

BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268B0001

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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

INTERNATIONAL MAIL REPORT

Docket No. RM2000-1

REPLY COMMENTS OF THE UNITED STATES POSTAL SERVICE

In accordance with Order No.1270 (November 18, 1999), the United States Postal Service hereby replies to the initial comments submitted by the parties in response to the Commission's request for comments on proposals to amend its Rules of Practice and Procedure in light of 39 U.S.C. 3663. Except for the issue of public access to commercially-sensitive information, the Postal Service will address the comments of each party separately. In general, the Postal Service reiterates its opening comment that "the Commission's first report to Congress in most respects struck appropriate balances with respect to scope and detail" and that the "flexible process seemed advantageous overall to both the Postal Service and the Commission."

Office of the Consumer Advocate

The comments of the Office of the Consumer Advocate (OCA) addressed mainly the issues of providing, and making public, explanatory information about the methodologies for developing international cost, revenue, and volume information and the data sources that are used in the development of that information. The OCA proposes that a new procedure be established whereby the Postal Service would be required to file:

detailed descriptions of the procedures it follows to generate the reports that it

files to the Commission, as well as a description of the methodologies employed, and the types of data and other information utilized. These descriptions would be made available to the public immediately following their filing with the Commission on or about March 15th each year. Interested members of the public would then be permitted to comment on possible deficiencies or oversights in procedures, methodologies, and information sources, with the aim of having the Postal Service supplement its filed reports or improve the quality of information used in future years.

OCA Comments at 3.

In the view of the Postal Service, this new proposal goes beyond the mandate and requirement of section 3663, which is to produce a report for Congress based on data provided by the Postal Service. In imposing this mandate, Congress did not require a public process comparable to that used for rate and classification proceedings (i.e. hearings on the record and a decision subject to judicial review). Instead, it required that "the Postal Service shall provide to the Postal Rate Commission such data as the Commission may require." This statutory process envisions not a public proceeding, but a cooperative effort between the Commission and the Postal Service. The conversion of this process into a new and very different process is unwarranted.

A further concern with this proposed process is that it would put outside parties in the position of second-guessing what the PRC needs to discharge its 3663 duties. However, the Postal Service submits that the Commission is best able to judge what supplemental information it needs and doesn't need -- after all, only the PRC is privy to everything filed by USPS, and is therefore in the best position to judge where any possible gaps might be. It is probably best that the Commission use its limited time between March 15 and July 1 to focus on its report to Congress, rather than issuing rulings on proposals from third parties for the Postal Service to file additional

information.

Further, to the extent that the OCA's proposed "public process" would result in the PRC amending what information it requires the Postal Service to produce in subsequent years, it has the potential to turn the annual 3663 process into a perpetual rulemaking that would be far more cumbersome and burdensome than 3663 contemplates.

Second, the OCA proposes a set of documentation requirements that at first blush sound reasonable. However, they appear to be an attempt to tailor international documentation to mirror as closely as possible domestic documentation. For example, the references to "summary description," "citations to materials already on file with the Commission" and "detailed descriptions of the procedures it follows to generate the reports that it files with the Commission, as well as a description of the methodologies employed, and the types of data and other information utilized" suggest that the OCA is trying to fit the 3663 process, and the information used to implement that process, to a template that it is familiar with -- the template of domestic rate/classification filings. The development of international information, however, is largely separate from the domestic process, and separate procedures have evolved to serve that purpose. The Postal Service in IM99-1 provided voluminous documentation that appears to have satisfied the Commission's need to understand the Postal Service's procedures. The additional documentation proposed by the OCA appears directed not at supporting the Commission's ability to understand data and prepare a report, but at developing a public record for other purposes. The Postal Service submits that requirements to provide additional information should be based on needs of the specific section 3663

process for producing a report, not the different process that is followed in developing rates of postage in a public proceeding. The Postal Service further submits that neither it nor the Commission should spend their limited resources on a "documentation exercise" which serves no real need in the section 3663 context.

Federal Express

Federal Express submitted comments that in many respects had more to do with its views on what the international mail system should be, e.g., terminal dues negotiations and Article 40, than with the specific problems of developing the report to Congress required by section 3663. As these policy matters are outside the scope of this rulemaking, the Postal Service will not address them in these comments. Rather, the Postal Service will address Federal Express's comments only as they pertain to the format and contents of the report.

