

ORIGINAL

PRESIDING OFFICER'S
RULING NO. MC98-1/20

Dec 30 3 28 PM '98

UNITED STATES OF AMERICA
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

Mailing Online Service

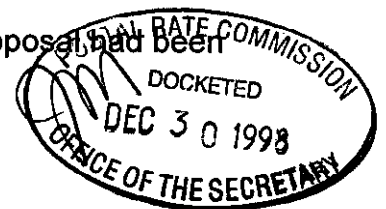
Docket No. MC98-1

PRESIDING OFFICER'S RULING GRANTING OCA MOTION TO COMPEL

(December 30, 1998)

Early in December, the Office of the Consumer Advocate (OCA) filed several interrogatories that seek amplification or clarification of some Postal Service responses to the Commission's Notice of Inquiry No. 1. Among those interrogatories were OCA/USPS-14, 15, 17(b-d), 23 and 24. On December 14, 1998, the Postal Service filed objections to these interrogatories, arguing that the OCA's interrogatories were tardy because they were filed after the deadline for discovery on the Postal Service's direct case. Objection of United States Postal Service to Interrogatories OCA/USPS-14, 15, 17(B-D), and 22 to 24. On December 15, 1998, the OCA filed a motion to compel Postal Service responses to all but OCA/USPS-17(b-d). It argued that the relevant consideration was that its interrogatories sought discovery on the Postal Service's responses to the Commission's Notice of Inquiry, and that their purpose was to help it prepare its direct case. Office of the Consumer Advocate Motion to Compel Responses to Interrogatories OCA/USPS-14, 15, 23, and 24 ("Motion"). The Postal Service filed its opposition to the OCA's motion on December 22, 1998. 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 ("Opposition").

Background. In its Opinion in the market test phase of this docket, the Commission concluded that certain features of the Mailing Online proposal had been



sufficiently supported for purposes of a limited market test, but that additional record evidence was needed to support those same elements in the experiment phase of this docket, because of the greater scope and duration proposed for the Mailing Online experiment. See PRC Op. MC98-1 at 26-27. Shortly after the Commission concluded the market test phase of this docket, it issued P.O. Ruling MC98-1/10 establishing the procedural schedule for the experiment phase of this docket. The schedule was compressed, in an attempt to help the Postal Service achieve its objective of beginning the Mailing Online experiment in January, 1999. That schedule included a November 6, 1998, deadline for discovery on the Postal Service's direct case. Two days after establishing this schedule, the Commission issued Notice of Inquiry No. 1.

Notice of Inquiry No. 1 set forth with more specificity the features of the Mailing Online experiment that the Commission concluded needed additional record support. Among them is the unilateral waiver of the minimum volume requirements for automation basic rates that the Postal Service requests for Mailing Online. The Notice of Inquiry called for more evidence on the issue of how much Mailing Online mail and how much competitors' mail is likely to need a waiver in order to qualify for automation basic rates. ("Issue No. 1" in the Notice of Inquiry). The Notice also called for more evidence on the issue of whether the objectives of the waivers proposed by the Postal Service could be achieved in other ways, such as a rebate system for Mailing Online mail that meets existing requirements for bulk discounts. ("Issue No. 2" in the Notice of Inquiry). The Postal Service's responses to Issues No. 1 and No. 2 in the Notice have substantially improved the record, but they are frequently overly general and conclusory. Responses to the OCA's interrogatories would help fill the critical need for more specific information on the need for, the impact of, and alternatives to, the unilateral waivers of discount eligibility requirements that the Postal Service seeks.

Postal Service position. The Postal Service asserts that there is a procedural bar to addressing these continuing deficiencies in the record. It insists that its responses to the Notice of Inquiry are part of its direct case, and, therefore, the

November 6 deadline for discovery against the Postal Service's direct case applies to its responses to the Notice of Inquiry. Objection at 1; Opposition at 1-2. It argues that these interrogatories are late because they were posed after November 6. In most dockets a Special Rule 2D is adopted that allows follow-up interrogatories to be filed within 7 days of answers to previous interrogatories. The Postal Service observes that Rule 2D was not adopted in this docket. Even if it had been, it suggests, the disputed interrogatories would be tardy. Opposition at 6. The Postal Service argues that during the hearings of November 18-20 on the Postal Service's direct case, the OCA had an opportunity to orally cross-examine the responses of the Postal Service's witnesses to the Notice of Inquiry, and argues, in effect that any questions not asked at that time, or shortly afterward in writing, should be considered waived. Objection at 3; Opposition at 2, 6.

