

ORIGINAL

ORDER NO. 1234
RECEIVED

Mar 19 4 22 PM '99

UNITED STATES OF AMERICA
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-00001

Before Commissioners: Edward J. Gleiman, Chairman;
W.H. "Trey" LeBlanc III, Vice Chairman;
Dana B. Covington, Sr.; Ruth Y. Goldway;
and George A. Omas

Mailing Online Service

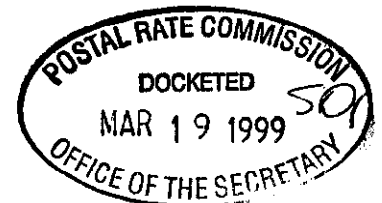
Docket No. MC98-1

ORDER DENYING WITHOUT PREJUDICE
OFFICE OF THE CONSUMER ADVOCATE
MOTIONS AND AUTHORIZING PROCEDURES
IN LIEU OF DISCOVERY

(March 19, 1999)

A. Introduction

Post Office Online (POL) is an internet-based service that is designed to provide a gateway to a variety of new electronic postal services. Among them is Mailing Online (MOL). MOL is a service that allows customers to submit electronic messages to the POL website, and to order and pay for their printing and mailing by the Postal Service, online. MOL pieces can be sent as First-Class or Standard A mail. Another major component of POL is Shipping Online (SOL). SOL is a service that allows customers to price and track parcel post, Priority Mail, and Express Mail online. The Postal Service is in the process of adding other services to POL as well. Tr. 10/2503. In this docket, the Postal Service's filing asked for authorization to conduct a limited market test of MOL, followed by a nation-wide, two-year experiment. The market test was authorized and implemented in October, 1998. The Commission is now considering whether to authorize the follow-on MOL experiment.



The Office of the Consumer Advocate (OCA) has filed a motion that arises from issues concerning how the costs of POL relate to the costs of MOL, and how MOL costs should be reflected in MOL fees. The OCA has attempted to obtain data that would allow it to present evidence as to what portion of POL costs should be attributed to MOL, or reflected in the MOL mark-up. The OCA contends that the Postal Service's failure to provide certain cost data required by the Commission has effectively denied its right to litigate these issues. Consequently, it has filed a motion to suspend this proceeding under the provisions of 39 U.S.C. § 3624(c)(2). 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 ("March 4 Motion"). The Mail Advertising Services Association International (MASA) and Pitney Bowes support this motion. The Commission must now decide whether the participants' right to litigate these issues can be honored within the 10-month period contemplated by § 3624(c)(1) of the Act, or whether this docket must be suspended in order to honor those rights, as contemplated by § 3624(c)(2).

When the Postal Service filed its request for approval of its proposed MOL special service on July 15, 1998, it asked that the Commission simultaneously apply its rules allowing a limited "market test" of the proposed service, and its rules allowing the service to be implemented on an experimental basis. The Commission's market test rules allow for a quick recommended decision (within 90 days rather than the usual 10-month period provided for by statute), but only for a test of limited scope and duration. See 39 CFR § 3001.161 et seq. The Commission's experiment rules (§§ 67 et seq.), allow a new service to be tested nationwide for up to two years, but 150 days are allocated to reach a recommended decision in order to give more thorough consideration to the issues raised by the proposal. The Commission issued a decision on October 7, 1998, recommending approval of the market test. PRC Op. MC98-1 (Market Test). The Postal Service began its market test on October 30, 1998.

A basic rationale for making the streamlined procedures of the market test available is that market tests will generate cost and demand information that will help provide a basis for evaluating a subsequent Postal Service request to establish the service on a permanent basis.¹ Consistent with that rationale, the Commission's Decision recommending that the market test go forward required the Postal Service to provide detailed reports on the costs and volumes experienced by MOL during the market test. PRC Op. MC98-1 (Market Test) at 48-51.

The Commission was aware that the Postal Service's desire to have its proposed experiment considered immediately after beginning its market test could be difficult to reconcile with the market test objective of generating enough historical data to meaningfully help the parties and the Commission evaluate the proposed follow-on MOL service. The Postal Service assured the Commission that despite the accelerated hearing schedule that it recommended, the data that it agreed to collect and report would fully inform the Commission and the participants of the costs and volumes experienced during the market test. Postal Service Reply Brief (Market Test) at 16. However, the Postal Service did not provide any accounting period cost data until March 10, 1999, the day scheduled for oral cross-examination of the participants' direct cases. This failure of the Postal Service to promptly provide the required accounting period cost data threatens to deprive the participants of the opportunity to use market test data in their direct cases and still leave a reasonable amount of time for the Commission to prepare a recommended decision within the 10-month time frame imposed by statute.² Unless all participants promptly comply with the extraordinary

¹ The Postal Service asked the Commission to apply both the market test and the experiment rules concurrently to its MOL proposal. The Commission granted that extraordinary request on the ground that market test data could provide a basis for evaluating a request for a follow-on experimental service as well as a follow-on permanent service. Order No. 1217, issued August 21, 1998, at 6-8.