Federal Express asserts on page 2 of its comments that the central issue of the report to Congress is to account for an alleged discount on domestic mail services which the Postal Service sells to foreign post offices. In support of this assertion, on page 3 of its comments, Federal Express asserts that the Postal Service provides foreign post offices the same services it provides domestic mailers. Federal Express further asserts that the Postal Service provides services to foreign post offices at a discount to rates that it charges domestic mailers. These assertions are inaccurate. Nothing in section 3663 or its legislative history supports the claim that the purpose of the report was to account for any alleged discount offered to foreign post offices. Moreover, the supposed factual premises for the assertions, that the Postal Service provides foreign post offices the same services as domestic mailers, and that it offers

discount rates for those services, are inaccurate. The Postal Service does not grant, calculate, or offer discounts from domestic rates, nor does the Postal Service sell discounted domestic services to foreign posts.

Under the Universal Postal Union, the postal administrations of member countries are obliged to accept and deliver foreign origin mail, and be compensated according to a multi-lateral agreement whose execution is embodied in the UPU Convention and the Detailed Regulations. All countries which are signatory to the UPU Convention, including the United States, are obliged to deliver foreign-origin mail. This is accomplished within the operational constraints of the domestic distribution and delivery network of the entity responsible for the implementation of the Acts. These domestic distribution and delivery networks are established primarily for the handling of domestic mail services. Thus, the recovery of the bulk of institutional costs for the domestic infrastructure is appropriately assessed to the full array of domestic mail services whose product features and service time attributes are not the same as those associated with foreign- origin mail.

The marginal cost of flowing approximately 1 billion pieces of international mail through a domestic network dedicated to supporting 165 billion domestic pieces does not support a conclusion that the burden of institutional cost recovery is or should be equivalent. This assumption is erroneously reflected in the comparison that results in concluding that the inbound cost coverage of 113.5% represents a serious deficiency when contrasted to the 159.5% cost coverage for domestic mail. Inbound international mail is compensatory. To argue that the cost coverage should be at parity with domestic mail is a contrivance that ignores fact, precedence, and the very major

conditions that make domestic and international mail different. Despite these differences, inbound mail is compensatory.

The extension of this argument by Federal Express offers a limited calculation that, had inbound international mail paid domestic rates in lieu of terminal dues, the Postal Service would have gained an additional \$178 million in revenue. This representation ignores the fact that, if the Postal Service could apply domestic rates to foreign origin mail, outbound mail from the United States would also be subjected to treatment in kind. As a net exporter of international mail, and as a low-cost, low-rate provider of services, the financial consequences would be a reduction in total Postal Service international mail revenues. Federal Express's estimate also ignores the overall price elasticity for international mail, which has been increasing because of competitive alternatives and is already approaching -1.0.

The further Federal Express theme that the Postal Service sells domestic services to foreign postal administrations is inaccurate in its characterization, and not supported by any reasonable mapping of inbound mail to domestic products. In fact, a one-to-one mapping, which would be necessary to make a supportable derivation of the revenue consequences, cannot be done at all, unless gross assumptions are attempted. Even the notion that inbound foreign origin mail can be mapped into the domestic mail classes has not been adequately considered. Operationally, the physical handling and distribution of inbound mail, by necessity, must make use of the domestic infrastructure. Therefore, mapping at an operational level is possible: letters map to letter operations, parcels go through parcel operations. It is not possible, however, to compare at the product, mail class, or rate category level. Differences in dimensions,

size limits, weight limits, classification of the mails, content restrictions, and mail preparation requirements all preclude meaningful mapping between domestic and international mail. To assume that such mapping can be accomplished as an outcome of a mechanical process is naïve. To assume that existing data systems can be modified to provide this mapping is also naïve.

Federal Express next asserts on pages 6-8 of its comments that the alleged discount for inbound mail should be taken into account in analyzing the costs and revenues of outbound mail, and that the alleged discount for inbound mail has a substantial influence on the rates charged for outbound mail. As a consequence, Federal Express urges that the Commission match the costs and revenues of inbound mail with the costs and revenues for outbound mail. It then proposes that the Commission combine inbound and outbound costs and revenues. This analysis, it claims, is necessary because inbound and outbound costs so intertwined that they cannot be separated. Federal Express then proposes that the alleged discount for inbound mail services be treated as a cost of outbound mail.