OCA position. The OCA suggests that the issues with which these interrogatories deal were not directly addressed by the Postal Service until the Commission raised its Notice of Inquiry. In any event, it argues, these interrogatories were posed for the purpose of developing its own evidence on alternative discount mechanisms for Mailing Online, and therefore are permitted until January 28, 1999, under the terms of P.O. Ruling MC98-1/18 at 3. Motion at 1-2.

Conclusion. I will grant the OCA's motion. Even though these issues might be considered implicit in the Postal Service's initial testimony, they were first explicitly addressed at the Commission's request. The Commission, in its Opinion in the market test phase, and in its Notice of Inquiry, concluded that these issues had not been squarely addressed on the record and that in order to support the proposed experiment, they needed to be. That is why the Commission, in its Notice, invited the Postal Service to supplement its testimony with respect to these issues. The Commission was making it as clear as it could that the burden of supporting a request for unilateral waivers of bulk mail discount eligibility requirements is considerable, and that it did not yet appear to be adequately met for purposes of the proposed experiment. In terms of procedural

fairness, the Commission was giving the Postal Service a second chance to meet this burden. PRC Op. MC98-1, Phase 1, at 35-36; Notice at 1-2.

The Commission gave the Postal Service 21 days from the issuance of its Notice to file supplemental testimony on the issues raised in the Notice. This was consistent with the premium that the Postal Service initially placed on expediting the experiment phase of this docket. By coincidence, 21 days fell on November 6, 1998, the same day that P.O Ruling MC98-1/10 had earlier set as the deadline for discovery on the Postal Service's direct case. The Commission, however, did not set an explicit deadline for discovery on the Postal Service's responses to the Notice of Inquiry. Contrary to the inferences that the Postal Service seeks to draw, the Commission did not intend the Postal Service's supplemental testimony to be subject to the same procedural deadlines as the testimony initially filed by the Postal Service. In its Notice, the Commission asked participants as well as the Postal Service to help make a more concrete record on these critical issues. It is not reasonable for the Postal Service to infer that the Commission intended discovery on the Postal Service's responses to Notice-related issues to be cut off on the very day that those responses were to be filed, especially in view of the Commission's efforts to enlist the help of both the Postal Service and the participants in strengthening the record on these issues.

It is reasonable to allow discovery on the Postal Service's testimony on Notice-related issues to go forward on a schedule that is separate from that applied to the Postal Service's direct case. The Postal Service's supplemental testimony on issues raised in the Notice of Inquiry was filed considerably later than its direct case, and much nearer the time that oral cross-examination of Postal Service witnesses was scheduled.¹

¹ The Postal Service's argument that OCA's discovery rights were fully afforded by its opportunity to conduct oral cross-examination on Notice-related issues is overdrawn. The OCA labored under a severely compressed schedule that was adopted to serve the then-perceived need for expedition. As a result of this compressed schedule, the OCA's opportunity to conduct its discovery orally was not wholly adequate. Oral cross-examination was conducted on November 18-20. Some key Postal Service responses to issues relevant to the Notice were not received until November 16 and 17, as the Postal

Allowing discovery on Notice-related issues to proceed on a deferred track is justified by the critical need to strengthen the record on these issues with direct and specific evidence. The need for expedition that prompted me to schedule oral cross-examination on Notice-related issues after scant opportunity for written discovery is now gone, due to the need to redesign the Mailing Online system. The OCA appears to have exercised reasonable diligence in propounding these interrogatories. While the OCA posed them several weeks after the conclusion of its oral cross-examination, it posed them shortly after learning from P.O. Ruling MC98-1/18 that the procedural schedule would be relaxed, which made additional discovery on Notice-related issues feasible.² In terms of procedural fairness, allowing this discovery on the Postal Service's responses to the Notice merely affords the Postal Service an additional opportunity to provide specific information that will help it carry its burden of demonstrating that a unilateral waiver of bulk mail discount eligibility requirements is needed, and that the impact of such a waiver will not be anticompetitive.

