

PRESIDING OFFICER'S
RULING NO. MC2006-3/4

UNITED STATES OF AMERICA
POSTAL RATE COMMISSION
WASHINGTON, DC 20268-0001

Rate and Service Changes to Implement
Baseline Negotiated Service Agreement
With Washington Mutual Bank

Docket No. MC2006-3

PRESIDING OFFICER'S RULING
DENYING MOTION TO COMPEL RESPONSE TO
INTERROGATORY OCA/USPS-T1-28

(Issued July 26, 2006)

On July 13, 2006, the Office of the Consumer Advocate (OCA) filed a motion to compel a response to interrogatory OCA/USPS-T1-28.¹ This interrogatory seeks extensive, detailed information related to the negotiation and approval process of costs incurred by the Postal Service in negotiating the Washington Mutual Bank Negotiated Service Agreement.

OCA/USPS-T1-28. This interrogatory seeks information on negotiation costs of the Washington Mutual NSA. Please refer to your testimony at page 1, lines 13-15.

- a. With respect to the Washington Mutual NSA, please provide the time period in months between Washington Mutual's first contact and the filing of the Postal Service's request in this proceeding.
- b. With respect to the Washington Mutual NSA, how many face-to-face meetings did the Postal Service have with Washington Mutual or its representatives?
- c. Please identify the organizational entities (i.e., Pricing Strategy, Finance, Law, etc.) within the Postal Service involved in developing

¹ Office of Consumer Advocate Motion to Compel a Response to Interrogatory OCA/USPS-T1-28, July 13, 2006 (Motion). OCA/USPS-T1-28 is included in Office of Consumer Advocate Interrogatories to United States Postal Service Witness Ali Ayub (OCA/USPS-T1-28-31), June 28, 2006.

- negotiating positions or negotiating on behalf of the Postal Service with respect to the Washington Mutual NSA.
- d. Please provide the total number of individuals involved in developing negotiating positions or negotiating on behalf of the Postal Service from the organizational entities identified in part c., above. How many of those individuals were supervisors, managers, or other higher level individuals?
 - e. Please estimate the time period in months that you devoted to developing negotiating positions, negotiating on behalf of the Postal Service, preparing testimony, etc., with respect to the Washington Mutual NSA.
 - f. Please estimate the total cost to the Postal Service of concluding the Washington Mutual NSA and securing Commission approval. This estimate should consider the personnel costs of legal, financial and other analysts developing negotiating positions, negotiating on behalf of the Postal Service, preparing filings for the Commission, etc.

OCA contends that an estimate of total cost (subpart f) is needed to calculate the overall return on investment experienced by the Postal Service based on the Washington Mutual Bank Negotiated Service Agreement. Alternatively, OCA contends that the estimate of total cost is needed as part of the application of the “Panzar test” to this Negotiated Service Agreement. Subparts a through e allegedly are designed to obtain information that could validate the response to subpart f, and thus are reasonably calculated to lead to the discovery of admissible evidence. OCA argues that the information sought is not protected by predecisional or commercial sensitivity privileges because the interrogatory merely requests an accounting of time, and does not request the content of discussions.

The Postal Service filed an objection to providing a response to this interrogatory on July 10, 2006, and a reply to the Motion on July 20, 2006.² First, the Postal Service objects to the interrogatory contending that it seeks information not reasonably calculated to lead to the discovery of admissible evidence. The Postal Service argues that the interrogatory focuses on the mechanics by which the Postal Service assembled

² Objection of United States Postal Service to Interrogatory of the Office of Consumer Advocate to Witness Ayub (OCA/USPS-T1-28) July 10, 2006 (Objection); Reply of United States Postal Service in Opposition to the Motion to Compel of the Office of Consumer Advocate (OCA/USPS-T1-28), July 20, 2006 (Reply).

the case, and not the factual evidence that underlies its position. Second, the Postal Service objects on the grounds of undue burden primarily because the information does not reside in records maintained by the Postal Service in the ordinary course of business, and would have to be collected by canvassing personnel who may have been involved in negotiations. Third, the Postal Service objects on the grounds that the information is predecisional in nature and therefore protected by the deliberative process privilege. Fourth, the Postal Service objects on the grounds of commercial sensitivity arguing that negotiating participants should be free of concern that discovery on the mechanics of their negotiations may somehow provide information adverse to their commercial interests.³

The Reply furthers the Postal Service's relevance argument by contending that subparts a through e request information too unrelated to time actually spent to serve as validating information. The Postal Service also claims subpart f is irrelevant because it would have incurred the same personnel costs whether or not the personnel were working on the Washington Mutual Bank Negotiated Service Agreement. Thus, the personnel costs spent on activities to develop and litigate the agreement are unrelated specifically to it.

Discussion. The motion to compel a response to OCA/USPS-T1-28 is denied. On its surface, ascertaining the costs of negotiating and ushering a proposal through the approval process would appear relevant to the overall profit or loss associated with any one Negotiated Service Agreement. Obviously, if the Postal Service is incurring more costs in negotiating and approving agreements than it benefits from the agreements themselves, *over the long run*, the Postal Service may wish to re-evaluate its Negotiated Service Agreement program. Many private entities may be in a position (by having systems in place) to accurately track these start-up costs, if not at the agreement level, at least at the profit and loss center level. In the future, the Postal Service may wish to develop this type of costing system to track start-up costs.

³ Objection at 1-3.

At this nascent stage in the Negotiated Service Agreement program, however, assigning particular start-up costs to particular agreements has no relevant value. The Postal Service is still developing its process for negotiating and approving agreements. There is likely to be as many failures as successes in this process. Including start-up costs at this stage is likely to unfairly penalize early agreements and inhibit the development of a successful Negotiated Service Agreement program. In the future, assigning these costs, and determining how to assign the costs of the agreements that do not come to fruition, may become relevant.

Including negotiating and approval process costs also would be inconsistent with the way the Commission handles other rate and classification cases. For example, the Commission does not require the Postal Service to calculate the costs incurred in preparing for and litigating an omnibus rate case, and to assign these costs to individual subclasses and services. Nor were costs associated with negotiating the settlement to the latest omnibus rate case relevant to proposed or recommended rates.

From a practical point of view, the Postal Service cannot provide costs for ushering an agreement through the Commission's review process because these costs have yet to be incurred, and are subject to the uncertainties of litigation. At most, the Postal Service could provide negotiation costs, and pre-filing preparation costs. However, the Postal Service contends that it does not have systems in place to capture these costs, and treats them as overhead. To recreate a record of these costs by canvassing employees after the fact is, as the Postal Service contends, both burdensome and unlikely to produce reliable results.

Whether or not the Postal Service should be required to capture negotiation and filing preparation costs is an issue that could have implications beyond this Negotiated Service Agreement case. It would be most appropriate to explore this issue further in a forum such as in an omnibus rate case.

RULING

The Office of Consumer Advocate Motion to Compel a Response to Interrogatory OCA/USPS-T1-28, filed July 13, 2006, is denied.

George Omas
Presiding Officer