

# ORIGINAL

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

Mailing Online Service

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Docket No. MC98-1

OFFICE OF THE CONSUMER ADVOCATE  
MOTION FOR ORAL ARGUMENT AND  
MOTION FOR EXPEDITED RESPONSES  
TO MOTIONS TO SUSPEND PROCEDURAL SCHEDULE  
AND TO COMPEL RESPONSES TO INTERROGATORIES  
(March 5, 1999)

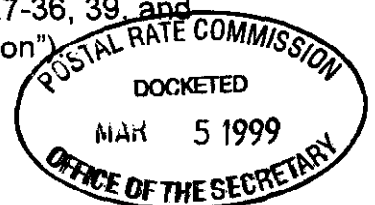
Executive Summary

On March 4, 1999, the Office of the Consumer Advocate ("OCA") moved to suspend the procedural schedule, to compel responses to interrogatories, and to extend the 10-month deadline for issuing a recommended decision.<sup>1</sup> Evidently anticipating that its refusal to respond to discovery requests would result in a request to suspend the schedule, on February 25, 1999, the Postal Service suggested that any extension of the 10-month statutory deadline "might preclude commencement of any Mailing Online experiment until well into calendar year 2000 . . . ."<sup>2</sup> This claim needs to be carefully evaluated before issuance of any rulings on the OCA's March 4 Motion. The Service also asserts that "responding to the totality of what the OCA seeks [in its

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<sup>1</sup> OCA Motion to Suspend Procedural Schedule Indefinitely, and to Compel Responses to Interrogatories OCA/USPS-27-36, -39, and -41-61, March 4, 1999 (hereinafter "March 4 Motion").

<sup>2</sup> Objection of the USPS to Interrogatories of the OCA (OCA/USPS-27-36, 39, and 41-61), February 25, 1999, at 1, n.1 (hereinafter "February 25 Objection").



interrogatories] would risk delay in the procedural schedule by two or more months.”<sup>3</sup>

This assertion also needs careful evaluation. The risks asserted by the Postal Service must be weighed against the expressed information needs of the Commission and the due process rights of participants to develop testimony concerning common costs of POL and MOL.

The best way for the Commission to measure the relative merits of the data needs of the Commission and the participants against the potential delay in the procedural schedule is to hold oral argument on the OCA's March 4 Motion. At oral argument the Commission would be able to determine the extent to which the Postal Service has complied with the Commission's directives to supply necessary data and obtain an explanation of why responding to OCA's interrogatories would take two or more months, given that much of the information sought should have been provided months ago under the Commission-imposed data collection plan for the MOL market test. The Commission would also be able better to ascertain whether compliance with the Commission's data-collection orders would implicate MOL in the Y2K problem alluded to by the Postal Service in its February 25 Objection.

The most convenient time for oral argument would be during the hearings scheduled for next week. Both the Commission and participants already have this time blocked out. However, for oral argument to be most productive, the Commission and participants should have responses to the OCA's March 4 Motion in hand ahead of time. Accordingly, the OCA requests that the Commission shorten the time normally

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<sup>3</sup> Id. at 1.

allowed for responses to the OCA's motion such that they be due at noon on Wednesday, March 10, 1999,<sup>4</sup> and that oral argument commence following the appearance of OCA witnesses on March 11, 1999. To facilitate this request for expedition, the OCA has served a copy of this motion for oral argument and expedited responses on the Postal Service by facsimile.

### Argument

OCA asks the Presiding Officer to direct the Postal Service to file an expedited response to OCA's Motion to Compel Responses to Interrogatories OCA/USPS-27-36, -39, and -41-61 on March 10, 1999, only one day earlier than currently required by the discovery procedures established by the Presiding Officer.<sup>5</sup> This should impose only a very slight hardship on the Postal Service and is far outweighed by the distinct advantage of giving the participants the opportunity to argue orally the important evidentiary and scheduling issues on March 11, 1999, the last day of hearings in the upcoming oral cross-examination of participant witnesses.

OCA is well-positioned to call for expedition by the Postal Service since this office has, in all respects, acted with great diligence. Witness Lim filed new testimony

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<sup>4</sup> In the normal course, the Postal Service would respond to the OCA's motion to compel on Thursday, March 11, and to the motion for suspension of the procedural schedule on Monday, March 15, 1999. Given the importance of the data-collection issue to the resolution of this proceeding, the modest advancement of the normal time for responses requested herein is clearly warranted.