OCA/USPS-14. This interrogatory asks the Postal Service to explain specifically why it would be difficult to track and match each Mailing Online piece to the rate for which it would ultimately qualify. Answers to this interrogatory would help supply the kind of direct and specific information concerning Issue No. 2 of the Notice that is currently lacking in the record. The Postal Service is directed to respond. The Postal Service asserts that witness Plunkett answered part (c). Objection at 2. The OCA correctly replies that he did not address the most relevant aspect of part (c) — whether

Service is aware (see Objection at 2; Opposition at 4) allowing little time for the kind of deliberate analysis displayed in some of the disputed interrogatories. In addition, some Postal Service witness' answers to Notice-related questions asked by the OCA at the hearing, were, in essence, "I don't know." This is particularly true of questions that required knowledge of Mailing Online system software development. See Tr. 7/1678. The Postal Service appears to recognize that oral cross-examination under these circumstances was not an adequate substitute for discovery by arguing that the OCA could have followed up on oral answers through written interrogatories shortly after the hearings. Opposition at 2, 4, 7.

² P.O. Ruling No MC98-1/18 was issued December 2, 1998. Interrogatories OCA/USPS-14 and 15 were filed on December 7, 1998. OCA/USPS-23 and 24 were filed on December 11, 1998.]

distribution would dilute presortation. Motion at 2, n. 4. The Postal Service also asserts that witness Garvey already discussed part (f). The exchange that the Postal Service cites at Tr. 6/1520-22 between witness Garvey and Commissioner Goldway, however, does not address the feasibility of a rebate system. The responses of witness Garvey to the OCA that the Postal Service cites at Tr. 7/1676-80 are not satisfactory because witness Garvey stated that he did not have the technical information requested.

OCA/USPS-15. This interrogatory asks the Postal Service to provide the basis for witness Garvey's assertion during the hearing that the Postal Service must have payment in hand, and therefore, could not calculate postage for Mailing Online at the end of the day, after orders had been placed. Tr. 6/1521. Part (a) asks the Postal Service to identify the regulation or other source of this requirement. It is clearly relevant to Issue No. 2 of the Notice, and should be answered. Part (b) asks for a copy of any such regulation, and should be answered. Part (c) asks for a legal conclusion as to whether any such regulation applies in the context of Mailing Online. The Postal Service objects that this a legal issue that can be addressed on brief. Objection at 5. Although an in-depth legal argument could wait until briefs are filed, it would help the participants prepare their responses to Issue No. 2 of the Notice to know ahead of time what the Postal Service's position is in this regard. Since this interrogatory is addressed to the Postal Service as an institution, it would be appropriate for the Postal Service to give brief notice of its legal position to help participants respond to the Notice of Inquiry. Part (d) asks if there are reasons other than legal that would discourage the Postal Service from seeking an exemption from any requirement that it must receive actual payment of postage before committing to provide service. This is relevant to Issue No. 2 of the Notice and should be answered.

OCA/USPS-23. This interrogatory asks the Postal Service about the report of its system developer (Tracor) which describes reasons that a rebate system would not be feasible. Part (a) asks the Postal Service to identify what "approach" is considered infeasible by Tracor. Part (b) asks what system resources would be required to

determine certain discounts. During the hearing, the OCA asked witness Garvey what discounts were referenced. His answer was that he didn't know. Tr. 7/1678. Part (c) asks how much additional time it would take to store depth-of-sort data and how much to perform additional accounting procedures, if a rebate system were adopted. When asked this question during oral cross-examination, witness Garvey replied that he did not know. Tr. 7/1680. Satisfactory answers to these interrogatories would help supply the kind of direct and specific information concerning Issue No. 2 of the Notice that is currently lacking in the record. The Postal Service is directed to respond to all three parts to the best of its ability.

OCA/USPS-24. This interrogatory is follow up to witness Plunkett's response to Issue No. 1 of the Notice of Inquiry. It asks the Postal Service to state more specifically how the Postal Service treats residual pieces in bulk mailings under various scenarios. Answers to this interrogatory would help supply the kind of direct and specific information concerning Issue No. 1 of the Notice that is currently lacking in the record. The Postal Service is directed to respond.

RULING

1. The Office of the Consumer Advocate Motion to Compel Responses to Interrogatories *OCA/USPS-14, 15, 23, and 24*, filed December 15, 1998, is granted.
2. Responses to these interrogatories are due on or before January 14, 1999.



W.H. "Trey" LeBlanc III
Presiding Officer