

UNITED STATES OF AMERICA
POSTAL RATE COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners: George Omas, Chairman;
Dawn A. Tisdale, Vice Chairman;
Dana B. Covington, Sr.;
Ruth Y. Goldway; and
Tony Hammond

Rate and Service Changes to
Implement Baseline Negotiated
Service Agreement with Bookspan

Docket No. MC2005-3

ORDER IN REGARD TO
OFFICE OF CONSUMER ADVOCATE MOTION
CERTIFIED TO THE COMMISSION

(Issued October 12, 2005)

On September 21, 2005, the Office of the Consumer Advocate (OCA) filed a motion to strike the testimony of witness Yorgey, or alternatively to suspend the procedural schedule.¹ Referring to interrogatory OCA/USPS-T2-11 subparts (c), (d) and (e), OCA asserts that the Postal Service “has not provided even the smallest shred of an answer to OCA’s questions[.]” Motion to Strike at 1. Thus, OCA contends that striking witness Yorgey’s testimony is appropriate because “OCA has been deprived of the opportunity to challenge the soundness and reliability of her analysis.” Id. at 3.

Interrogatory OCA/USPS-T2-11 requests witness Yorgey to elaborate on her experience with International Customized Mail (ICM) agreements as referred to in her Autobiographical Sketch. See USPS-T2 at ii.

¹ Office of Consumer Advocate Motion to Have the Presiding Officer Strike the Testimony of Witness Yorgey or, Alternatively, Suspend the Procedural Schedule, September 21, 2005 (Motion to Strike).

OCA/USPS-T2-11.² Please refer to your testimony at page ii. You state that: 'In 1996, I was selected as the Program Manager for International Customized Mail agreements in the newly formed International Business Unit. I was responsible for negotiation, development and implementation of ICM agreements.'

- a. Please describe your duties in negotiating and implementing ICM agreements.
- b. Please give the time period during which you negotiated and implemented ICM agreements.
- c. Please state the number of ICM agreements, by year, that the Postal Service entered into during the period of time given in answer to part b. of this interrogatory. Please break down this number into:
 - i. number, or percentage, of total ICM agreements (by year) that broke even, i.e., revenues equaled costs.
 - ii. number, or percentage, of total ICM agreements (by year) that produced a surplus, i.e., revenues exceeded costs.
 - iii. number, or percentage, of total ICM agreements (by year) that lost money, i.e., costs exceeded revenues.
- d. Please list all measures used by the Postal Service to ensure revenue surpluses for ICM agreements.
 - i. How successful were these measures?
 - ii. If the measures were not entirely successful, what changes to these measures are being taken with respect to ICM agreements.
- e. Please describe in detail all methods and techniques that were used under your direction to estimate the volumes that would be entered by mailers pursuant to ICM agreements.
 - i. How accurate were the volume estimation methods and techniques that were used?
 - ii. If the measures were not entirely successful, what changes to these methods and techniques were adopted to make them more successful?

² Office of Consumer Advocate Interrogatories to United States Postal Service Witness Michelle K. Yorgey (OCA/USPS-T2-11-14), August 5, 2005.

Witness Yorgey provided responses to subparts (a) and (b).³

(a)-(b). In 1996, as Program Manager for International Customized Mail agreements, my initial duties included: developing a process to negotiate agreements; creating profile worksheets for USPS Sales Specialist to complete; facilitating the development of agreements with International Pricing, International Operations and International Product Managers; developing communication to USPS District offices to implement agreements; and developing a data tracking reports. Over the past 9 years, I have continued to work on the implementation process, tracking data to ensure agreement compliance, and providing customer service support by assisting customers with specific international mailing issues.

However, the Postal Service objected to allowing witness Yorgey to respond to subparts (c), (d) and (e).⁴ It argued that subparts (c), (d) and (e) lack relevance asserting that the “detailed information sought will shed no light on the consistency of the Bookspan NSA with the relevant policies of the Act[.]” Objection at 1.

OCA filed a motion to compel the Postal Service to respond to interrogatory OCA/USPS-T2-11 subparts (c), (d) and (e) directed to witness Yorgey.⁵ OCA argued that “[t]he success of witness Yorgey in particular, and of the Postal Service in general, in negotiating and administering NSAs is patently relevant in a baseline NSA proceeding[.]” more specifically because “information concerning the financial performance of previously implemented NSAs bears on the reliability of the financial projections provided in this proceeding.” Motion to Compel at 1. The Postal Service

³ Responses of Postal Service Witness Yorgey to Interrogatories of the Consumer Advocate (OCA/USPS-T2-11a&b, 12a & 13, August 19, 2005; Notice of Filing of Revised Cover Sheet for Responses of Postal Service Witness Yorgey to Interrogatories of the Consumer Advocate (OCA/USPS-T2-11a&b, 12a & 13, August 19, 2005).

