

CONFIDENTIAL

001314

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

RECEIVED
AUG 12 2 07 PM '98
POSTAL RATE COMMISSION

Mailing Online Service)

Docket No. MC98-1

STATEMENT OF THE OFFICE OF THE CONSUMER ADVOCATE
IN RESPONSE TO ORDER NO. 1216
(August 12, 1998)

The Postal Service filed on July 15, 1998, a Request for Recommended Decisions on a Market Test Classification and Fee Schedule and on an Experimental Classification and Fee Schedule Mailing Online Service. Concurrently, the Postal Service filed a Motion for Expedition and for Waiver of Certain Provisions of Rule 161 and Rule 64(h). The Commission's Order No. 1216 on July 17, 1998 noticed these filings. It provided for the filing no later than August 12, 1998, of requests for hearing and statements prescribed by the Commission's market test rules, statements of issues on the request for an experimental mail classification, and answers to the Postal Service's motions for expedition and for waiver of certain provisions of Rule 161 and Rule 64(h).¹ The Office of the Consumer Advocate (OCA) hereby responds to the Order.

I. Market Test-- Statement of Issues and Request for Hearing

Based upon analysis to date of the request for market test classification, the OCA submits that questions of material fact remain to be determined in the market test

¹ Order No. 1216 at 8.

portion of this docket before the Postal Service has met its burden required by the Commission's market test rules under § 3001.162. Specifically, issues revolving primarily around the missing contract costs and missing or unsupported development costs and telecommunications costs prevent a determination of the true nature, scope, and impact of the market test. Discovery requests are pending and significant questions remain to be answered before the proposal may be approved.² These issues must be resolved before the Commission may grant authorization for the requested market test. At this time, it appears that a trial-type hearing may be necessary to compile a satisfactory record concerning the market test.

Most significantly, the market test request does not contain the prices in the printing contract which will not be completed until mid or late August.³ This deficiency is fundamental. The prices and other terms are critical to this test and the entire program. Other significant contract terms that are now totally unknown relate to the billing and payment provisions as they may affect future costs and charges; the terms of service including the possibility of day-certain delivery; the effect of delays or breakdowns; the allowances, if any, for bundling of market test mail to qualify for increased discounts; the allowances for the bundling of Mailing Online material with other non-Postal Service business; and the responsibility of the Postal Service for other costs that may affect the longer-term cost of the new service or impact upon the flexibility of contemplated future

² At the time of this pleading, no contract with a printer has been entered into by the Postal Service for the market test; development costs are unsupported; telecommunications costs bear no explicit relationship to telecommunications capacity requirements; and capacity requirements are based on *ad hoc* unsupported assumptions. The OCA has addressed these issues in discovery. See, for example, interrogatories OCA/USPS-T1-27, OCA/USPS-T3-7-10.

³ USPS-T-5 at 13.

services. The Postal Service also needs to explain how it will maintain Mailing Online material, including address lists remaining in its files after mailing, and if the information is subject to scrutiny or sale to third parties.

Also lacking in this record is a clear description of the service area in which the market test will be conducted. The areas cited, Philadelphia, New York and Boston are broad geographic regions. More specific boundaries are necessary to determine whether the estimated volumes and revenue projections are reasonable, the test is practical, and the regions tested are sufficient to meet the announced goals. There is also no reference to the specific postal facilities involved in the eastern test area. The sites and locations of the printing plants in question are also not yet provided.

Particularly significant is the requirement in Rule 162(h) that the Postal Service demonstrate the means by which equal access will be provided to all potential users of the test. The burden is not met. The Postal Service has not indicated if there is any geographic limit to the source of the incoming print orders or the output of those orders. The methods and costs of informing the public of the test and the amount of advertising are not indicated in the filing.

