

ORIGINAL

BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268B0001

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MAILING ONLINE SERVICE

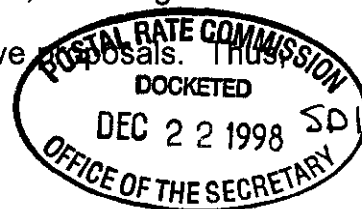
Docket No. MC98-1

OPPOSITION OF UNITED STATES POSTAL SERVICE TO
OFFICE OF THE CONSUMER ADVOCATE MOTION TO COMPEL
RESPONSES TO INTERROGATORIES OCA/USPS-14, 15, 23, AND 24
(December 22, 1998)

The United States Postal Service hereby opposes the Office of the Consumer Advocate Motion to Compel Responses to Interrogatories OCA/USPS-14, 15, 23, and 24, filed December 15, 1998 (OCA Motion). The OCA Motion argues that these interrogatories concern the "development of an automated rebate system for presort discounts, a subject first raised in the Commission's Recommended Decision in the Market Test Phase of this proceeding and not discussed at all in the Service's Request or direct testimony." OCA Motion at 1. As discussed below, the OCA's characterization ignores the fact that the Postal Service, in response to the Commission's request in Notice of Inquiry No. 1, supplemented its direct testimony concerning the application of an automated rebate system to Mailing Online.

Each of the interrogatories for which the OCA seeks compelled responses therefore relates to the Postal Service's direct case, discovery regarding which closed on November 6, 1998. Each interrogatory is accordingly late. Only by means of the OCA's unreasonably and unworkably narrow view of "direct case" can its belated approach to discovery be sustained.

The Postal Service's "direct case" generally includes all the evidence that Postal Service witnesses provide during the first phase of the case, including discovery responses that defend their testimony against alternative proposals. Thus,



the “hearings for cross-examination of the Postal Service’s direct case”, held on November 18 to 20, covered not just the Postal Service’s Request and direct testimony filed at the beginning of the case, but also all discovery responses by its witnesses, as well as the witnesses’ responses to Presiding Officer’s Information Requests and Notices of Inquiry. In particular, Postal Service responses to discovery that seeks to challenge the Postal Service’s direct case, by raising alternatives to the Postal Service’s testimony, are nonetheless treated as discovery on the Postal Service’s direct case.¹

“The essence of due process is a reasonable opportunity to ask relevant questions and get responsive answers.” Presiding Officer’s Ruling No. R97–1/69 at 3. As explained in the Postal Service’s objection, at 1–2, the OCA had an opportunity to ask all of these interrogatories at the hearings held on November 18 to 20, or shortly thereafter. Thus, to allow this discovery would provide “a second crack at [the Postal Service’s direct] case past the deadline for doing so.” Presiding Officer’s Ruling No. R87–1/138, at 5.²

¹ See, e.g., Presiding Officer’s Rulings No. R97–1/85, at 4, and R97–1/89, at 4, concerning David Popkin’s and Douglas Carlson’s late discovery on operational practices for return receipt service. In Presiding Officer’s Ruling No. R97–1/89, the Presiding Officer rejected Mr. Carlson’s claim that his interrogatories “are for his direct case and do not pertain to the Postal Service’s direct case,” noting that the interrogatories “derive from the line of questioning he began on September 14, 1997 [during the discovery period on the Postal Service’s direct case] and continued at the hearing when Mr. Carlson cross-examined Mr. Plunkett on this same issue.” *Id.*

² In Docket No. R97–1, the Presiding Officer denied intervenor David Popkin’s motion to compel responses to discovery on the quality of return receipt, in part because “as a practical matter, there is no reason these discovery requests could not have been filed earlier. Mr. Popkin cross-examined witness Plunkett concerning the same return receipt issues on October 7, 1997.” Presiding Officer’s Ruling No. R97–1/85, at 4.

In particular, interrogatories OCA/USPS-14 and 24 follow-up on witness Garvey's and Plunkett's responses to Notice of Inquiry No. 1.³ In issuing this notice of inquiry, the Commission invited the Postal Service to make its responses part of its direct case, so that parties would have an opportunity to conduct cross-examination at the November hearings.

The Postal Service is invited to file appropriate portions of its responses as supplements to the direct testimony that it initially filed in this docket in support of its proposed Mailing Online experiment. This will afford other parties an opportunity to conduct oral cross-examination of the Postal Service's responses at the time that they cross-examine the testimony that the Postal Service initially filed in support of its proposed experiment.

Notice of Inquiry No. 1 at 1.

The Commission thus solicited input on issues it believes would inform its evaluation of the Postal Service direct case, while assuring participants' exercise of their due process rights. While the Postal Service's responses were filed by November 6, as part of its direct case, intervenor responses are not due until February 5, 1999, when participant direct cases are due. If the OCA cares to

³ The OCA incorrectly claims that the Postal Service seeks to have the OCA penalized for diligence, because "[a]s best the OCA can determine, the sole connection between the subject of these interrogatories and the Service's direct case is that the OCA began asking questions about alternative discount mechanisms prior to the close of hearings on the Service's direct case." OCA Motion at 1-2. To the contrary, the "alternative discount mechanism" was addressed by Postal Service witnesses independently of the OCA's questions, because the Commission asked the Postal Service to supplement its direct case to address this mechanism in Notice of Inquiry No. 1. In any case, questions about an alternative discount mechanism are inherently directed at the Postal Service's direct case because they challenge the discount mechanism proposed by the Postal Service.

sponsor testimony favoring a rebate approach, it may do so at that time, and further proceedings on that approach will then resume.