² The Postal Service did not begin its market test until October 30, 1998. Although it initially urged the Commission to schedule hearings on its proposed experiment, and approve it by early January 1999, the need to provide supplemental testimony explaining the Service's reconfigured information system eliminated this possibility, and the standard § 3624 10-month time period has been applied.

measures prescribed in this Order, there is a substantial risk that the 10-month statutory deadline will not be met.

B. Background

In the market test phase of this docket, the Postal Service argued that only those POL costs that would be avoided if MOL were not offered should be attributed to MOL. It also argued that only those MOL costs that would be incurred during the experiment phase should be attributed for purposes of the experiment, as long as pre-mailing MOL costs incurred prior to the experiment would be covered by the revenue earned by the pre-mailing MOL fee during the experiment. Tr. 8/1765-66. The participants, in their briefs, argued that the Postal Service should be required to collect and report the total costs that are incurred jointly by POL and MOL to enable them to present evidence that costs jointly benefiting MOL and other services should be allocated to those services. They also argued that sufficient data should be collected during the market test to evaluate the assumptions underlying Postal Service information systems cost estimates for the experiment phase. OCA Brief at 20, Pitney Bowes Brief, Sections 3(A) and 3(B).

In its market test Opinion, at 48, the Commission confirmed that the parties should receive the data necessary to present such evidence, and directed the Postal Service to provide, by accounting period, “[c]osts 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)” [PRC Op. MC98-1 (Market Test) at 51] and “all set up costs and on-going expenses for equipment, software, communications and processing activities that involve Mailing Online....” Id. at 48.

The Postal Service’s direct case for the experiment phase was filed July 15, 1998, but hearings on the experiment phase were not held until late November, after conclusion of the market test phase of this proceeding. Accordingly, the testimony of

witnesses Stirewalt and Seckar concerning MOL information systems costs was cross-examined on November 18, 1998. On November 20, 1998, the Postal Service notified the Commission that it was redesigning the basic architecture of the MOL information system, and would be submitting supplemental testimony on January 14, 1999, revising the information system cost estimates of witness Stirewalt. Notice of United States Postal Service Regarding Expected Filing Date for Supplemental Testimony, November 20, 1998.

In order to provide an opportunity for discovery and cross-examination of this new testimony, the Presiding Officer pushed back the time for receiving the parties' direct cases from December 4, 1998, to February 8, 1999, which compressed the procedural schedule as far as possible without impairing the Commission's ability to issue a recommended decision on the proposed experiment within the 10-month deadline imposed by § 3624(c)(1). P.O. Ruling MC98-1/18. Under the revised hearing schedule, the Presiding Officer authorized the parties to use the to-be-available market test cost data to supplement their direct cases up to March 10, 1999, the date of oral cross-examination. He authorized this procedure in an effort to obtain for the participants a meaningful amount of market test data upon which to base their direct cases. In doing so, he expressed his expectation that four months of data would have been provided by that time. *Id.* at 3.

On January 14, 1999, the Postal Service replaced the information systems cost estimates of witness Stirewalt (USPS-T-3) with a much higher estimate by witness Lim (USPS-ST-9) to reflect a reconfiguration of the information system architecture. Witness Lim estimated all information system costs that would be exclusive to MOL during the two-year experiment. With respect to POL costs, he determined which were functionally related to MOL, and which were functions that were shared between POL and MOL. With respect to the shared functions, he hypothesized which would be eliminated if the MOL service were eliminated. Tr. 8/2018.

Through timely discovery, the OCA asked witness Lim to explain his reasons for determining that certain POL functions are not related to MOL, and the basis for his conclusions that MOL was responsible for only certain portions of various cost pools. See OCA/USPS-ST9-1-12, filed January 25, 1999. The OCA also asked witness Lim to use his cost avoidance hypothesis to comprehensively allocate all POL costs to POL, MOL, and SOL (essentially, to analyze POL costs from the "top down"). See OCA/USPS-ST9-3. In response, witness Lim was unable to estimate total POL costs since he analyzed costs only for the MOL portion of shared POL functions (essentially, assembled MOL costs from the "bottom up").

The OCA moved to compel witness Lim to provide a top-down estimate of POL costs and its components, insisting that this was a necessary first step in calculating the information system costs of MOL. 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, at 2. The Presiding Officer granted the OCA's motion in part. The Presiding Officer required witness Lim to comprehensively describe the functional components of POL that he concluded did not relate to MOL, and to explain the basis for those conclusions. Because it was not part of witness Lim's method, the Presiding Officer did not require witness Lim to provide a "top down" estimate of POL costs. P.O. Ruling MC98-1/22 at 3-4.

Witness Lim was orally cross-examined on February 5, 1999. The OCA asked him to explain the basis for his conclusions that particular POL functions were MOL-related and others were not, as required by P.O. Ruling MC98-1/22. Tr. 8/1916. He was unable to provide these explanations because he had relied essentially on the analysis and conclusions of the POL and the MOL information system developers rather than formulating his own. Tr. 8/1946-47, 51, 56-57. Accordingly, the Presiding Officer directed the Postal Service to provide information complying with Ruling 22 within a week. The Postal Service filed witness Lim's analysis on February 22, 1999,

two weeks later. See Response of United States Postal Service to Questions Raised During February 5, 1999 Hearing.