In the view of the Postal Service, this entire section has no basis in fact or in rational economic analysis. As explained above, there is no "discount" offered to foreign post offices. Rather, the Postal Service applies remuneration rates prescribed by the UPU, or bilateral rates negotiated with other postal administrations. That fact alone undermines the entire Federal Express argument. Moreover, there is no basis for the claim that outbound international rates are influenced by inbound costs, or for the claim that inbound and outbound costs cannot be separated reliably. In fact, the Postal Service calculates separate costs for outbound and inbound mail, and, as the

Commission concluded in its 1999 report, those costs are reliable. Further, as indicated in the materials provided to the Commission in connection with the 1999 report, outbound rates are based on the outbound costs, and are in no way influenced by the costs or revenues of inbound mail.

Federal Express attempts to counter these facts with further unsound, unsupported claims. On page 11 of its comments, it again asserts that the cost for outbound mail is the cost of outbound terminal dues, plus the alleged discount for inbound mail. It further asserts that the Commission's "common sense" conclusion that the terminal dues the Postal Service pays is the cost for delivery is insufficient, because those rates reflect a reciprocal discount for foreign delivery of outbound mail. As opposed to the Commission's commonsense conclusion, Federal Express's assertions make no sense. The costs are, as the Commission concluded, the costs that are paid, and those are the terminal dues. There is no causal connection between the costs incurred for delivery of outbound mail and the costs incurred and revenues received for inbound mail. Absent such a causal connection, there is no basis for allocating any fictitious discount to outbound mail.

Federal Express concedes on page 12 of its comments that outbound mailers are not responsible for inbound mail. Nonetheless, it argues that inbound and outbound costs and revenues should be considered together. It further asserts that both inbound and outbound mail should pay fair market value for postal delivery and that fair market value is represented by domestic postage rates. It continues to assert that the "nominal" costs and revenues for outbound mail do not accurately measure the cost coverage for such mail, because the costs do not include the alleged discount for

inbound mail. It concludes that joint analysis of inbound and outbound costs and revenues would more accurately measure the cost coverage of outbound mail.

Once again, Federal Express relies on its assertion that the Postal Service offers a discount for inbound mail, and that somehow that discount should be counted as a cost for outbound mail. As explained above, this line of reasoning has no basis in fact or rational economic analysis. Federal Express's further claim that combining the costs and revenues of inbound and outbound mail would more accurately measure the cost coverage of outbound mail is likewise unsound. The costs of outbound mail are the costs actually incurred for processing and delivery, not some whole-cloth cost numbers that include phantom costs that, even if they did exist, would have no causal connection with the costs of outbound mail.

Federal Express next asserts, on pages 13-14, that the fact that there are no analogous inbound services for many outbound services is no basis for joint analysis of inbound and outbound costs and revenues. It yet again reasserts its claim that the Postal Service discounts rates for inbound services to foreign postal administrations, with the implication that these "discounts" are part of the costs of outbound mail. In this particular instance, Federal Express reiterates its claims in the context of International Priority Airmail and International Surface Airlift services, which are bulk LC and AO services for which no comparable service exists.

There is nothing in this section that Federal Express has not said before, and for which anything additional can be said in reply. As the Postal Service has explained above, there are no discounts for inbound mail. Moreover, there is no basis for including costs that do not exist in the cost calculations for outbound mail.

Federal Express next argues that because the Postal Service is responsible for outbound rates and is not solely responsible for inbound terminal dues does not undercut the need for joint analysis of inbound and outbound costs and revenues. Once again, it argues that there is a "misalignment" between terminal dues and "fair market value", which is just a different way of asserting that there is a discount for inbound mail that should be included in the costs of outbound mail. Once again, there is no basis in fact or rational economic analysis to allocate to outbound mail services costs that do not exist and that outbound services do not cause. There is no "discount" for inbound mail and there is no causal connection between outbound mail and any alleged discount.

Federal Express attempts to support this line of argument by a one-page exposition on what it believes is wrong with terminal dues, and on how it has been unsuccessful in convincing responsible authorities to do what it wants. This exposition is irrelevant to the Commission's task of preparing a comprehensive report to Congress on international mail costs, revenues, and volumes. Whatever may be the perceived deficiencies in terminal dues and like charges, those alleged deficiencies do not change the actual costs incurred in providing service and they provide no basis for artificially increasing the calculated costs of service or, consequently, the rates of postage the users of those services pay. They most certainly do not support combining inbound and outbound costs and revenues as a basis for reporting the costs and revenues of outbound mail alone. For these reasons, the Postal Service opposes the proposed amendment of the Rules of Practice set forth by Federal Express on page 16 of its comments.

