

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

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OFFICE OF THE SECRETARY

Mailing Online Service)

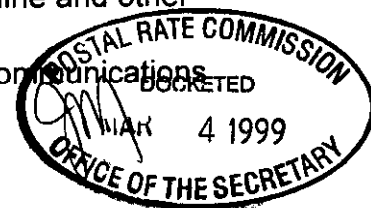
Docket No. MC98-1

OFFICE OF THE CONSUMER ADVOCATE
MOTION TO SUSPEND PROCEDURAL SCHEDULE INDEFINITELY,
AND TO COMPEL RESPONSES TO INTERROGATORIES
OCA/USPS-27-36, -39, AND -41-61
(March 4 , 1999)

The relief sought by this motion is twofold: (1) suspend Docket No. MC98-1 indefinitely because of the Postal Service's failure to provide the cost information required in the Commission's opinion and recommended decision in the market test phase of this proceeding, and (2) overrule the Objection of the Postal Service to Interrogatories of the Office of the Consumer Advocate ("OCA") OCA/USPS-27-36, -39, and -41-61 (filed February 25, 1999, hereinafter, "Objection"), and direct the Postal Service to file complete answers to these interrogatories.

Motion to Suspend Proceeding Indefinitely

Suspension of the hearing schedule can no longer be avoided; suspension is called for under 39 U.S.C. §3624(c)(2). In PRC Op. MC98-1 (Market Test), the Commission explicitly directed the Postal Service to collect and report "Costs specific to Mailing Online and for selected expenditures common to Mailing Online and other services (Advertising and Marketing, Processing Center, Help Desk, Communications



and Printer Site),” including “all set up costs and on-going expenses for equipment, software, communications and processing activities that involve Mailing Online.”¹ These costs/expenditures were to be reported on an accounting period basis, throughout the market test, both for Mailing Online (“MOL”), and for PostOffice Online (“POL”) when such costs benefited Mailing Online in common with other services. The Postal Service's failure to report this information constitutes an unreasonable delay resulting from a failure to respond to a lawful order of the Commission (the Commission's data collection requirements set forth in the market test opinion). The remedy set forth in §3624(c)(2) for this failure to respond is a one-day extension of the proceeding for each day of delay. Since the Postal Service has not yet filed even a single cost datum, the delay occasioned at this time is at least four accounting periods, and will continue indefinitely until such time that the Postal Service complies with the data reporting requirements of the recommended decision in the market test.

The current hearing schedule, which was established in P.O. Ruling MC98-1/18 at 3, was revised to reflect the Postal Service's plan to “make substantial changes in the hardware and software configurations” of MOL and develop “supplemental testimony to fully explain these modifications.” *Id.* at 1. The dates established in the revised hearing schedule were expressly premised on the expectation that (*id.* at 3, emphasis added):

Participant witnesses will be permitted to update their testimony to account for market test results until they appear for oral cross-examination. *This will allow for use of more than four months of market test data.*

¹ PRC Op. MC98-1 (Market Test) at 48.

At this stage of the proceeding, with only six days remaining until the hearings on participant cases begin, participants do not have even a particle of the cost data that were ordered to be filed at pages 48 and 51 of the market test opinion. This situation is entirely of the Postal Service's own making—cost data should have been reported approximately one accounting period after the market test was commenced and should have continued throughout the market test. The Postal Service has utterly failed to fulfill the data collection and reporting obligations imposed on it by the market test decision. Hence, in addition to delaying unreasonably, in violation of §3624(c)(2), the Postal Service has made a sham of market test Rules 162(i) and 165 which call for data gathering and periodic reporting so that the request for a permanent classification (in the instant proceeding, an experimental classification), can be evaluated in light of the reported data. The Postal Service's failure to furnish the cost data required by the market test decision deprives the participants and the Commission of one of the chief products of (and reasons for) conducting a market test. Thus, the violation of Rules 162(i) and 165 constitutes an independent ground for suspending the proceeding indefinitely—until such time as the Postal Service has satisfied its duties under these rules.