During his oral cross-examination, when the OCA asked witness Lim for documentation for his conclusions, witness Lim referenced the company that currently holds the contract to develop the POL and MOL information systems (Compaq).³ At the OCA's request, the Presiding Officer directed the Postal Service to provide the Compaq contract. Tr. 8/1986. The OCA assumed the Compaq contract was the starting point for witness Lim's estimate of the POL and MOL information system development costs. 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, ("March 5 Motion") at 7.

After the OCA failed to obtain information on costs shared by POL and MOL from the hearings on the Postal Service's revised testimony, its concern grew that such information would not be included in the overdue accounting period reports that the Commission's market test Opinion required the Postal Service to file. March 5 Motion at 9. Accordingly, on February 18 and 19, 1999, the OCA filed a series of interrogatories intended to flush out this information in time for it to be used to supplement its direct case.⁴

The first set in this series of interrogatories (OCA/USPS-27-36) was designed to obtain POL and MOL costs incurred during the operations test and market test (essentially, "start-up" costs). The second set in this series (OCA/USPS-37-61) was

³ This was the first time that the Postal Service had identified the current MOL information system contractor and acknowledged the existence of the development contract. The name of the predecessor contractor (Digital Equipment Corporation) had been included in an exhibit of witness Stirewalt filed on July 15, 1998. In this Exhibit, DEC was cited only as the source of contract prices for various hardware items. It was not identified as the MOL information system developer. Tr. 3/733.

⁴ P.O. Ruling MC98-1/18 allowed supplemental testimony reflecting market test data to be filed up to March 10, 1999, the date on which it was to be orally cross-examined. The OCA concluded that it would have to obtain such information by March 1, 1999 in order to be able to incorporate it in supplemental testimony filed by March 10, 1999. March 5 Motion at 9.

designed to obtain a cross-walk from the Compaq contract to the information system development costs estimated by witness Lim.

The Postal Service objected to the first set primarily on the ground that the information sought in these questions was cumulative, since it would soon be provided in its accounting period reports. With respect to interrogatory 31, which requested a detailed functional breakout of POL costs, the Postal Service objected that a detailed estimate would take over two months to prepare, while a "ball park" estimate would take two weeks. Objection of United States Postal Service to Interrogatories of the Office of the Consumer Advocate (OCA/USPS-27-36, 39, and 41-61), February 25, 1999, ("Objection") at 7. The Postal Service objected to the second set primarily on the ground of relevance, arguing that witness Lim made no use of the Compaq contract in estimating the information system costs of MOL. *Id.* at 8. To overcome this relevance objection, the OCA submitted a third set of interrogatories on March 2, 1999, (OCA/USPS-62-66). This set asked the Postal Service to quantify the costs of the non-MOL-related POL functions that witness Lim identified on February 22, in response to P.O. Ruling MC98-1/22, and asked the Postal Service to attach costs to those functions.

At this point, the OCA had less than a week remaining to supplement its testimony. It had tried three separate avenues to obtain enough information about the relationship between POL and MOL information system costs to submit its own analysis and recommendations as to how those costs should be reflected in the pre-mailing fee for MOL: 1) timely discovery and cross-examination of witness Lim; 2) timely institutional discovery against the Postal Service; and 3) timely discovery on the Compaq contract. A fourth potential avenue for obtaining the necessary information — the accounting period reports that the Service was obligated to file — was one that the OCA had reason to believe would still be available in time to use in its supplemental testimony. Its belief was consistent with the Postal Service's clear duty under the Commission's market test Opinion, the Postal Service's lack of notice that they would

not be available, and representations made to the OCA in Postal Service pleadings that accounting period reports remained a viable alternative to discovery as a source of this information. See Objection at 6-7.

By March 4, 1999, the Postal Service had yet to file any accounting period reports, as required by the Commission's market test Opinion. At that time, the OCA concluded that it could not obtain the requested information through any of the four possible avenues in time to use it in its direct case six days later. Consequently, the OCA filed a motion to suspend this proceeding under the provisions of § 3624(c)(2), and to compel responses to the first two sets of interrogatories described above. March 4 Motion. The following day it requested oral argument on these motions. March 5 Motion at 2. P.O. Ruling MC98-1/26 granted the OCA's motion for oral argument and expedited responses. P.O. Ruling MC98-1/27 certified the March 4 Motion to the full Commission, and the Commission accepts certification. The OCA's arguments with respect to its motion to compel and its motion to suspend, and the Postal Service's responses to them, are so interrelated that they will be presented and addressed together.