Additionally, the plan for reporting the test data to the Commission lacks specificity and does not provide clearly for frequent reports to assist the Commission in resolving the request for the experimental phase of the program. For instance, the statement that data will be reported "periodically" is unsatisfactory. (USPS-T-1 at 14). If this proceeding moves forward under shortened procedures as contemplated by the Postal Service, market data, if filed quarterly, will not be available in time for review of the request for experimental classification. The Postal Service should be required to

provide the volume and revenue market test data to the Commission at least monthly on a date certain.

II. Statement of issues presented on experimental mail classification request

A. Experimental status

Experimental status determinations are made on a case by case basis.⁴ OCA believes that the criteria for proceeding under the experimental request rules are satisfied in this docket with the caveat that the market test information will not be available to provide the data the Commission may believe to be necessary to reach a reasoned decision within the time frame contemplated by the rules for experimental requests. In this case, the Commission ought to consider, if necessary, some flexibility in its procedures on the experimental request in order to consider the results of the market test or any modifications of the program resulting from the test.

The first criterion of an experimental request is that it must be novel. This experimental program is novel. It would provide for the first time a Postal Service internet address for submitting information to be prepared for mailing, including printing and envelope insertion service, and the service of transporting the envelope to a Postal Service mail facility. The proposal differs from any service currently available from the Postal Service.

Another criterion is the magnitude of the proposed change on existing operations. The magnitude appears minimal as it does not alter any existing

⁴ PRC Op. MC96-1 at 17.

classification or services but adds new options for mailers. The effect on costs and revenues during the experimental phase are relatively minor, consistent with the experimental rules. Costs (excluding markup) are estimated to be \$56 million and \$95 million in the first two years of service in 1999 and 2000 (USPS-T-5, Exh. B at 1).

Revenues in the first two years are estimated, excluding postage, to be \$70 million and \$120 million, respectively, (USPS-T-5, Exh. B at 1) with net new postage revenue of \$12.5 million and \$26 million for the first two years (USPS-T-5, Exh. D at 1-2).⁵

Moreover, the data to be gathered will directly count volume and will therefore assist in providing improved documentation of mail volumes in future cases.

The effect on firms offering services competitive with or alternative to the experimental service is also unknown, at least during the experimental phase. The Postal Service testimony of John Hamm supports the experiment on behalf of Printing Industries of America (PIA) which, as the nation's largest printing and graphic arts association with about 15,000 members, "represents every segment of the printing industry in virtually every state." (USPS-T-6 at ii). However, witness Garvey indicates that "Lettershops may be impacted by Mailing Online." (USPS-T-1 at 14).

⁵ OCA interrogatories and the responses thereto have indicated these original estimates of the Postal Service need to be corrected to reflect the underlying data, but the order of magnitude is not significantly different. The longer term potential effect on revenues beyond the experimental period is significant as awareness of the service increases and more small businesses expand their reliance on computer technology.

B. Issues of material fact**001319**

The experimental request raises numerous issues of fact which must be resolved. The request for authorization for an experimental classification suffers from virtually all of the same deficiencies, listed above, as the market test request. In addition, the data that would be provided by the market test itself is obviously not now available. Rule 162(i) requires a plan for reporting the test data to the Commission.

Significantly, the market test data will not be available to the Commission or the participants for consideration during the pendency of the request for the experimental changes unless the proposed reporting plan (USPS-T-1 at 14) to provide the Commission the market test data on a "periodic" basis is revised. A plan to report periodically is so vague as to constitute virtually no plan at all. It may mean quarterly or semi-annual reporting, not necessarily when the data is available. Such a plan permits reporting at the whim of the Postal Service when the data suits its purposes. The Commission needs to be assured that the market test information will be available to assist the Commission's timely review of the data in the context of the experimental request. The plan needs to provide for reporting during the conduct of the test. The implications of this for the procedures to be implemented and the rules to be invoked are discussed below in the section responding to the Postal Service's motions.