On page 18 of its comments, Federal Express asserts that it would be useful to provide unit costs for international mail that could be compared with unit costs for domestic mail. While it is undoubtedly possible to produce unit costs by class of service by dividing costs by volume, there is no basis to assume that a comparison of unit costs for international mail with the unit costs of domestic mail in this way would provide any meaningful, much less useful, information. As noted above, international mail services do not correspond to domestic classes of mail. There are substantial differences in weight, shape, mail makeup, and other characteristics. These differences seriously undermine the validity of any comparisons that might be made.

United Parcel Service

While UPS devotes most of its comments to disclosure issues, it does address the issue of using accrued accounting costs as the basis for calculating international costs, as opposed to using a cash basis for calculating costs. On pages 12-13 of its comments, UPS argues that in principle accruals more closely match costs with revenues, and that therefore accruals rather than cash expenditures should be used exclusively in preparing the international mail report. In principle, the Postal Service agrees that accruals are the appropriate basis for estimating costs. The cases of international transportation and settlements, particularly in FY 1998, however, are exceptions, and in supporting the departure in these instances, the Postal Service does not support going to a cash basis for estimating costs. The departure is a consequence of the accrual not accurately reflecting the costs as they were incurred, and therefore needing adjustment to do what UPS believes is important, accurately matching expenses with revenues.

Through FY 1998, accruals for international air transportation overstated the actual cost of transporting mail. As a result of an analysis conducted during FY 1999, the Postal Service determined an amount for this category which more closely reflected the cost consequences of the mail carried. A byproduct of this effort was that accrual adjustments were made during FY 1999, including adjustments for prior years. The effect is that the accrued costs for FY 1999, including the prior year adjustments, dramatically understate the cost consequences of the mail carried during that year. We expect that beginning with FY 2000, it will be reasonable to return to the use of accrued costs for this item.

Settlements are an entirely different matter. Accrued costs are prospectively the best judgment about the consequences of mail delivery in other countries. There are several reasons, however, why they can be dramatically different from the actual costs of delivery. First, settlement processes often are attenuated, sometimes resulting in prior-year adjustments years after the fact when retrospective volumes are very different from the prospective ones. Second, this same attenuation can result in very different dollar conversions from SDRs than had been anticipated. Finally, statistics developed months after a year closes will necessarily be more accurate than those in place during a year. Therefore imputed settlement costs will generally more accurately reflect the delivery cost consequences of the mail in question.

UPS argues that because of the imbalance method of EMS delivery payment, revenue, cost and contribution analysis should combine both inbound and outbound statistics. If this method of payment was predominant and the Postal Service used

accrued costs and revenues in its ICRA settlement calculations, they would be correct. Neither of these two conditions is true, however.

Over half of all administrations now settle with the Postal Service according to the two-tier system, with separate rates for documents and merchandise which are the same in both directions. This includes most industrialized administrations. In these cases, the Postal Service applies the outbound delivery rates to the outbound volumes and the inbound delivery rates to the inbound volumes. Additionally, the Postal Service uses private couriers to deliver its EMS in several high-volume countries. In these cases, there is no reciprocal service to consider. For the remaining postal administrations, the Postal Service measures the imbalance direction of the volume flow and applies the imbalance rate to all of the outbound volume to each country. Therefore, the rate in the other direction has no influence on reported costs. Also, since in almost every case, the imbalance flow is outbound, the ICRA reports delivery charges by applying destination administration rates to outbound pieces.

To summarize, the structure of rates would mitigate the effect of imbalance payment systems on product costs, if we used accrual accounting to calculate those costs. Since we do not, there is no effect at all.

Finally, UPS asserts that the "deadlines" for production of the domestic CRA and the Cost Segments and Components Report, either in audited or unaudited forms, are too generous. UPS Comments at 11-12. UPS asserts that the Commission should require the Postal Service to provide *audited* versions of these reports by March 15 of each year. As proof of the feasibility of this requirement, UPS notes that the Securities

and Exchange Commission requires annual 10-K reports to be filed within 90 days after the end of the fiscal year covered by the report.

Even a cursory inspection of a typical 10-K report will reveal that such documents pale in comparison to the scope and level of inquiry and detail contained in the Postal Service's CRA and Cost Segment and Components Reports. As only one example, 10-K reports contain no product cost information at all, let alone detailed marginal cost information like that contained in the CRA. Furthermore, the types of information that the 10-K reports do contain is already normally available in Postal Service financial reports and the Annual Report, which are commonly filed with the Commission significantly before March 15 of each year anyway. For UPS to suggest that the CRA and Cost Segments and Components Reports could be accelerated on a comparable basis is seriously unrealistic.