Another contributing factor to the predicament created by the Postal Service is that the Service effectively withdrew all evidence that underlay the information systems fee of 0.1 cent proposed in the July 15, 1998, Request, and made an entirely new filing on January 14, 1999, when witness Lim's euphemistically described "supplemental"

testimony was filed.² The Postal Service admits as much in its Objection: [The Lim testimony] "*effectively supplants* that of witness Stirewalt."³ The basis for the information systems fee (initially supplied by witness Stirewalt) was entirely replaced by new testimony—the Lim testimony—six months after the Request for an MOL experiment was filed.⁴ Therefore, the true filing date for the MOL case is not July 15, 1998, the apparent starting point for the Postal Service's computation of the statutory ten-month period.⁵ Rather, the effective filing date of the Postal Service's Request is January 14, 1999, the date that it filed witness Lim's testimony. Therefore, the deadline for the Commission's decision on the Request for an experimental classification must not be measured from July 15, 1998, but must be measured from January 14, 1999. Wherefore, for the reasons set forth above, OCA respectfully requests that, following the oral cross-examination of participant witnesses on March 10 and 11, the proceeding be suspended indefinitely until such time that the Postal Service files all accounting period costs required by the Commission in its market test decision.

² Witness Lim's testimony does not "supplement" other testimony on the information systems costs. It replaces earlier testimony entirely.

³ Postal Service Objection at 3.

⁴ The supersession of old testimony by new constitutes a second ground for application of §3624(c)(2). In Order No. 280, Docket No. MC78-1, the Commission found that an extension of the proceeding was justified under §3624(c)(2), in part, by "the numerous changes in the testimony of Postal Service witnesses [which] contributed significantly to delay in the hearings in th[e] docket."

⁵ Objection at 1, note 1.

Motion to Compel Responses to Interrogatories
OCA/USPS-27-26, -39, and -41-61

The Postal Service filed an objection to OCA interrogatories 27-36, 39, and 41-61 on February 25, 1999. Various grounds were alleged: timeliness, due process, burden, cumulative nature, lack of foundation, and relevance. OCA disputes all of the grounds alleged and respectfully requests that the Presiding Officer direct the Postal Service to provide complete answers to all of the captioned interrogatories.

The Postal Service contends, throughout its Objection, that OCA interrogatories are untimely. This contention is completely unfounded. Interrogatories filed to pry loose costs and expenditures required by the Commission's market test decision (at 48 and 51), should not be considered untimely because the OCA has detrimentally relied on the Postal Service to comply with directives contained in that decision. Almost all remaining interrogatories have been triggered by an entirely new Information Systems' cost testimony—the Lim testimony—which “supplants” the earlier Stirewalt testimony, and the Service's decision to exclude operations costs from witness Seckar's most recent cost estimates, when, prior to the filing of the Lim testimony, these costs were included in the Informations Systems cost base.⁶

One of the chief grounds for the Postal Service's objection to providing the information sought by OCA is “the Commission's mandate that the Postal Service collect and report actual cost data during the conduct of the market test.”⁷ This is given as a justification for not responding to OCA's interrogatories 39 and 41-61.

⁶ USPS response to interrogatory OCA/USPS-37.

⁷ Id. at 4.

Interrogatories 39 and 41-61 generally inquire about the nature of the work performed under the “master contract” for system development initially awarded to Digital Equipment Corporation (and later taken over by Compaq);⁸ and the inclusion (or non-inclusion) of the costs specified under particular delivery orders and contract modifications in the information systems costs presented by witness Lim. The Postal Service should not be permitted to evade provision of answers to eminently relevant interrogatories by vague promises to file required data collection reports at some future time.

Another ground alleged by the Postal Service for not answering *any* of interrogatories 39 and 41-61 is that:⁹

the Compaq contract establishes a series of cost pools against which invoices can be charged, and payment furnished. That does not mean, however, that the full amount of each cost pool necessarily becomes an actual cost. Some funds are not expended, and in other cases where invoiced costs exceed the ceiling, contract modifications are made to cover those costs.

This sweeping characterization, however, fails to distinguish between work already performed under the contract, for which payment has been made, and work yet to be performed. Payments already made under the contract for work performed are incontrovertibly relevant under the principle articulated by the Commission in its market test opinion—“joint costs that benefit Mailing Online should be considered as potentially relevant to either the attributable costs or the appropriate markup for Mailing Online.”¹⁰

⁸ Response of USPS to interrogatory OCA/USPS-38.