The information missing from the market test request (prices, overhead costs, discounts, initial markets, advertising costs) is also lacking from the experimental classification request. These gaps in the filing must be filled prior to authorization. The missing data is fundamental. The missing data is not extensive, such as the detailed cost study data or productivity data which the Commission has said in previous

experimental request cases it might require in a request for permanent authority but not require in reviewing a request for experimental authority.⁶

Therefore, the Commission should determine the experimental request is appropriate under the rules and establish hearing procedures to resolve issues of fact. Moreover, the Commission should maintain flexibility in its procedures to permit it to consider the results of the market test and to determine if modifications of the experiment are necessary in order to comply with the provisions of §3623 of the Postal Reorganization Act.

III. Motions

A. Response to Motion for Expedition

The Postal Service's motion for expedition of the request for experimental classification states the "Postal Service's preferred objective for this experiment" is to have a recommended decision "by the end of November, 1998." (Motion at 1). That is approximately 4 1/2 months from the July 15 filing date, only slightly less than the 150 days contemplated for decision on a request for experimental service under the Commission's rules.⁷

OCA submits that the Postal Service has not provided sufficient and clear justification for a reduction in the Commission's shortened procedural schedule for

⁶ PRC Op. MC96-1 at 18.

⁷ The Postal Service does not invoke § 3001.69-69c of the Commission's rules relating to expedited minor classification cases and we do not respond in the context of those rules. Moreover, the Postal Service has not moved to expedite the market test procedures in this case even though the date for launching its market test is October 1 in the North Eastern US with print sites anticipated to be established on September 14 and December 7 (Exhibit USPS 1B at 17). The market test rules contemplate a decision in 90 days (120 days if a hearing is held).

experimental requests. On the one hand, the Commission's rules already provide for extremely shortened procedures where hearings are involved in order to complete the recommendations for experimental changes in not more than 150 days. Rule 67d (39 C.F.R. § 3001.67d) states that requests involving experimental changes will be treated "as subject to the maximum expedition consistent with procedural fairness." A further shortening of the time, especially if the Commission finds, as we believe, a trial-type, on the record hearing is required, would impinge upon the ability to compile a sufficient record with trial-type hearings.

The difficulties presented to the participants and the Commission in reaching a reasoned decision on an expedited schedule must be weighed against the advantages cited by the Postal Service for a further reduction in the already short procedural schedule. The Postal Service's reasons are at best vague and do not clearly explain its need for an additional two weeks in December in order to move forward in a timely manner with its experiment.

First, we note the Postal Service states that a late November decision date is only a "preferred objective" not critical to the program. Second, the Postal Service says an earlier decision would allow it "to explore the possibility" that major software developers could integrate Mailing Online into impending updates. A decision later than November "could" leave the experiment "too uncertain" to meet software development deadlines. (Motion at 2).

These reasons are speculative and unsupported by any factual showing. The Postal Service says it intends only to "explore" the "possibility" for integrating new software and that a delay "could" create a problem. The Postal Service provides no

indication that it has contacted any software companies, nor that any software companies are contemplating incorporating mailing online into their software or what their development deadline schedules may be. Moreover, the Postal Service has not stated why it could not now explore those possibilities in anticipation of the experiment, particularly where such "exploration" would not involve the significant expenditure of investment funds by the Postal Service. Also, the Postal Service is requesting authorization for an experiment only, not permanent approval, and it makes no representation that any software manufacturer plans to incorporate mailing online into its software while this program is an experiment.

In support of its motion for expedition, the Postal Service cites the planned deployment in January 1999. That is not a satisfactory reason for expedition. The Postal Service is in control of its programs and planning. It is also fully aware of the Commission's procedural rules based upon substantive legislative requirements. It is the Postal Service's responsibility to submit its filings with this Commission in a timely fashion. Where there is no demonstrated justification for the untimely filing of its application or a demonstrated need to necessarily commence the program in January 1999, other than the fact that this is the arbitrary date established by the Postal Service, then the Commission need not and should not adjust its procedures. Moreover, if the Commission is able to reach a decision by mid-December, the Postal Service would have almost one month to scale up from the small-scale market test and to implement the relatively minor experimental classification changes in the DMCS at the time of its January 10, 1999 rate changes. The Postal Service has, therefore, not provided a

satisfactory justification for expedition of the request for experimental classification and its motion should be denied.