The Postal Service's initial comments pointed out that the Postal Service regards the development of the CRA and Cost Segments and Components reports as an important, multi-staged process that should not be interrupted or prematurely made public. That determination is an important policy choice. Nothing in the Commission's rules is likely to alter it. In any event, we repeat our firm expectations that necessary materials, including appropriate versions of the CRA and the Cost Segments and Components Reports or parts thereof, will be available in time for effective use in connection with the Commission's reporting responsibilities under section 3663. As it was in assisting with the first report to Congress, the Postal Service is committed to working with the Commission to ensure that it is able to meet the July 1 due date.

Public Disclosure

A large part of the comments addressing the Notice of Proposed Rulemaking pertain to public disclosure. Proposed Rule 103 does not create a detailed procedural mechanism governing public access to the Commission's report to Congress or to Postal Service records. It does, however, create a presumption in favor of nondisclosure, and it prescribes a basic requirement that the Postal Service identify sensitive information when it presents materials to the Commission. It also expresses "required by law" as a general standard governing disclosure. Referring to the list of "reports" that the Postal Service would be required to produce each year, the second sentence of the proposed rule states:

Information contained in these reports that is considered to be commercially sensitive should be identified as such, and will not be publicly disclosed except as required by applicable law.

In general, the Postal Service continues to believe that section 3663 should not be used as a vehicle for giving access to Postal Service commercial data. In this respect, the Postal Service believes that the approach adopted by the Commission in 1999 of responding to requests for information under Freedom of Information Act (FOIA) procedures is the wisest course. Although we would prefer that the Commission's rules make that choice explicit, we believe that the proposed language, which makes clear that, except as required by law, information identified as sensitive will be withheld, would be adequate.

1. Parties' Comments

UPS and Federal Express each propose eliminating the second sentence of proposed Rule 103 and substituting other language. UPS proposes adding the

following:

The entire report and all of the information used to prepare the report shall be made available to the public when the report is issued, unless (1) such disclosure will result in specific identifiable and serious injury to the Postal Service, and (2) the interest of the public in full disclosure is outweighed by such injury.

Federal Express proposes the following:

Information contained in these reports that is considered to be commercially sensitive under (i) the standard set out in 39 USC 410(c) of the Postal Reorganization Act or (ii) the standard of public disclosure applied by the Commission in public hearings conducted under the Administrative Procedure Act should be identified as such, and will not be publicly disclosed except as required by applicable law.

The Reporters Committee simply proposes eliminating the Commission's second sentence altogether, but does not recommend substitute language. The Committee advocates a vague standard favoring disclosure, as follows:

We think that the information contained in the reports submitted by the Commission pursuant to the proposed regulation should be disclosed to the greatest extent possible.

With regard to justification for withholding information, the Committee rejects the standard contained in 39 U.S.C. § 410(c)(2) ("good business practice"), in favor of a stricter standard of "substantial competitive harm." The Committee maintains that this standard has developed through judicial opinions interpreting the fourth exemption of the FOIA (5 U.S.C. ' 552(b)(4)).

The OCA does not comment directly on the disclosure language in the proposed rule. Rather, as noted above, it proposes adding materials to the list of items to be provided, including written explanations of procedures and methodologies, full documentation for data systems, and detailed descriptions of how reports are

generated. With respect to all of these additional items, the OCA suggests that they should be released to the public at the time they are presented to the Commission.

As for identifying what types or categories of information should be regularly disclosed, the commenters appear to favor liberal disclosure of most types of information, with a heavy presumption against finding commercial harm from disclosure in order to justify withholding information.¹ As noted above, UPS reverses the presumption in favor of nondisclosure embodied in the proposed rule. Under UPS's formulation, most, if not all, information in the report and in Postal Service documents shall be publicly disclosed. UPS does outline a relatively strict standard that would justify withholding information, but its comments make clear that it believes that little, if any, information provided by the Postal Service would qualify to be withheld. Among those items that the Postal Service has considered to be most sensitive in the past, namely, specific international product costs and cost coverages, UPS does not believe that any should be withheld. UPS Comments at 6-7. In several instances, furthermore, UPS refers to "full disclosure." It states that "the full report [to Congress] and, with rare exceptions, all supporting cost information should be disclosed to the public." *Id.* at 2. UPS identifies only "specific proprietary mail sorting technologies or logistical processes" as information that might pass scrutiny under the standard recommended by UPS. *Id.* at 9.