⁹ Objection at 3.

¹⁰ PRC Op. MC98-1 (Market Test) at 48.

Furthermore, the best estimate of *potential* costs for the development of Mailing Online are those set forth in the contract, whether or not the work has actually been performed at this time. When witness Lim consulted the system designers to obtain their opinions on what costs would be caused by MOL, it would certainly have been unreasonable for the designers to exclude costs that were likely to be incurred in the future under the Compaq contract merely because they had not yet been incurred. If it is indeed the Postal Service's position to exclude systematically all costs likely to be incurred under the Compaq contract as the POL and MOL systems continue to be developed, improved, and refined, then witness Lim has surely understated the one-time (start-up) costs of MOL, and the participants and the Commission must have access to the requested information in order recalculate the estimates of future expenditures for the MOL experiment more accurately and realistically. The Information Systems fee for MOL should not be limited to disbursements already made, but should include expenditures likely to be made to get MOL "up and running smoothly" during the experiment. The Compaq contract serves as the best evidence of likely future expenditures.

The Postal Service also stresses that the contract cost ceilings presented in the Compaq contract are for PostOffice Online¹¹ (implying that they are not specifically for Mailing Online). This argument was made by the Postal Service in its Reply Brief on the MOL Market Test at 15.¹² However, the Commission was not persuaded that the

¹¹ Objection at 3.

¹² "[C]osts that are fixed and common to projects other than Mailing Online, such as advertising costs for PostOffice Online, would be incurred regardless of whether Mailing Online goes forward and should therefore not be borne by Mailing Online. The only

Postal Service should be relieved of the obligation to provide joint costs that benefit Mailing Online. They were considered potentially relevant as either the attributable costs of MOL or relevant to the markup for MOL.¹³ The Postal Service's view did not prevail.¹⁴

[A]ll set up costs and on-going expenses for equipment, software, communications and processing activities that involve Mailing Online should be collected and reported to the Commission. During consideration of the experiment, the issue of how to attribute such costs can be fully considered only if the costs are available.

The Commission's statements, viewed severally and in their entirety, lead to the inescapable conclusion that the Postal Service is obligated to provide the costs of the system development contract for PostOffice Online and give the participants and the Commission the means of determining independently whether some portion of these costs (which benefit MOL at least indirectly) should be attributed to MOL. The questions posed by OCA to identify which Compaq contract costs or portions of costs are included in witness Lim's analysis and which are excluded (and the reasons for their exclusion) are manifestly relevant and appropriate under the Commission's holding in the market test decision. Once the Postal Service has presented its rationale for excluding Compaq contract costs, the OCA (and other participants) may find that they disagree with the Postal Service's reasoning. If there is disagreement, the OCA (and other participants) may try to convince the Commission that excluded costs or portions

fixed costs that arguably should be included are those specific to Mailing Online. . . . it is inappropriate for the Postal Service to provide information on costs that are not part of the attributable costs of the product." Reply Brief at 15. (Citations omitted).

¹³ PRC Op. MC98-1 (Market Test) at 48.

of excluded costs are attributable to MOL and that the Information Systems fee proposed by Postal Service must be enlarged to account for such costs. Without complete answers to the interrogatories posed by OCA, the Commission (as well as the participants) will be deprived of the means of enlarging the Information Systems fee on this basis. The Commission held in its market test decision that it would entertain arguments for and against attribution, but that the costs must be available for inclusion if this issue were resolved against the Postal Service. Therefore, full and complete answers to interrogatories to interrogatories 39 and 41-61 must be provided.

In its Objection, the Postal Service complains of the use of the terms "attributable," "one-time," "fixed," "incremental," "shared," and "variable."¹⁵ This complaint is frivolous and should be dismissed out of hand. Postal Service witness Lim himself understands and uses several of these terms in his testimony, e.g.:¹⁶

Table 2 separates total information technology costs for the experiment into *one-time* costs and "*variable*" costs.