B. Waiver of the Rule 161 requirement

The Postal Service also requests waiver of the requirement contemplated by Rule 161 (§ 3001.161) that a Postal Service request for a permanent classification change must be filed as a prerequisite for a market test request. The Postal Service requests the waiver to permit the market test procedures in the context of its request for an experimental classification.

The OCA does not, in this instance, object to waiver of that portion of Rule 161 which requires that a request for a permanent classification must be on file if a market test request is filed. The Postal Service intends the market test to form a basis for fashioning the experimental service. It states the proposed interim fees for the market test "would remain in effect only until a recommended decision on the experimental service was issued and...implemented by the Postal Service." (Motion at 3). Its motion further states:

The use of market tests to gain "real world" experience and to gather data is as relevant to a request for an experimental classification as to a request for a permanent classification change. As explained in the testimony of witness Garvey (USPS-T-1), the market test would also enable the Postal Service to conduct further tests of the technology and to define the relationships needed to be established and maintained with printers for the experimental service. (Motion at 3-4).

Because additional market test information is needed before a larger- scale experimental program can reasonably be implemented, the usual schedule for review of experimental classification proposals may need to be extended without any harm to the

overall program. Some procedural flexibility needs to be maintained by this Commission and the Postal Service to obtain the results of the market tests before resolving the request for an experimental program in order to assure the statutory classification requirements are met.

The Commission should view the Postal Service request for a waiver of Rule 161 in the context of the purposes of the relatively new market test rules and the older experimental classification rules. The Commission rules for experimental classification procedures were in existence when the new market test rules were adopted in 1996. However, when the market test rules were drafted, the Commission did not indicate that an experimental classification application would be an acceptable alternative to a request for permanent authorization. Unless it was mere oversight by the Commission, it must be assumed that the Commission viewed the purposes of the market test differently than the purposes of the experimental rules and purposely did not link the two procedures. That difference is not expressly discussed in the Commission's market test order.⁸

The final order on the market test rule briefly considered a suggestion by American Banker's Association that a request for a permanent change in mail classification should not be a prerequisite for procedures that would authorize market tests. The Commission rejected the idea because, "In the Commission's view, a 'free standing' market test rule would require a different set of procedures, and possibly additional forms of evidentiary support by the Postal Service."⁹

⁸ Order No. 1110, Order Adopting Final Rules, Docket No. RM95-4, issued May 7, 1996.

⁹ Order No. 1110 at 7 and 8.

In short, the Postal Service requests attempt to combine two rules designed for situations that are normally mutually exclusive. The experimental request rules effective since 1980 had been in operation for several years before the market test rules were proposed. The market test rules were therefore clearly designed to provide an avenue of relief that was not available under the experiment request rules. The experimental request rules require a showing that the proposed change is novel and allows experimental changes for up to two years. The experimental request Rule 67b also requires a full explanation justifying the unavailability of the data required under Rule 64 pertaining to formal requests for mail classification changes, but does not require a formal request for a permanent classification change to be on file.

On the other hand, the market test rules fill a previous gap in the rules. The new market test service is not required to be novel in order to qualify for special treatment. Because a market test is primarily a data gathering exercise, the rules do not require a showing justifying the lack of data. Presumably, the contemplated permanent classification request would normally consider the data gathered from the market test. Because sufficient data to support authorization for a permanent change is not likely to be available pending the outcome of the market test, the market test rule allows the Postal Service to seek a suspension of the underlying reclassification proposal "until the information to be produced in connection with the market test becomes available." (§ 3001.166(a)). The market test is also allowed for up to one year instead of the two years allowed by the experimental request rules although additional market test periods may be requested. However, the Commission's requirement that a request for permanent change is on file when a market test is requested indicates the Postal

Service must seriously contemplate a permanent change in its classification before it may embark upon a market test. It cannot simply go on a fishing expedition with its market tests.