C. Positions of the Participants

The OCA. The OCA's March 4 and March 5 Motions argue that the Commission's market test opinion requires the Postal Service to report the hardware, software, communications, and processing costs incurred by MOL, whether they were incurred separately or jointly with POL. These costs, it argues, were to include both start-up and ongoing expenses, in sufficient detail, and in sufficient time, to enable the participants to present their own analyses and conclusions concerning how those costs should be reflected in the pre-mailing rates charged for MOL during the proposed experiment. In terms of the requirements under § 3624(c)(2) for suspending this proceeding, the OCA contends that the data reporting requirement in the Commission's

market test Opinion was a “lawful order of the Commission” to which the Postal Service had failed to respond within a reasonable time which had unreasonably delayed consideration of the Postal Service’s request by preventing participants from supplementing their direct cases with data from the accounting period reports. March 4 Motion at 2; March 5 Motion at 9.

The OCA notes that the remedy provided for in § 3624(c)(2) is a one-day extension of the statutory 10-month deadline for each day of delay. It argues that since no reports had been filed for the four accounting periods that had elapsed since the market test began, the delay caused by the Postal Service’s failure to respond should be considered to be at least four accounting periods. The OCA maintains that the suspension should continue until the accounting period reports are filed and the participants have had an opportunity to incorporate them into testimony, since the Presiding Officer had based the current hearing schedule, including the March 10 deadline for supplementing direct cases with accounting period data, on the expectation that more than four months of market test data would be available to the participants by that time. March 4 Motion at 2, 4.

The OCA also argues that the Postal Service’s failure to provide any accounting period data after four accounting periods had elapsed and participants’ direct cases were due has made a sham of the Commission’s market test rules, which are intended to generate market test data to help evaluate a follow-on version of the tested service. *Id.* at 3. The OCA suggests that the 10-month statutory period for processing requests for changes in rates should be measured not from July 15, 1998, but from January 14, 1999, when the Postal Service supplanted the MOL information system estimate of witness Stirewalt with the estimate of witness Lim. *Ibid.*

The Postal Service. On March 10, 1999, the Postal Service filed market test data covering Accounting Periods 2 through 4. The same day it filed its Response of United States Postal Service to 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, ("Postal Service Response"), March 10, 1999. Its Response incorporates arguments made in its February 25 Objection.

With respect to the OCA's motion to compel, the Postal Service's argument has four themes. The first is that the OCA should have pursued its objective of obtaining comprehensive "top down" POL costs six months earlier during the market test phase of this proceeding. It implies that witness Stirewalt was the proper witness to have asked to prepare such an analysis. It notes that witness Stirewalt made references in an exhibit to Digital Equipment Corporation contract prices for various data processing hardware. It implies that the OCA should have found this clue, and followed it until it discovered that Digital Equipment Corporation held a contract not just to provide hardware at specified prices, but to design the overall POL and MOL information systems, and that this contract was later assigned to Compaq, who apparently subcontracted it to Marconi. Postal Service Response at 6. See Postal Service Response to OCA/USPS-38, filed February 26, 1999.

The second theme in the Postal Service's response to the OCA's motion to compel is that when it submitted the information system cost estimate of witness Lim, the OCA should have confined its interrogatories to witness Lim's methodology, which avoided analyzing POL costs not caused by MOL. Postal Service Response at 5. The third theme is that the OCA should wait for the accounting period reports that the Postal Service would eventually provide, since they would provide better evidence of POL and MOL costs than the Compaq contract. Objection at 4, 6-7. The Postal Service also argues that the OCA should rely on the accounting period reports as the best evidence of POL and MOL start-up costs. *Id.* at 5.

The fourth theme in the Postal Service's response to the OCA's motion to compel is that responding to the OCA's interrogatories would unacceptably delay this proceeding. It argues that the OCA's request for a "top down" estimate of POL costs would require two months to prepare, although it observes that a "ball park" estimate might be prepared in two weeks. Objection at 1, 7. It recognizes that any extension of

this proceeding at this late stage runs the risk of pushing it beyond the 10-month statutory deadline for processing rate change requests. It goes on to assert that any extension of the ten-month deadline "might preclude commencement of any Mailing Online experiment until well into calendar year 2000, because of an impending Y2K freeze on changes to postal computer systems." *Id.* at 1, n.1

The Postal Service argues that its actions do not satisfy the prerequisites for invoking the suspension provision of § 3624(c)(2). It suggests that its failure to provide accounting period reports on MOL costs until now has not unreasonably delayed the Commission's consideration of its request. *Tr.* 10/2490.

The Postal Service further maintains that the participants' alleged need for market test data is a "pretense," since, it contends, none of their witnesses uses any of the reported volume data in their testimony, nor indicates any need for the data that the Postal Service was expected to provide in its accounting period cost reports. It argues that the OCA's witnesses, in particular, do not address any topics that might have been illuminated by the market test data that were unavailable at the time they testified. *Postal Service Response* at 3. It argues that the Commission's market test Opinion, which required reporting of joint POL/MOL costs, did not go so far as to require a "top down" analysis of POL costs. It emphasizes that in P.O. Ruling MC98-1/22, the Presiding Officer turned down the OCA's request that witness Lim perform such an analysis. *Id.* at 3-4. It suggests that its obligation to the participants to report joint POL/MOL costs was discharged by witness Lim's estimate of the MOL-related portion of those costs, and that its obligation to the Commission to report those costs will be discharged by the accounting period reports that it has begun to file. *Id.* at 5, 7. The Postal Service also makes technical arguments that in order to invoke § 3624(c)(2), it is necessary for the Commission to have issued an order requiring an action by the Postal Service by a specific deadline, and to have notified the Postal Service that if the deadline were violated, it would serve as the measuring point for unreasonable delay supporting extension of the 10-month deadline. *Id.* at 7.