Postal Service witness Plunkett also understands and uses several of these terms, e.g.:¹⁷

In general, I agree with the Commission's view of *attributable* costs insofar as it describes the Commission's current definition of the term. However, I disagree with the notion that such *attributable* costs, which include *fixed* costs, provide the best basis for setting prices in all instances. I would instead suggest that in many cases, particularly when dealing with new products and services, the use of *fixed* costs as part of the base to be marked up may produce problematic results.

¹⁴ Id. (Emphasis added). With respect to advertising and marketing cost data, the Commission made the apt observation that: "The Commission agrees on the value of the cost data without prejudging the attribution issue."

¹⁵ Objection at 4.

¹⁶ USPS-ST-9 at 2.

¹⁷ Tr. 8/1779 (Response of witness Plunkett to interrogatory OCA/USPS-T5-52b.)

also:¹⁸

To the extent that any costs of Mailing Online could reasonably be said to conform to the definition presented in part c, they would be *incremental* to Mailing Online.

The Postal Service alleges that OCA uses the term “shared” in the set of interrogatories 39 and 41-61. However, a careful examination of these interrogatories did not reveal that this six-letter word was ever used.¹⁹ This part of the Postal Service’s objection is patently unfounded.

The Postal Service objects to providing responses to any of the interrogatories contained in the set OCA/USPS-27-36. Several of the interrogatories posed in this set, namely 27-30, arise from the Postal Service’s response (filed February 12) to a question posed at the February 5 Hearing (at Tr. 8/1987-88) implying that operational and market test costs may have been excluded from the current unit Information Systems cost estimates now under consideration. OCA believes that such costs should be reflected in Information Systems fee and has asked a series of detailed questions to preserve the opportunity to do so. If such costs are excluded from the latest unit Information Systems cost presented by witness Seckar, then it is OCA’s position that witness Plunkett has overstated the cost coverage for MOL. The information sought in interrogatories OCA/USPS-27-30 is not only relevant, but is fundamental to establishing MOL fees for the experiment. The Postal Service should be directed to file complete responses.

¹⁸ Id. at 1783 (Response of witness Plunkett to interrogatory OCA/USPS-T5-53d.)

¹⁹ OCA counsel even attempted to use the “Edit, find” feature of “Word” to find the term “shared,” but, alas, still wound up empty-handed.

Interrogatory OCA/USPS-31, which asks for the total expenditures of operating POL, must also be answered as it provides the means for including a portion of POL costs in the attributable costs of MOL, as envisioned by the Commission in its market test opinion. The Postal Service claims that providing a detailed answer would require two to three months, and a ballpark estimate would require at least two weeks. Further, the Postal Service questions whether a ballpark estimate is reliable enough for purposes of a Commission decision. The Commission made clear its position on this issue in the market test decision:²⁰

[J]oint costs that benefit Mailing Online should be considered as potentially relevant to either the attributable costs or the appropriate markup for Mailing Online.

The Postal Service should not be permitted to profit from its decision to ignore this directive by the Commission and withhold such information. OCA holds the view (and hopes to persuade the Commission) that a portion of POL costs must be attributed to MOL since POL is the gateway to MOL.²¹ Even if the Commission decides that a ballpark estimate is not the ideal basis for including a portion of POL costs, OCA submits that a rough measure of such costs is preferable to their outright exclusion, and requests that the Postal Service be directed to answer.

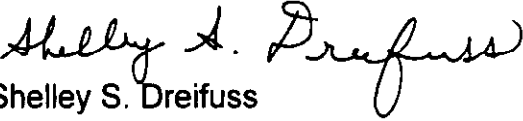
Interrogatories 32-36 generally ask for provision of information clearly required by the Commission's market test decision, but long overdue. The Postal Service should be directed to provide this information immediately, and if it is not able to do so, to state when full reporting will take place.

²⁰ PRC Op. MC98-1 (Market Test) at 48.

²¹ Tr. 8/1954-56, and Tr. 5/1072-73.

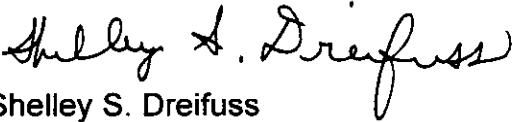
In conclusion, OCA moves that the Postal Service be compelled to answer interrogatories OCA/USPS-27-36, -39, and -41-61.

Respectfully submitted,


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Office of the Consumer Advocate

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.


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