<sup>5</sup> Tr. 1/81. The Presiding Officer determined that it would be unnecessary to adopt formal special rules of practice in this proceeding, but did state that participants should file responses to motions to compel within seven days. Since OCA's Motion to Compel was filed on March 4, 1999, the response would ordinarily be due on March 11, 1999. OCA asks that the period for response be modestly shortened by only one day to March 10, 1999.

on the Information Systems costs of Mailing Online on January 14, 1999.<sup>6</sup> After examining and analyzing this new, complex testimony (which was based, in part, upon a new library reference—USPS-LR-MC98-1/27, containing Mailing Online unit costs used in the Lim testimony—also filed on January 14, 1999), OCA filed a set of detailed interrogatories eleven days later on January 25, 1999. Two additional interrogatories were filed on January 26, 1999. Both sets were submitted well before the January 28, 1999, cutoff date established in the revised procedural schedule for filing discovery on the “supplemental” testimony.

Interrogatory OCA/USPS-ST9-3 (January 25, 1999), embodied OCA’s attempt to gain a thorough and timely understanding of the allocation methodology presented only superficially in witness Lim’s Diagram 1, contained in USPS-ST-9 at 3. This Diagram showed that witness Lim began with the complete POL system (step 1), then made an allocation of the POL system into POL-specific, MOL-specific, MOL-shared, and SOL-specific (step 2). POL-specific and SOL-specific costs were explicitly excluded from the allocation of costs to MOL. Step 3 consisted of an allocation of 100 percent of MOL-specific costs to MOL; step 4 consisted of an allocation of a portion of MOL/POL/SOL costs to MOL; and step 5 added together the step 3 and step 4 MOL costs. Naturally, OCA asked for the costs of the complete POL system and the

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<sup>6</sup> Although the Postal Service employs the euphemism “supplemental” in labeling witness Lim’s testimony, it is, in fact, entirely new. The Postal Service admits in its February 25 Objection that the Lim testimony “effectively supplants that of witness Stirewalt.” OCA agrees that the Stirewalt testimony has been supplanted by entirely new testimony and that “the two testimonies are difficult to compare directly.” February 25 Objection at 3.

allocation of these costs into MOL-specific, POL-specific, SOL-specific, and MOL/POL/SOL-shared costs. It was essential to obtain answers to these questions because it appeared that witness Lim had not allocated any portion of what he considered POL-specific costs to MOL. Furthermore, when the reasoning and separation process was fully explained, it might reveal that OCA and other participants (and the Commission) would reason differently, and might argue that additional or fewer costs should be allocated to MOL. Moreover, the Postal Service violated all traditional principles of evidence (and the Commission's own rules of practice) when it refused to reveal the foundational cost information and arithmetic which underlay the allocation process represented in Diagram 1. What if the Postal Service made a mistake in arithmetic and the final cost estimates presented in the Lim testimony were not those that *he* intended?

These arguments were made by OCA in a Motion to Compel Witness Lim to Be Prepared to Answer Interrogatory OCA/USPS-ST9-3 at the February 5, 1999, Hearing (filed February 3, 1999). The Motion to Compel was filed with great dispatch—two days after receiving witness Lim's response to the subject interrogatory and two days before his appearance for oral cross-examination. The Motion was granted in part by P.O. Ruling MC98-1/22. The Presiding Officer ordered witness Lim "to be prepared to comprehensively describe all functional components of POL that he concludes are not related to MOL and the reasons for those conclusions at the hearings on February 5, 1999." *Id.* at 4.

As instructed by Ruling 22, OCA did indeed inquire at length about witness Lim's rationale for including or excluding components of POL as MOL-related.<sup>7</sup> It became clear during OCA's oral cross-examination that witness Lim merely functioned as a conduit for the judgments made by the MOL system designers concerning which portions of the POL and MOL systems were "affected by the existence of the MOL program" and "caused by the MOL program."<sup>8</sup> Once it became evident that witness Lim would be unable to comply with Ruling 22 and explain the detailed series of judgments that led to the conclusions that certain functional components were caused or not caused by Mailing Online, the Postal Service volunteered to satisfy the injunction of Ruling 22 and perform a "homework assignment" by which the functional component analysis would be presented in writing "on a one-week turn-around schedule."<sup>9</sup> This would have made the due date for functional component analysis February 15, 1999 (one week after the February 8 hearing). This analysis was not filed in one week as promised, but was filed *two weeks later*, on February 22, 1999.

After learning that Compaq was the designer of the POL and MOL systems,<sup>10</sup> and that the cost of Compaq's services comprised a substantial portion of the Information Systems costs estimated by witness Lim, OCA requested that a copy of the Compaq contract be filed with the Commission. The Presiding Officer directed the

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<sup>7</sup> See Tr. 8/1939-86.

<sup>8</sup> Tr. 8/1946-47 and 1982-86.

<sup>9</sup> Id. at 2027.

<sup>10</sup> Id. at 1947-49

Postal Service to do so,<sup>11</sup> and it was filed as a library reference—USPS-LR-29/MC98-1—on February 12, 1999. OCA naturally assumed that the contract would have formed the basis for the estimates of the costs of the services Compaq was providing to the Postal Service to design and develop MOL and POL. Hence OCA submitted interrogatories OCA/USPS-37-61 on February 19, 1999, one week after the filing of the contract as a library reference.