Oral Argument. Oral argument on the OCA's March 4 Motion to suspend and to compel took place on March 11, 1999, one day after the Postal Service first provided accounting period reports of the market test costs incurred by MOL. The OCA acknowledged that the Postal Service had provided market test cost data for Accounting Periods 2 through 4, but observed that the reports in some respects appeared to be incomplete, inconsistent, or inaccurate. The OCA argues that in order to preserve its due process right to present evidence based on such data, it would need reports for Accounting Period 5 and 6, approximately three weeks to conduct discovery on the reports, and another three weeks to prepare testimony. Accordingly, OCA argues, the unreasonable delay occasioned by the Postal Service's failure to provide timely accounting period cost reports should be considered to be six weeks from the time that it receives those reports. Tr. 10/2436-38, 49. Pitney Bowes and MASA both concur in the estimates of three weeks for discovery on the accounting period reports, and potentially three more weeks if they decide to supplement their direct cases. Id. at 2460, 64.

During oral argument, the OCA moved to compel the Postal Service to respond to its interrogatories 62-66. These interrogatories ask the Postal Service to attach "ball park" cost estimates to the POL functions identified by witness Lim in response to P.O. Ruling MC98-1/22, and to provide the assumptions made by the system designers that underlie witness Lim's allocation of portions of those costs to MOL. The OCA emphasizes that the primary objective of its motions is to obtain an estimate of the cost of POL functions, and an explanation of their relationship to MOL. It characterizes these interrogatories as its most important data requests, and observes that answers to them would "go a long way" toward meeting its primary objective. Id. at 2443-45.

D. Commission Analysis and Conclusions

In this proceeding, the Commission allowed the Postal Service the latitude to apply the Commission's market test rules and its experiment rules concurrently to the Service's MOL proposal. In allowing the Postal Service to have its experiment considered immediately after its proposed market test had commenced, both the Commission and the Postal Service were aware that the Postal Service would have to exercise diligence in collecting and reporting the market test results if the participants and the Commission were to make meaningful use of those results to evaluate the proposed experiment.

The Commission's market test Opinion requires the Postal Service to provide its accounting period reports "promptly after the close of the reporting period." PRC Op. MC98-1 (Market Test) at 50-51. By any reasonable measure, the Postal Service has failed to promptly report MOL costs. Its Accounting Period 2 report was provided more than 17 weeks after the close of that period, and its Accounting Period 3 report was provided more than 13 weeks after the close of that period. In P.O. Ruling MC98-1/18, issued December 2, 1998, the Presiding Officer deferred the due date of the participants' direct cases as far as possible in order to allow them to use four months of cost and volume data. The Postal Service's failure to produce any accounting period reports until March 10, 1999, left participants with no time to incorporate market test cost data in their direct cases.

The Commission's market test Opinion made it clear that the requirement that cost data be reported by accounting period was intended to enable the participants to analyze the relationship between POL and MOL costs independently of the Postal Service, and to present evidence as to how costs incurred jointly should be reflected in MOL's pre-mailing rates. PRC Op. MC98-1 (Market Test) at 48. The participants had a reasonable expectation that accounting period reports with the necessary data would

be forthcoming in time to supplement their direct cases well in advance of the March 10, 1999 date scheduled for cross-examination of those cases set by the Presiding Officer.

The OCA diligently pursued the possible avenues for obtaining MOL information system cost data, to little avail. As described above, the Postal Service withdrew the original MOL information system cost estimate of witness Stirewalt and replaced it with the estimate of witness Lim. By the Postal Service's own admission, witness Lim's estimate used methods, and produced results, that could not be meaningfully compared to those of witness Stirewalt. Objection at 3. Notwithstanding its novelty, and its submission late in the proceeding, the Postal Service presented witness Lim's estimate with so little explanation that its basis is essentially unreviewable by the parties.

Having done so, the Postal Service then resisted OCA discovery on witness Lim's testimony that was designed to elicit both POL costs, and joint POL/MOL costs, arguing that the OCA should have pursued these areas during consideration of the market test. This argument is groundless. The record shows that the OCA conducted diligent discovery on witness Stirewalt during the market test phase of this case. The fact that witness Lim's replacement estimate applied different methods to a new POL/MOL information system architecture, and produced far different results, provides ample justification for the OCA to start from scratch in its discovery on witness Lim, with respect to both total POL costs, and shared POL/MOL costs. Tr. 10/2472. It is contradictory for the Postal Service to criticize the OCA's efforts to discover this information as tardy, and suggest elsewhere that the OCA should forego such discovery and wait until the Postal Service provides that information in its accounting period reports. Compare Objection at 2 with Objection at 4-5.