⁴ Objection of the United States Postal Service to Interrogatories OCA/USPS-T2-11(c)-(d), August 15, 2005; Notice of United States Postal Service of Filing of Errata to Objection to Interrogatories OCA/USPS-T2-11(c)-(e) and Motion for Late Acceptance, August 19, 2005.

⁵ Office of Consumer Advocate Motion to Compel Responses to Interrogatories OCA/USPS-T2-11(c)-(e), September 1, 2005 (Motion to Compel).

responded to the OCA's Motion to Compel attempting to distinguish Negotiated Service Agreements from International Customized Mail agreements.⁶

Presiding Officer's Ruling No. MC2005-3/6 directed the Postal Service to respond to interrogatory OCA/USPS-T2-11 subparts (c), (d) and (e).⁷ The Presiding Officer found these questions relevant, and reasonably calculated to lead to admissible evidence. 39 CFR § 3001.25. Past experience and education has direct bearing on the weight of a witness' testimony, and may be relevant to evaluating the credibility of the witness. The Presiding Officer also found that "Negotiated Service Agreements are similar enough to ICM agreements to potentially shed light on the accuracy of the financial projections of the Bookspan NSA."⁸

Postal Service witness Yorgey provided her compelled response to OCA/USPS-T2-11(c)-(e) on September 20, 2005.⁹ Her complete response states:

My understanding is that data concerning international revenues and costs are not provided publicly by the Postal Service, but are made available for the Commission under seal.

This single sentence response precipitated the OCA's September 21, 2005, Motion to Strike.

⁶ Response of the United States Postal Service to Motion of the Office of the Consumer Advocate to Compel Responses to Interrogatories OCA/USPS-T2-11(c)-(e), September 9, 2005.

⁷ Presiding Officer's Ruling on Office of Consumer Advocate Motion to Compel Response to Interrogatories OCA/USPS-T2-11(c)-(e), September 13, 2005 (P.O. Ruling No. MC2005-3/6).

⁸ Id. at 3.

⁹ Compelled Response of Postal Service Witness Yorgey to Interrogatories of the Office of the Consumer Advocate (OCA/USPS-T2-11c.-e.), September 20, 2005.

On September 29, 2005, the Postal Service filed a response in opposition to the OCA's Motion to Strike.¹⁰ For the first time, a Postal Service pleading indicates that a response might reveal sensitive information: "Had the sensitivity of the underlying data been apparent, it would have been raised in the objection." Response at 2. It then provides further information about ICMs, attempting to distinguish ICMs from NSAs. It concludes that the Presiding Officer's findings in regard to the discoverability of this interrogatory do not establish that the data has sufficient weight to support a motion for the extraordinary relief of striking testimony.

The Postal Service also describes instances where OCA has misinterpreted witness Yorgey's responses to OCA/USPS-T2-11 subparts (a) and (b), and information contained in the FY 1998 ICRA report. These arguments are provided to attack the relevance of OCA's line of questioning. *Id.* at 4.

Discussion. Several preliminary comments are necessary to put this controversy in perspective. The Presiding Officer certified this matter to the full Commission because of the extraordinary relief requested and the nature of the arguments presented in participants' pleadings. We accept certification as appropriate under Rule 23.

As will be described in more detail below, participants have not distinguished themselves in this matter. The compelled response provided by the Postal Service on September 20, 2005, is patently unresponsive. The Office of the Consumer Advocate reacted by seeking extreme sanctions. Postal Service counsel personalizes

¹⁰ Response of the United States Postal Service to Motion of the Office of the Consumer Advocate to Strike the Testimony of Witness Yorgey or, Alternatively, Suspend the Procedural Schedule, September 29, 2005 (Response). This response was filed one day late without an accompanying motion for late acceptance. The Commission's practice of requiring a motion for late acceptance is necessary for the Commission to rule on any prejudice that may occur, and to facilitate maintenance of the Commission electronic filing database. Although the Commission has considered the arguments presented in their Response, the Postal Service is to file an appropriate motion for late acceptance.

Participants should provide themselves with a sufficient time cushion to allow for successful electronic filing before the cutoff deadline. The Commission will make every effort to assure the accuracy of the time stamp, and will take corrective measures if alerted to a problem. However, slight time variances between the time stamp and a participant's internally kept time are to be expected. Participants who attempt to file very close to the cutoff time do so at their own risk. The electronic time stamp is the final arbitrator between filing on time and filing late.

implications in the OCA motion and then presents as argument information that would more properly have been contained in the witness' response.