Both UPS and Federal Express advocate that the practical measure of whether international information and data will be made public should be whether comparable information is disclosed in domestic rate and classification proceedings. *Id.* at 9;

¹Except with respect to the new categories of explanations and documentation that the it proposes to create, the

Federal Express Comments at 17. UPS, and to a lesser extent Federal Express, imply that, by this standard, very little specific cost, volume, and revenue information would be withheld. Furthermore, UPS suggests that, even where comparable information might be withheld in the domestic context, it should be disclosed in the context of the Commission's international mail report. UPS contends that full disclosure of international mail data and information is required to compensate for the lack of evidentiary hearings and due process protections afforded in domestic rate and classification cases. UPS Comments at 8-9.

No party proposes detailed procedures for presenting and evaluating data and information. As noted, the proposed rule, and both UPS's and Federal Express's alternative versions, would require the Postal Service to identify information to be protected when it is presented to the Commission. All three versions, furthermore, express some standard for nondisclosure. UPS's standard is presented as a strict exception to the rule of disclosure. The proposed rule and Federal Express's variation presume nondisclosure, qualified by the standard, "except as required by law."

In Docket No. IM99-1, the Commission explicitly declined to create a procedure providing for access to data and information in connection with preparing the report to Congress. Rather, the Commission elected to respond to requests for access through "existing disclosure laws and policies" (FOIA).² In this respect, the Commission's invitation here for parties to propose procedures suggests that its position in Docket No. IM99-1 may be reconsidered. At any rate, UPS's proposal appears to contemplate

OCA does not address Commission's proposed rule governing disclosure.

²Order Denying United Parcel Service Motion to Provide Public Access to International Mail Data, Docket No. IM99-1, at 4 (May 21, 1999).

public access as a part of the reporting process. The Commission's full report to Congress could thus be made public when it is issued. Access to Postal Service records used to prepare the report would also be given when the report to Congress is issued.

By contrast, the Reporters Committee appears to assume that the Commission will continue to consider requests for access to international mail records as fundamentally governed by the FOIA. The Committee's comments seem to infer that the proposed rule is predicated on particular interpretations of the FOIA and 39 U.S.C. § 410(c)(2). In this respect, the Committee argues for a different interpretation that would create a more restrictive standard to justify nondisclosure.

Federal Express's comments contrast what it characterizes as two standards governing disclosure: the standard arising out of the FOIA, and the standard applied to domestic mail data and information in rate and classification cases. Federal Express would require the Postal Service to describe which sensitive commercial information could be withheld under each the two standards. Federal Express contends that this would help the Commission in analyzing the appropriate standard of disclosure to apply. Federal Express also suggests that the Commission should identify these two categories in its report to Congress. According to Federal Express, this information "would materially assist Congressional consideration of the [international mail report]."³

Federal Express Comments at 17

³This conclusion is not explained. Federal Express seems to be suggesting that the two categories would assist Congress in deciding whether it, as opposed to the Commission, should make public sensitive Postal Service commercial information. In this regard, Federal Express notes that "Congress is not constrained by the standards of public disclosure imposed by law on the Commission." *Id.* It further claims that "the House Postal Service Subcommittee has already ordered the disclosure of the entire 1998 [international mail report] (although it is not yet available)." *Id.*

2. Postal Service Comments

The Postal Service believes that, in preparing its FY 1998 report to Congress, the Commission correctly identified the FOIA as the appropriate mechanism for considering requests for disclosure of sensitive commercial information pertaining to international mail. Section 3663 was never intended by Congress to be a vehicle for public disclosure. Rather, it was created as an integral part of the legislative scheme of the Postal Reorganization Act. In that scheme, as has been observed many times, the Postal Service was created as a unique governmental enterprise, with a pervasive mandate to employ modern, effective business techniques to assist it in its overall mission of providing important postal and other services to the nation. The freedom to operate like a business, furthermore, is an important element in the overall scheme. In this respect, Congress deliberately freed the Postal Service from the requirement of having to publicly disclose information that good business practice would dictate should remain confidential. 39 U.S.C. § 410(c)(2). That freedom, however, is significantly circumscribed to the extent that substantial information pertains to Postal Service activities falling within the ambit of the Commission's limited authority over domestic rates and classifications. Such information is subject to disclosure in Commission proceedings, under rules promulgated pursuant to 39 U.S.C. 3624 and the Administrative Procedure Act. Under the Commission's rules, furthermore, the Postal Service is afforded the same due process protections against unwarranted disclosure of confidential and privileged information that are available to other parties, in accordance with federal administrative procedural and other law.