In P.O. Ruling MC98-1/22, the Presiding Officer denied the OCA's request to require witness Lim to produce a "top down" estimate of POL costs on the ground that such an estimate was not part of witness Lim's method. The Postal Service apparently interprets this ruling as the Presiding Officer's stamp of disapproval on the OCA's underlying discovery objective. Postal Service Response at 5; Tr. 10/2469-70.

Ruling 22 should be viewed in context. Quite properly, that ruling kept that stage of the proceeding focused on the evidence on which the Postal Service chose to rely.

It is clear that the Market Test Opinion contemplated that accounting period reports would include data on joint POL/MOL costs. PRC Op. MC98-1 (Market Test) at 48. The Postal Service has acknowledged this in oral argument. Tr. 10/2470. The Postal Service did not begin to provide these data until the day that the participants' direct cases were to be cross-examined. The Postal Service's delinquent production of its accounting period cost reports creates a serious risk that the OCA, and perhaps other participants, will be denied their right to present direct evidence on MOL costs unless the statutory deadline is extended. This is because its delinquency comes at a time when this proceeding is already pressing against the statutory 10-month deadline.

The Postal Service suggests that witness Lim's information system cost estimates provided an adequate substitute for the accounting period data that it had failed to file. Objection at 4. This suggestion is without merit. Even though witness Lim provided estimates of the MOL portion of joint POL/MOL costs, for the most part the Postal Service has not yet explained the rationale underlying his separation and quantification of those costs, even in its response to P.O. Ruling MC98-1/22. Accordingly, the participants have not been provided with sufficient information to make their own estimates of joint POL/MOL costs and how they should be treated.

The Postal Service contends that the participants do not need data on joint POL/MOL costs, since no participant offered testimony on the proper allocation of those costs. This argument is also without merit. As a technical matter, MASA/Pitney Bowes witness Prescott did file testimony advocating that the MOL information system costs presented in the Postal Service's revised case were incomplete, and should include start-up costs and joint MOL/SOL advertising costs. Tr. 9/2133, 2135, 2137. MASA and Pitney Bowes, who have joined in the OCA's motion to suspend (Tr. 10/2460, 2463-64), would be warranted in supplementing witness Prescott's attributable cost estimate for MOL if he had relevant data from the accounting period reports.

Generalized cost allocation testimony of the kind that the Postal Service suggests the participants should have filed has little practical purpose if it cannot be applied to relevant data. Under these circumstances, it would be inappropriate to conclude that the participants have waived their right to file testimony based on those data. That a participant such as the OCA did not offer such generalized testimony should not be grounds for inferring that it has no intent to supplement its case to make use of such data when they become available, in light of its diligent discovery on this topic and its vigorous assertions to the contrary.

As explained above, the Postal Service's delinquent production of accounting period cost reports toward the end of this already compressed proceeding, together with the effects of late revisions to the Postal Service's case and resistance to discovery on that case, combine to create a risk that the OCA and other participants will not be able to present testimony based on those data and have it considered within the 10-month statutory deadline. In a non-experimental proceeding, these circumstances would satisfy the basic prerequisites for extending this proceeding under § 3624(c)(2). The Postal Service has failed to respond within a reasonable time to the data reporting requirements incorporated in the Market Test Opinion. The likely result is unreasonable delay of the participants' opportunity to obtain evidence that will enable them to present testimony analyzing these costs. If the Commission were to extend this proceeding under § 3624(c)(2), it would be reasonable to measure the extent of the prospective delay from the time that four accounting periods of cost data have been reported, plus three weeks for discovery on those reports, and another three weeks to prepare supplemental testimony, as the participants have suggested.⁵

⁵ The Postal Service suggests that there are certain technical prerequisites for invoking § 3624(c)(2) that are not present here, such as a specific deadline attached to a specific Commission order from which to calculate the precise number of days of delay. Postal Service Response at 7. No support for this contention is provided. The circumstance here is much like that faced by the Commission in Docket No. MC78-1, the only previous instance in which the Commission has invoked this provision. There, the Commission concluded that basic revisions to the Postal Service's direct case late in the proceeding, coupled with the effect of unreasonably late responses to discovery orders, deprived the participants of data necessary to prepare direct cost cases of their own. At the time that the Commission

Even though the prerequisites for invoking § 3624(c)(2) are present here, the Commission recognizes that the circumstances of this case also bear on whether the resort to § 3624(c)(2) in this docket would provide an optimal solution. There are potentially serious downsides to extending the 10-month statutory deadline for the purposes that the participants request. Among them is the risk that a detailed “top down” study of POL information system costs might, as the Postal Service alleges, monopolize more than two months of key MOL system managers’ time. Objection at 7. This might retard the implementation of the MOL information system, and increase the risk that any modification to the MOL experiment that the Commission might recommend, such as those that the OCA proposes, could not be implemented prior to the Postal Service’s self-imposed moratorium on deploying new software systems after July 31, 1999. See Tr. 10/2481-82.