In sum, this controversy has escalated unnecessarily. Presiding Officer's Ruling 2005-3/6 remains sound and appropriate. If the Postal Service believed that a proper response would have involved the production of data that should be made subject to protective conditions, it has the obligation to provide the Commission with an appropriate motion supported by reasoned justification. It has been more than two months since the discovery request at issue was filed, and participants have yet to address what appear to be the Postal Service's real concerns. While the Commission seeks to expedite proceedings, see § 3624, the OCA is entitled to fully explore witness Yorgey's demonstrated expertise in negotiating, or developing appropriate procedures for arriving at, contracts under which the Postal Service provides reduced rates in return for mailers providing a predetermined volume of business. OCA is also entitled to fully explore the success or failure of procedures the Postal Service has used (if any) to project changes in volumes that its potential partners are likely to send if volume-based discounts are made available to them.

Witness Yorgey is scheduled to testify on October 19-20, 2005. If, following cross-examination, OCA believes that its inquiry into either of these topics has been directly frustrated by delays resulting from this controversy, it should request appropriate relief by October 21, 2005. Responses to such a motion will be due by October 24, 2005.

Witness Yorgey's response to OCA/USPS-T2-11 subparts (c), (d) and (e) fails to address the questions asked. Subpart (c) asks witness Yorgey to state the number of ICM agreements, by year, that the Postal Service entered into during the time period she negotiated and implemented ICM agreements. It then asks to break these numbers down by ICM agreements that broke even, produced a surplus, or lost money. Subpart (d) asks witness Yorgey to list all measures used by the Postal Service to ensure a revenue surplus. It then asks further details in regard to these measures. Subpart (e) asks witness Yorgey to describe all methods and techniques that were used

to estimate volumes that would be entered by mailers pursuant to ICM agreements. It then asks further details in regard to these methods and techniques. To these questions witness Yorgey simply states: "My understanding is that data concerning international revenues and costs are not provided publicly by the Postal Service, but are made available for the Commission under seal." The questions do not ask whether the Postal Service provides data concerning international revenues and costs, or whether data concerning international revenues and costs are supplied under seal.

Yorgey's statement could be interpreted as her understanding that a response might involve disclosing sensitive information. One can only hypothesize on this issue because the Postal Service has not provided any persuasive argument which contends that responding to the interrogatory subparts might require disclosing sensitive data. However, the interrogatory subparts do not ask for information specific to any particular ICM agreement. The questions do not ask for disclosure of specific or aggregate revenue or cost data. The overall number of ICM agreements by year could be obtained by reviewing the publicly available *Postal Bulletin* notifications, although this would not specify which ICMs are related to witness Yorgey's tenure. The managerial questions in regard to ensuring a revenue surplus and on volume estimates are general in nature and not particular to any one ICM or other type of agreement. The questions that ask what number or percentage of the ICM agreements broke even, operated at a loss, or operated with a surplus could require the Postal Service to internally reference international revenues and costs data. However, these questions can be answered without exposing any information specific to a particular ICM, and without exposing any financial information as to the success or failure of the overall ICM program.

Witness Yorgey's response also could be interpreted as indicating that the information requested has been provided to the Commission under seal. This does not appear to be the case. The data provided to the Commission under seal does not discuss measures employed to ensure a revenue surplus (subpart (d)), or methods and techniques used to estimate volumes (subpart (e)). Furthermore, the data is not

provided in sufficient detail to determine how many ICM's were financially successful, broke even, or operated at a loss (subpart (c)).

The Postal Service attempts to tie this discoverability dispute to an "attempt to seek public disclosure of protected information." Response at 5. The Postal Service is well aware that the Commission has established procedures for instituting protective conditions applicable to sensitive material. The Postal Service has not made a request for protective conditions or any argument that would support such a request.

The Postal Service provides as part of its argument information that is somewhat responsive to OCA's interrogatory. For example: "Moreover, volume projections do not need to be made in entering into ICMs, because they are based on pre-established minimum volumes or revenues and the discounts are applied to all of the customer's mail if the set minimums are met." *Id.* at 3 (footnote omitted). "Thus, they are unlike the NSA in this case and the others that have been before the Commission for which volume thresholds are established individually for each customer based on its historic and projected volumes." *Ibid.* This information, if provided by the witness, would be responsive, in part, to question 11(e), and perhaps to clarifying a response to 11(d). But as a statement by counsel, it frustrates potential clarifying questions.¹¹ The Commission affirms that the interrogatory seeks relevant information that is reasonably calculated to lead to admissible evidence and that a response should be provided by a witness prepared to explain the basis of the answer.