In the Postal Service's February 25 Objection (at 3), the Postal Service makes the astonishing statement that "witness Lim did not need to consider this contract," in support of its position that it need not respond to any of these interrogatories (with the exception of OCA/USPS-37, 38, and 40, which were answered). OCA argues in the Motion to Compel Responses to these interrogatories that the Compaq contract is the best evidence of costs likely to be incurred by virtue of services performed by Compaq.<sup>12</sup>

The Postal Service's contention that OCA's inquiries about the Compaq contract are untimely is in error since the participants and the Commission learned about this contract, and the costs associated with it, for the first time in the prepared and oral testimony of witness Lim. The details of this contract, of course, were not available until Library Reference 29 was filed on February 12.

The Postal Service also objected to interrogatories OCA/USPS-27-36 as untimely, but the chronology of events leads to precisely the opposite conclusion. It

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<sup>11</sup> Id. at 1985-86.

<sup>12</sup> March 4 Motion at 6-9.

must be recalled that, at the same time witness Lim's "supplemental" testimony was filed, witness Seckar filed new testimony conforming to witness Lim's new testimony.<sup>13</sup>

The incremental costs provided in my original response have changed as a result of the Mailing Online information technology costs put forth by witness Lim, USPS-ST-9.

Witness Seckar neglected to inform the participants and the Commission that, when he "updated his costs to reflect witness Lim's supplemental testimony, he omitted the system developer costs because they were not undertaken for the experiment."<sup>14</sup> OCA had an inkling of this in the Response of the Postal Service to Question Posed by the OCA at the Hearing on February 5, 1999, Question Posed at Tr. 8/1987-88 (filed February 12, 1999). The Postal Service stated that Library Reference 7 Netpost contract costs were not included in witness Lim's information systems' cost estimates because they "are related to the operational and market tests for Mailing Online, rather than the Mailing Online experiment." OCA thought this clearly implied that other operations' test and market test costs might not have been included in *any* of the current incremental cost estimates for Mailing Online. Consequently, OCA promptly followed up on the Postal Service's February 12 statement with interrogatories OCA/USPS-27-36, filed six days later, on February 18, 1999. These interrogatories generally sought updates of previously furnished incremental cost estimates, with a focus on costs incurred during the operations test and the market test. An issue related

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<sup>13</sup> Revised Response of Witness Seckar to Question Posed by Presiding Officer at the November 20, 1998 Hearing (filed January 14, 1999, the same date as the filing of the Lim testimony).

<sup>14</sup> Response of the USPS to interrogatory OCA/USPS-37.

to the possible exclusion of operations and market test costs from witness Seckar's incremental cost estimates was the possibility that witness Plunkett had failed to account for these costs in his cost coverage calculations. A series of inquiries relating to this possibility were included in the set of interrogatories. On February 18, 1999, when interrogatories 27-36 were submitted to the Postal Service, OCA was experiencing a growing sense of alarm that, since the Postal Service had not complied with the Commission's directives in its market test decision to file costs common to MOL and other services, OCA might not receive the data in time to update testimony, as envisioned by P.O. Ruling MC98-1/18. This prompted the filing of interrogatories 32-36.

#### Conclusion

The seriousness of the Postal Service's failure to adhere to the data collection plan for MOL cannot be overstated. The Postal Service's failure to file the required accounting period data and its objection to answering the OCA's discovery requests will, if not remedied, deprive the participants and the Commission of vital information. It is now apparent that the Postal Service's obduracy will prevent participants from supplementing their direct cases with data from the accounting period reports required in the Commission's Market Test Opinion, contrary to Presiding Officer's Ruling No. MC98-1/18. The Commission and the participants have been more than patient in awaiting accounting period reports. Even if those reports had been filed as late as Monday, March 1, it might have been possible to argue that participants had been accorded a reasonable opportunity to supplement their direct cases as contemplated by Ruling No. 18. It is now Friday, March 5, and there is clearly no possibility that

participants can digest the accounting period reports, prepare supplemental testimony, and file that testimony in time for the hearings next week, even if those reports were filed today.

The Postal Service will no doubt question the timeliness of the OCA's motion to suspend the procedural schedule and the need for expedited responses thereto. However, the OCA filed its motion as soon as it became apparent that the Postal Service's failure to submit accounting period reports had, indeed, deprived the participants of an opportunity to supplement their direct cases. And expedition with respect to the OCA's motion is necessary so that the Postal Service can have the maximum opportunity to beat its self-imposed Y2K deadline should the Commission grant the OCA's March 4 Motion.

Respectfully submitted,



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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. In addition, I have served a copy upon the United States Postal Service by facsimile.

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