In the Commission’s view, the risk that this proceeding will have to be extended beyond the 10-month statutory deadline can be reduced if, in lieu of granting the OCA’s motion to suspend this proceeding indefinitely and compel written responses to its

issued its Order invoking § 3624(c)(2), the parties had had only one day to review key evidence necessary to prepare their direct cases. Under these circumstances, the Commission recognized that the measure of delay was necessarily prospective. It concluded that delay should be measured by first estimating the time that it was likely to take the participants to review the necessary data once they were received, and to prepare and file testimony based on those data. Based on that estimate, the Commission set a prospective filing date of the participants’ testimony. The Commission then compared the prospective date that it had set for filing participants’ testimony with the date that it had initially set for filing that testimony to determine the number of days of delay. Order No. 280, issued May 18, 1979, at 28-30. There is a potentially significant distinction between the situation in Docket No. MC78-1 and the situation in this docket. In this docket, the most significant orders to which the Postal Service has not responded in a reasonable time are the data reporting requirements imposed by the Commission Opinion and Recommended Decision in the market test phase of this docket. The Opinion and Recommended Decision functions as a “lawful order” governing the experiment phase of this docket. If it were not a lawful order applicable to the experiment phase of this docket, the Commission could not require the Postal Service to collect and report market test data during consideration of its proposed experiment. The effect would be to nullify the market test rules, because their basic purpose is to provide market test data with which to evaluate a follow-on service. One consequence of concluding that the data reporting requirements in the Commission’s market test Opinion and Recommended Decision are not “lawful orders,” is that the Commission would have to withdraw the option of applying its market test rules concurrently with its experiment rules.

interrogatories, the Postal Service provides the essence of the information requested by the participants through extraordinary informal procedures designed to serve the same purpose as formal written discovery.

The OCA, MASA, and Pitney Bowes all argue that they need accounting period cost reports through Accounting Period 6 and an opportunity to conduct discovery on them. The Postal Service has provided partially complete Accounting Period 5 and 6 reports, and has expressed confidence that substantially complete Accounting Period 5 and 6 reports will be provided by the end of this week. Notice of United States Postal Service of Filing Accounting Period Data Reports, filed March 16, 1999. It also offered to explain these reports informally. Tr. 10/2471. In order to provide the participants with the equivalent of expedited discovery on all available accounting period reports, the Postal Service is directed to consult with the participants and select a mutually agreeable day between March 22 and March 26, 1999, on which to hold an informal conference open to participants at Postal Service headquarters on those reports. If the conference is to effectively serve as an expedited substitute for traditional discovery, the Postal Service must be prepared to provide explanations of how these reports were compiled, what the data represent, and how they should be interpreted.

On March 15, 1999, the OCA moved to compel the Postal Service to respond to its interrogatories ST9-3 and 62-66. Office of the Consumer Advocate Motion to Compel Responses to Interrogatories OCA/USPS-62-66 and OCA/USPS-ST9-3. These interrogatories ask the Postal Service to attach "ball park" cost estimates to the POL functions identified by witness Lim in response to P.O. Ruling MC98-1/22, and to provide the assumptions made by the system designers that underlie witness Lim's allocation of portions of those costs to MOL. During oral argument, the OCA indicated that the primary objective of its motions is to obtain an estimate of the costs of POL functions, and an explanation of their relationship to MOL, and commented that answers to OCA/USPS-62-66 would "go a long way" toward meeting these objectives. Tr. 10/2443-45.

To enable the OCA to achieve the primary objective of its interrogatories, the Postal Service is directed to provide to the Commission and the participants, by March 31, 1999, or sooner if possible, "ball park" cost estimates for the POL functions and components listed in Attachment A to this Order. The functions and components are taken from the Response of United States Postal Service to Questions Raised During February 5, 1999 Hearing, filed February 22, 1999. The Postal Service also is directed to consult with the participants after filing this information, and select the earliest feasible, mutually agreeable times between April 6 and April 9, 1999 sufficient to hold similar informal conferences at Postal Service headquarters at which these "ball park" POL information system cost estimates can be thoroughly explained. The purpose of this procedure is to give the participants a basic grasp of how POL and MOL functions relate to each other, and a reasonable approximation of their costs.

To maintain the proper perspective during these informal procedures, the participants should bear in mind that it is an experimental service that is being proposed, and that information system costs are not a major portion of the total costs of the proposed MOL service. Therefore, it is reasonable to accept estimates of POL and MOL information system costs that are less detailed and precise than if a rate for a permanent service were being proposed. In its motion to compel responses to OCA/USPS-62-66 and ST9-3, filed March 15, 1999, at 6, the OCA observes that if the Presiding Officer will be satisfied with "ball park" estimates of information system costs, then the OCA will be satisfied with such estimates as well. The Commission agrees that under the circumstances of this case, any testimony of the participants that addresses the relationship between POL and MOL information system costs may rely on reasonable approximations.

