal Service's arguments for products and services *reviewed by the Commission and determined to be non-jurisdictional*. In such cases, the Commission's need for detailed information would be limited to the types of reporting and accounting activities proposed by the Commission in RM2004-2, Reporting Requirements for Nonpostal Services. The reporting and accounting rules would be directed primarily at ensuring that non-jurisdictional services and products produce sufficient revenues to cover their incremental costs and make a contribution to institutional costs. The Commission would need this information to be certain that jurisdictional domestic ratepayers bear none of the costs of non-jurisdictional services.

However, OCA strongly opposes the view of the Postal Service that the Commission and participants must accept the Postal Service's unilateral determination of the jurisdictional character of the commercial products and services that are the subjects of the 75-80 agreements. Because the Postal Service refuses to provide copies of the agreements, it puts OCA and the Commission in the position of having to argue blindly about their "postal/nonpostal" character. Once the agreements are provided, the Commission will be in a better position to assess whether to treat the

¹¹ Id. at 13.

underlying services as unauthorized services that fall under the Commission's definition of a postal service in RM2004-1 or as non-jurisdictional services that must be accounted for under the proposed rules of RM2004-2.

The Postal Service claims that:¹²

Examination of the legal agreement between the parties, however, is not necessary to understand the activities performed by the Postal Service.

Indeed, those activities have already been described in the response on which these questions are based, OCA/USPS-53.

That statement cannot possibly be correct because the numbers just don't add up. At page 3 of the objection, the Postal Service notes that OCA is seeking copies of between 75 – 80 agreements. However, the services discussed in response to interrogatory 53 only number 20,¹³ outside of the separate listing of "Affiliates & Alliances." What about the other 55 - 60 agreements? They are never described in response to interrogatory 53 and the specific costs involved in activities that are performed by the Postal Service and its partners under these agreements have never been provided. Although the Postal Service believes that the unidentified 55 – 60 agreements are "nonpostal" in character, it is quite possible that participants and the Commission would not agree.

In two complaint cases involving complaints about the unauthorized provision of postal services – Pack and Send and PosteCS – the Postal Service was convinced that the services were "nonpostal," but the Commission was unconvinced. On the contrary, in the case of Pack and Send, the Commission issued an order declaring that Pack and

¹² Objection at 2.

¹³ See Attachment One to the Postal Service's response to OCA/USPS-53.

Send was postal in character.¹⁴ In the case of PosteCS, the Commission entertained the idea that PosteCS, which was a substitute for hardcopy mail and a functional equivalent might be postal in character.¹⁵ The Commission must have the requested agreements before it to make an informed determination.

The Postal Service cannot avoid spending some time in preparing the requested agreements for review by the Commission. The best way to handle the problem is to have the Postal Service provide the agreements in a Library Reference with alleged proprietary details redacted. (This should not take more than a few hours). At the same time, unredacted copies of the agreement should be filed under protective conditions, which should provide ample protection to the Postal Service and its strategic partners from commercial harm. After all, access to the confidential materials is highly restricted and the use for the materials is severely circumscribed.

Following provision of the agreements for review by participants and Commission staff, OCA and other participants should be permitted to present arguments to the Commission for specific redactions to be removed based upon a showing that the activities described in the agreement are jurisdictional in character and that the Commission should exercise its classification authority to declare them so; alternatively participants may argue that the Postal Service is likely incurring costs for its part in engaging in the activities produced by the agreement and that the costs have not been accounted for and thereby have improperly been shifted to jurisdictional ratepayers as institutional costs; or finally, that the Postal Service's claims that the agreements are

¹⁴ Order No. 1145, "Declaratory Order Finding Complaint to be Justified and Providing for Further Proceedings," issued December 16 1996, Docket No. C96-1.