The Postal Service highlights areas where OCA arguments incorrectly interpret responses to interrogatory OCA/USPS-T2-11 subparts (a) and (b).¹² For example: "First, although the OCA asserts that witness Yorgey says 'she was the Program Manager for International Customized Mail agreements from 1996 to 2003,' witness Yorgey says only that she was selected as the program manager *in* 1996." *Id.* at 2 (emphasis in original). The Postal Service never clarifies what portion of 1996, or of

¹¹ Because the argument is part of a response to a motion, it will not be part of the record for consideration.

¹² The Postal Service also contends that OCA has misinterpreted data based on the FY 1998 ICRA report.

1997 through 2003, witness Yorgey's duties included the position of Program Manager for International Customized Mail. Interrogatory OCA/USPS-T2-11 subparts (a) and (b) ask witness Yorgey to describe her duties and provide time periods. The Postal Service has not provided complete and unambiguous answers to these questions. This does not further the development of the record, and may lead to a needlessly prolonged hearing to clarify these responses.

OCA requests the Presiding Officer to strike the testimony of witness Yorgey, or alternatively, to suspend the procedural schedule until the Postal Service provides a responsive answer. Both of these suggested remedies for the Postal Service's failure to provide a response to this interrogatory are extreme at this point in the proceeding. Granting a motion to strike is reserved for "extraordinary" relief. 39 USC § 3001.21(c). The Commission will grant a stay in the procedural schedule "only if it finds that failure to supply adequate information interferes with the Commission's ability promptly to consider the request and to conduct its proceedings with expedition in accordance with the Act." 39 USC § 3001.194.

The OCA's interrogatory is directed at the witness' prior work experience. The response could either bolster or undermine a claim that the witness has certain expertise. This could affect the Commission's confidence in the witness' testimony in that area. It creates an indirect inference.¹³ However, it does not directly address the credibility or reliability of the actual testimony. The Postal Service's failure to answer this interrogatory does not yet rise to the level necessary to strike witness Yorgey's entire testimony, or to suspend the proceeding. The OCA's Motion to Strike is denied without prejudice.¹⁴

Denying the OCA's Motion to Strike does not bring the discovery dispute to a close. Parties are not at liberty to pick and choose which interrogatories to answer, nor do they make a final determination as to what interrogatory is relevant or not in any given proceeding. Recipients of discovery requests may file objections to

¹³ A negative inference can be drawn by a failure to answer this interrogatory.

¹⁴ A properly focused motion to strike may be offered either immediately before, or following, witness Yorgey's appearance.

interrogatories based on established exceptions, and proponents of interrogatories may contend that an exception is not justified and request that answers be compelled. Both parties may advocate their positions. However, the Presiding Officer makes the final determination on whether or not, and under what restrictions, an interrogatory should be answered.

When discovery disputes occur, the Commission expects the parties to first attempt to amicably resolve the issues on their own. The Postal Service's argument that subparts (c), (d) and (e) of the interrogatory lack relevance is unpersuasive. There is no support for an argument that interrogatory responses necessarily would require the disclosure of sensitive information. There has been no request for protective conditions. No burden, or lack of knowledge, arguments have been presented. No persuasive reason to justify not responding to the interrogatory has been presented. The Postal Service shall provide a responsive answer to interrogatory OCA/USPS-T2-11 subparts (c), (d) and (e) by October 14, 2005.

The Postal Service has also provided an ambiguous response to OCA/USPS-T2-11 subparts (a) and (b). The Postal Service shall provide a more complete response as to witness Yorgey's duties (including position titles, job functions, and applicable time periods) by October 14, 2005.

It is ordered:

1. The Commission accepts the certification requested by the Presiding Officer in P.O. Ruling MC2005-3/11 as appropriate under Rule 23.
2. Office of Consumer Advocate Motion to Have the Presiding Officer Strike the Testimony of Witness Yorgey or, Alternatively, Suspend the Procedural Schedule, filed September 21, 2005, is denied without prejudice.

3. If necessary, following the oral cross-examination of witness Yorgey, OCA may seek appropriate relief consistent with this Order. A request for relief shall be due by October 21, 2005. A response to such a motion shall be due by October 24, 2005.

4. The Postal Service is directed to provide a response to interrogatory OCA/USPS-T2-11 subparts (a) through (e) consistent with this ruling by October 14, 2005.

5. The Postal Service is to file the required motion for late acceptance of the untimely filing of Response of the United States Postal Service to Motion of the Office of the Consumer Advocate to Strike the Testimony of Witness Yorgey or, Alternatively, Suspend the Procedural Schedule, filed September 29, 2005.

Steven W. Williams
Secretary