If this conference is to effectively serve as an expedited substitute for traditional discovery, the Postal Service must be prepared to explain why the costs of particular functions and components are either allocated entirely to MOL, divided between MOL and POL, or deemed not allocable to MOL. For example, the Postal Service should be

prepared to explain why it allocated 70 Gigabytes of storage capacity to MOL and 111 Gigabytes to POL/SOL, why it did not allocate any of the costs of registration or payment software to MOL, and whether certain POL/MOL costs that it allocates entirely to MOL might be over allocated to MOL, or might represent only part of the relevant cost pool.

The cost estimates prepared for the functions listed in Attachment A, and other facts elicited during the two informal conferences, may subsequently be submitted for the record in the form of stipulations or admissions. On or before April 13, 1999, the participants will file a report with the Presiding Officer containing all stipulations and admissions, and describing areas where agreement could not be reached. On that date, any participant intending to submit supplemental testimony premised on information developed at these conferences shall provide notice to that effect.

At the conference on information system costs, the Postal Service should be prepared to provide comprehensive estimates of the POL and MOL costs incurred to date for the operations and market test phases.

The information provided by this procedure is intended to yield a direct, "ball park" estimate of POL and MOL costs by those familiar with the design of these systems. The Commission assumes that such information will be better evidence of POL and MOL information system costs than can be inferred from the Compaq contract. Accordingly, if the above procedure is generally successful in obtaining a "ball park" estimate of these costs, the Postal Service will be excused from responding to interrogatories OCA/USPS-39, and 41-61. Questions covering the subjects addressed by interrogatories OCA/USPS 27-36, 62-66 and ST9-3 may be asked orally at the conference.

The motions of the OCA to suspend these proceedings indefinitely, and to compel written responses to interrogatories OCA/USPS 27-36, 39, 41-61, 62-66 and ST9-3, will be denied without prejudice, in order to give the extraordinary procedures in lieu of discovery authorized by this Order a chance to succeed. The Commission

believes that if all participants cooperate, this proceeding can still be completed within the 10-month statutory period.

The current hearing schedule will remain in effect for all issues that do not depend primarily on the receipt of accounting period cost data or the estimation of POL and MOL information system costs. If the participants decide to present supplemental testimony based on the data obtained through these informal procedures, the Commission intends to accommodate such testimony by applying the procedural schedule set forth in Attachment B.

IT IS ORDERED:

1. The 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, filed March 4, 1999, is denied without prejudice.
2. The Office of the Consumer Advocate Motion to Compel Responses to Interrogatories OCA/USPS-62-66 and OCA/USPS-ST9-3, filed March 15, 1999, is denied without prejudice.
3. The Postal Service and the participants are directed to pursue the extraordinary procedures in lieu of discovery that are described in the body of this Order.

By the Commission.

(S E A L)



Cyril J. Pittack
Acting Secretary

Costs For PostOffice Online by Function and Component

Total cost amount for POL Web GUI broken down by component:

- Web servers (how many, cost)
- Internal switches (how many, cost)
- Internal interface routers (how many, cost)
- Load balancing system (what is it, cost)
- Firewalls (description, cost)
- Operating system (cost)
- Web pages and development (cost)
- Costs and components for Online help, and Public services

Total cost amount of New Registration and Account Maintenance broken down by component:

- POL servers (number, cost)
- Database servers (number, cost)
- Backup tape system (size, cost)
- Internal switches (number, cost)
- Database management system (cost)
- Operating system (cost)
- Customized registration (description, cost)
- Account maintenance (description, cost)
- Address book (description, cost, when MOL expected to use it)

Total cost of Payment Processing and Payment Reporting:

- POL servers (number, cost)
- Database servers (number, cost)
- Backup tape system (size, cost)
- Internal switches (number, cost)
- Routers (number, cost)
- Database management system (cost)
- Operating system (cost)
- Payment processing software (cost)
- Refund software (description, cost)
- Reporting applications (description, cost)

Total cost of Reporting and Internal Operations:

- Datamart server (cost)
- POL servers (number, cost)
- Database servers (number, cost)
- Internal switches (number, cost)
- Database management system (cost)
- Operating system (cost)
- Customized reports (description, cost)

Total cost of POL Help Desk

SCHEDULE FOR CONSIDERING
EVIDENCE NOT BASED PRIMARILY
ON DATA ELICITED BY
ORDER NO. 1234 PROCEDURES

SCHEDULE FOR CONSIDERING
EVIDENCE BASED PRIMARILY
ON DATA ELICITED BY
ORDER NO. 1234
PROCEDURES

March 22, 1999 Filing of evidence in rebuttal
to the cases-in-chief of
participants other than the
Postal Service

March 29-31, 1999 Hearings on evidence in
rebuttal to participants'
direct evidence

April 9, 1999 Initial Briefs

April 16, 1999 Reply Briefs

May 15, 1999 Decision

March 22-26, 1999 Conference on Accounting
Period Reports

March 31, 1999 POL Cost Report (see
Attachment A)

April 6-9, 1999 Conference on POL Cost
Report

April 13, 1999 Report on Informal
Conferences

April 20, 1999 Filing of supplemental
testimony

April 26, 1999 Oral cross-examination of
supplemental testimony

April 30, 1999 Filing of briefs on
supplemental testimony

May 15, 1999 Decision