Within the overall scheme in the Act, section 3663 stands as a limited exception

to the Postal Service's freedom from scrutiny in areas where the Commission lacks substantive ratemaking jurisdiction. The limitations on section 3663, however, must be respected and interpreted in harmony with the other provisions of the Act.

The Commission has recognized these principles on numerous occasions. It specifically addressed them in the current context in connection with UPS's efforts to gain access to international mail data during preparation of the Commission's first report to Congress under section 3663. In that situation, the Commission clearly acknowledged that its international mail reporting authority neither expanded the scope of inquiry under domestic rate and classification procedures, nor circumscribed the Postal Service's freedom from unwarranted disclosure embodied in section 410(c)(2). In denying UPS's motion for access, the Commission stated the following:

The Commission believes that in adopting § 3663, Congress was aware of the competing concerns of the Postal Service in keeping certain data on international mail confidential, and of the concerns of the Postal Service's international mail competitors in verifying that international mail services are covering their costs. By not imposing the APA procedures of public hearings, discovery, and cross-examination on the § 3663 reporting process, and by requiring only that the Commission report its findings to Congress, Congress appears to have contemplated that existing information disclosure laws and policies provide appropriate means for weighing these competing interests.⁴

As it has in the past, UPS invokes overarching policies favoring government disclosure embodied in the FOIA to justify creating an avenue for access under section 3663. UPS Comments at 2. In its most recent comments, furthermore, UPS cites several court opinions arising out of discovery disputes in federal civil litigation to support its position. *Id.* at 5-7. From these cases, which largely involved consideration of confidentiality orders and protective conditions in civil trials, UPS derives a formula

⁴Order Denying United Parcel Service Motion to Provide Public Access to International Mail Data, Docket No

for analyzing whether particular information should be protected in the current context. The analysis that UPS advocates involves a relatively high standard of justification for nondisclosure, and a process that balances claims of specific, serious harm against public interest favoring disclosure. UPS supports its views on the appropriateness of this analysis by a misreading of the court's opinion in *National Western Life Insurance Co. v. United States*, 512 F.Supp. 454 (N.D. Tex. 1980). UPS Comments at 3-4.

We need not challenge or engage in an extended discussion of the important principles of access and disclosure espoused in the FOIA and, in proper context, in the cases UPS cites. In their broadest reach, the cases cited deal with principles relating to public access to civil and criminal trials and to "judicial records" that have roots in common law and in the First Amendment of the Constitution.⁵ More specifically, the analytical approach followed by the courts in the cases UPS cites pertains to the civil discovery context in federal court proceedings. Even UPS seems to concede that, as precedent, these principles have limited application here. Certainly, the cases do not support the general proposition that public disclosure of international mail data and information is mandated under the scheme embodied in the Act. In this respect, general policies favoring disclosure, as well as the principles applied in civil litigation, do not supersede the Postal Reorganization Act's comprehensive framework governing the rights, responsibilities, and authorities of the Postal Service, the Commission, and the public, as they relate to public disclosure questions.⁶ In the instant context, furthermore,

IM99-1, at 4 (May 21, 1999).

⁵ See generally Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 Harv. L. Rev. 427 (1991).

⁶ Cf. *Linder v. National Security Agency*, 94 F.3d 693, at 695-96 (D.C. Cir. 1996)(plain language of National Security Act providing that disclosure of NSA's organization and function would not be required prohibits disclosure in discovery); *Doe v. Stephens*, 851 F.2d 1457 (D.C. Cir. 1988)(comprehensive scheme of Veterans

Congress has done nothing to modify the Act's clear expression of intent that the Postal Service is entitled to withhold commercial information from public disclosure in accordance with its assessment of good business practice.

Nor do UPS's comments regarding the court's opinion in *National Western Life* alter this conclusion, or support UPS's formulation of a balancing test to be applied when analyzing particular disclosure inquiries. In *National Western Life*, the court did not hold that section 410(c)(2) is subordinate to the Postal Service's responsibilities as a government entity, or to a general public interest in disclosure. Rather, it held that the exemption did not apply in that situation because lists of postal employees and duty stations were not "commercial information" in the context of that case. 512 F.Supp. 462. As UPS knows well, furthermore, the Commission has already reached this conclusion itself.⁷

In this respect, we note the Reporter's Committee's argument that the proposed rule is undermined by the Ninth Circuit Court of Appeals decision in *Church of Scientology of California v. United States Postal Service*, 633 F.2d 1327 (9th Cir. 1980). The Reporter's Committee's infers that the presumption in favor of nondisclosure embodied in the proposed rule is based on a predetermined conclusion that 39 U.S.C. § 410(c)(2) justifies withholding particular information. The Committee contends that the *Church of Scientology* case stands for the proposition that section 410(c)(2) cannot be used to support nondisclosure of commercial information, since the provisions of section 410(c) do not qualify as exempting statutes under the FOIA. Reporters

Records Statute controls disclosure of veteran's records).