Applying these factors to the motion for waiver suggests that combining a market test with the experimental request rules is like trying to fit a round peg in a square hole. In effect, the Postal Service's requested market test is merely the first stages of the experimental program. It involves the first two print sites while the experimental program continues to ramp-up until the end of the year 2000 when a total of 17 print sites will be in operation (Exh. USPS-T-1 at 17). However, the combined periods exceed the two year time limit allowed for experimental tests.

The Postal Service might have merely utilized the experimental change rules but they contemplate a decision as long as 150 days (mid-December) while the market test rule states, "The purpose of this subpart is to allow for consideration of the proposed market test within 90 days, consistent with the procedural due process rights of interested persons.") (§ 3001.164). The market test rules therefore provide for a faster decision than the rules for experimental requests.

Unfortunately, the Postal Service did not file its request until July 15. The normal market test procedures do not contemplate a decision until or before October 15. Even if the market test commenced immediately, the purpose of the market test to provide data for the continuation of the program (as an experimental classification) would not be met until at least some data is available. The Postal Service needs an opportunity to consider and adjust its experimental program in response to the market test and, also, to file that information with the Commission as contemplated by the market test rules

which require "a plan...for reporting the test data to the Commission." (§ 3001.162(i)).

A quick review of the calendar indicates that there is no chance that the market test data will be available to the Commission in time for adequate consideration by the participants and the Commission on the request for an experimental change if that decision is expected by mid-December under the experimental request rules.

The Postal Service in its haste to move the experimental program along is seeking to have it both ways: a quick market test procedure but without the discipline of a full-blown classification case. At the same time, it seeks a longer term authorization for an experimental program without any more data than it now has to support the experiment. The Postal Service is essentially bootstrapping the experimental proposal. It cannot now request a permanent classification change because it is not ready--it needs an experimental period, but it cannot provide the basic data necessary because the market test is not complete. The Commission may be in the position of approving an experiment exceeding two years without adequate justification for a lack of data to support the program.

The Postal Service is not, however, in a catch-22 situation. It only needs to reduce its expectations of moving forward by a few weeks to provide opportunity for reasoned decisions consistent with due process. In any event, the Postal Service has not convincingly demonstrated that it can move ahead with its new program as quickly as planned. First, the lack of a firm contract until the middle or late August suggests that there has been slippage in its contracting plans. Certainly the market test application would have been more complete with the proper contracts in place. Second, the Postal Service's recent record of meeting its planned investment programs

001328

does not give confidence that it will be ready to move forward as planned with this program.¹⁰ On balance, therefore, the Postal Service's current apparent haste to move this program forward and to jam the program into mutually exclusive provisions of the rules needs to be tempered. OCA recognizes the desirability of moving forward with the Mailing Online program. However, this should not be at the cost of reasoned planning and review by this Commission. It is important that the correct data be made available for review. The sooner that data is made available by the Postal Service pursuant to a specific plan for reporting the market test results to the Commission for its consideration, the sooner the Commission may reach a decision in conformity with the statutory requirements.

OCA believes that waiver of Rule 161 is appropriate to allow the market test to go ahead on the basis that the Postal Service has demonstrated a seriousness of purpose with its longer-term experiment. However, the Commission must maintain flexibility in its procedural deadlines for the experimental request pending the availability of the market test data.

Respectfully submitted,

Kenneth E. Richardson

Kenneth E. Richardson
Attorney

Office of the Consumer Advocate

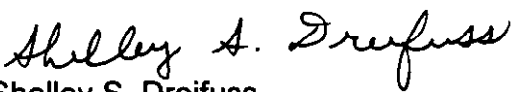
by JJD

¹⁰ See PRC Op. R97-1 at paras. 2120-2136.

001329

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing document upon all participants of record in this proceeding in accordance with section 12 of the rules of practice.


Shelley S. Dreifuss
Attorney

Washington, D.C. 20268-0001
August 12, 1998