Interrogatory OCA/USPS-15 similarly addresses the Postal Service's direct case by inquiring into the requirement that customers engage and pay for a transaction during a single Web site visit. This prepayment requirement stems from the business interest of a simple customer interaction, while also applying the greatest possible extension of the prepayment rule (*see, e.g., Domestic Mail Manual* § P011). The requirement was identified in the Postal Service's market test reply brief more than six weeks before the hearings on the Postal Service's direct (experimental) case, when the Postal Service stated:

In order to charge customers at the time they submit their jobs, a postage rate must be quoted before the batching is completed and the actual presort level is known.

Reply Brief of United States Postal Service Regarding Mailing Online Market Test, at 3–4. The OCA asked witness Plunkett about this statement in interrogatory OCA/USPS-T5–45, filed November 6, 1998, nearly two weeks before the start of hearings, and witness Plunkett responded on November 16, 1998, also before the start of hearings. Again, the OCA could have pursued this matter through oral cross-examination or written follow-up shortly after the hearings. Because interrogatory OCA/USPS-15 is based upon a requirement for Mailing Online service identified in the Postal Service's direct case, the interrogatory must be late if the deadline for discovery on that case is to have any meaning.

In any case, part (c) of this interrogatory asks for a legal conclusion, and thus is not proper discovery. The OCA argues that “[i]f the Postal Service is aware of a statutory prohibition on exempting MOL from a prepayment ‘requirement,’ it should reveal that fact now.” OCA Motion at 3, n. 7. However, there is no statutory “fact” to present concerning the application of the prepayment rule to Mailing Online; rather, there is a legal issue concerning how the prepayment rule applies to Mailing Online, which can be addressed on brief, as necessary.

Finally, interrogatory OCA/USPS-23 asks about a report by the Mailing Online system developer concerning a procedure for obtaining the information that would be necessary to implement the postage rebate approach for Mailing Online. This report was provided by witness Garvey on November 6, and thus became part of the Postal Service's direct case. The OCA has already had plenty of opportunity to conduct cross-examination on the report, and used that opportunity at the hearings. Tr. 7/1676-80.

The OCA's motion to compel relies heavily on the language in Presiding Officer's Ruling No. MC98-1/18, at 3, that permits “discovery for the purpose of developing participant evidence. . . .” The Presiding Officer, in using that language, was rejecting the implication by MASA that unlimited discovery would continue until January 28.⁴ The OCA's approach, however, would leave discovery virtually

⁴ Presiding Officer's Ruling No. MC98-1/18, at 3. Indeed, MASA's comments stated that “[p]arties could continue to engage in discovery of the Postal Service with respect to market test data [t]hat is reported in the meantime, and to obtain information needed for their direct cases.” Comments of Mail Advertising Service Association International on Procedural Schedule, at 2 (filed November 30, 1998). The language in Presiding Officer's Ruling No. MC98-1/18 must have intended a

unlimited, since intervenors generally would be able to show how any discovery is necessary "for the purpose of developing participant evidence." Instead, that language, when read in context, should be limited to discovery on issues for which the Postal Service did not provide a witness during presentation of its direct case. Discovery to obtain Postal Service data, such as from the market test, or other similar institutional information, would thus be permitted.⁵

The OCA also relies on the absence of a Special Rule 2D in this proceeding to posit that follow-up discovery can be asked as long after response as the participant wants. OCA Motion at 3. This interpretation would make meaningless any nominal limitation on discovery regarding a direct case. The longstanding limits on follow-up were not intended to be abandoned in this docket simply because, in a desire to streamline this case, no special rules were adopted.⁶ Otherwise, since there is no follow-up authorized by the Commission's Rules of Practice and Procedure, the absence of a Special Rule 2D would suggest no follow-up discovery is permitted.

In conclusion, the OCA's interrogatories relate to answers provided by Postal Service witnesses as part of its direct case. Participants thus had the opportunity to exercise their due process rights during November. These interrogatories are

more narrow interpretation of "for the purpose of developing participant evidence", focusing on institutional information, such as the Postal Service's market test data, rather than information that could have been requested from witnesses during cross-examination on the Postal Service's direct case.

⁵ See Tr. 5/911 (applying discovery after close of discovery on direct case to market test data) and Tr. 6/1213 (limiting this discovery to "information or data necessary to prepare intervenor evidence").

⁶ See Presiding Officer's comments at Tr. 2/81.

therefore late, because discovery against the Postal Service's direct case has ended, and a reasonable period for follow-up has passed.

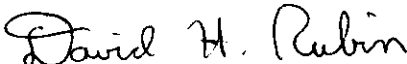
Wherefore, the United States Postal Service asks that the OCA's Motion to compel responses to interrogatories OCA/USPS-14, 15, 23 and 24 be denied.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

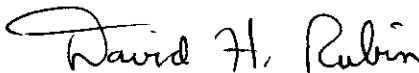
Daniel J. Foucheaux, Jr.
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David H. Rubin

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all participants of record in this proceeding in accordance with section 12 of the Rules of Practice.



David H. Rubin

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