¹⁵ Order No. 1239 at 14 – 15.

irrelevant to the Commission's performance of its duties under Chapter 36 of title 39 are justified and that no further action on the agreements need be taken. In this way, the burden argument asserted by the Postal Service may be greatly reduced because a subset of the agreements may be determined to be irrelevant to Chapter 36 proceedings. For those agreements that are found relevant to exercise of Chapter 36 duties, the burden argument may be found to be outweighed either by the postal character of the services and products offered under the agreements or by the improper cost shifting that may be taking place.

The nondisclosure provisions that the Postal Service has in place with its strategic allies are of no moment in the Commission's determination. The Postal Service should not enter into such agreements when it is well aware that the Commission has rate and classification duties that it must perform under Chapter 36 that may involve releasing details of the subject agreements. If the Commission decides that the confidentiality of such agreements outweighs the public's need to review them, then the Commission can maintain confidential treatment of them for the remainder of this proceeding – by allowing follow-up interrogatories, responses to interrogatories, initial and reply briefs, and the Commission's opinion and recommended decision all to be filed under protective conditions. In this way, there is no injury to the Postal Service's proprietary rights (if, indeed, such rights exist).

Interrogatory 147.d. and 148.a. request copies of the agreements underlying the provision of specific services to the public that are well publicized, namely Mailing Online, NetPost Certified Mail, NetPost Card Store, and Electronic Postmark. Since the nature of these services is better known than those involved in the 55 - 60 agreements,

it is seen more readily that the four services have distinct a distinct "postal" character. Therefore, the Postal Service should be directed to file these without the restrictions of protective conditions.

Mailing Online is essentially the same service that the Postal Service itself believed to be a service when it submitted Docket No. MC2000-2 for the Commission's approval. The fact that many of the operations are furnished by a strategic partner does not change their "postal" character. The Postal Service goes to extraordinary lengths to convince the public that it is doing business with the Postal Service and that Mailing Online is being provided by the Postal Service. If the Postal Service receives revenue under an arrangement with its current Mailing Online partner, the cost and revenue details of the arrangement must be closely scrutinized. It is also essential to see whether the Postal Service took any steps in entering into the current agreement with Poste Digital to compensate jurisdictional ratepayers for the losses they suffered during the MC2000-2 experiment.

NetPost Card Store that begins with a transaction initiated at the Postal Service's website and culminates with the mailing of a card as First Class has unmistakable characteristics of a postal service. NetPost Certified Mail begins and ends in the same way; thus it is also a postal service.

Electronic Postmark is offered as an electronic substitute for hardcopy mail with functions and purposes similar to those of PosteCS. There is a good chance that the Commission will determine this to be a postal service under its proposed definition. Therefore, the Authentidate contract is clearly relevant to the Commission's discharge of its duties and is not subject to any proprietary privileges.

WHEREFORE, the OCA requests that the presiding officer direct the Postal Service to respond to interrogatories OCA/USPS-147a. and d. and 148.a..

Respectfully submitted,

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OCA/USPS-147. Please refer to the "Affiliates and Alliances" paragraph of Attachment Two to OCA/USPS-53.

a. Please furnish copies of the 75 linking agreements referred to in the interrogatory. (One of the major purposes for this request is to gain a better understanding of the activities performed by the parties to the agreement, particularly the Postal Service, so as to see whether expenses incurred by the Postal Service in performing its activities have been fully and appropriately accounted for). For each, please indicate whether the purpose of the agreement is: (1) to complement the Postal Service's core product offering; (2) to generate mail; and/or (3) to provide value to our customers.

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d. Please provide copies of the following agreements (if not otherwise provided in response to part a.): Mailing Online; NetPost Certified Mail; and NetPost Card Store.

OCA/USPS-148. Please refer to the "Affiliates and Alliances" paragraph of Attachment Two to OCA/USPS-53 where it is stated: "Today, we limit consideration of Affiliates to those that complement our core product offering, generate mail, and/or provide value to our customers." Also refer to the Electronic Postmark (EPM) paragraph.

a. Please provide a copy of the Authentidate agreement cited in the EPM paragraph.