⁷ Order Denying Appeal of Piper & Marbury from the Commission's Disposition of Its FOIA Request for a Copy of the Commission's Report on International Mail, Order No. 1261 (Sep. 15, 1999).

Committee Comments at 2.

First, we do not agree with the Committee's conclusion that there is a fundamental inconsistency between the language included in proposed Rule 103 and any particular interpretation of the FOIA or the Postal Reorganization Act. The proposed language merely would establish a presumption in favor of nondisclosure, "except as required by applicable law." Logically, a determination that particular information or records were required to be disclosed under the FOIA, for whatever reason, would overcome the presumption, because disclosure could be "required by applicable law."

Second, to the extent that the Reporter's Committee is challenging the presumption, because, as a matter of law, section 410(c)(2) could not exempt commercial information from mandatory disclosure under the FOIA, that conclusion is simply wrong. Two federal courts have now found that section 410(c)(2) qualifies as an exempting statute under the FOIA. *Weres Corporation v. United States Postal Service*, C.A. No. 95-1984, at 3-5 (D.D.C. 1996)(unpublished Memorandum Opinion); *National Western Life*, 512 F.Supp. at 458-59. The Commission, moreover, has followed this precedent in denying access under the FOIA to the same type of information and records covered by proposed Rule 103.⁸ The Reporters Committee's comments do not acknowledge the existence of this authority, let alone attempt to distinguish it. In any event, even if the *Church of Scientology* opinion stood alone, it would not settle the question of whether commercial international mail information and data could be

⁸ See Order Denying Appeal of Piper & Marbury from the Commission's Disposition of its FOIA Request for a Copy of the Commission's Report on International Mail, Order No. 1261 (Sep. 15, 1999); Letter from Margaret Crenshaw, Secretary, Postal Rate Commission, to Katherine P. Muth, Editor, *Business Mailers Review* (July 28,

withheld pursuant to section 410(c)(2).⁹ In this respect, we need not engage in a lengthy analysis of the issues presented by that question. The thrust of these Postal Service comments is that the Commission should not address questions involving disclosure of particular records in the context of preparing its report to Congress. Rather, those questions should be addressed individually as requests made under the FOIA.

In this context, UPS's comments regarding whether cost data and cost coverages associated with particular international mail services can and should be withheld from public disclosure are also misplaced. The Commission has already determined that this information qualifies as exempt from mandatory disclosure under applicable law.¹⁰ As noted above, furthermore, the Postal Service does not agree that the particular balancing test that UPS proposes to apply, or that the standard of substantial harm that UPS would apply, control analysis of the issues under the FOIA and the Act.

Similarly, UPS's and Federal Express's arguments that the Commission should apply the same standards of disclosure to data provided under section 3663 as it applies to data produced in domestic rate cases should not impel creation of procedures for disclosure in the instant rulemaking. As explained above and on other

1999)(on file at the Postal Rate Commission).

⁹ The Court of Appeals in *Church of Scientology* did not consider the scope or applicability of section 410(c)(2), but rather of section 410(c)(6), another exempting provision that had an analog in the FOIA in the form of Exemption 7 (5 U.S.C. § 552(b)(7)). An important element of the court's analysis, furthermore, depended on the fact that, subsequent to the enactment of the Postal Reorganization Act, Congress had amended Exemption 7, narrowing and clarifying its scope with specific statutory language. In the court's opinion, this development seriously undermined the status of section 410(c)(6) as a qualifying statute under Exemption 3. No similar element exists in the analysis of the applicability of section 410(c)(2).

¹⁰ See footnote 8, *supra*.


occasions, different statutory requirements apply to the disclosure of domestic mail data and international mail data. From the standpoints of legal analysis as well as policy, the Commission should not be misled into turning the cooperative effort contemplated by section 3663 into an adversarial inquiry similar to domestic rate and classification cases.¹¹

¹¹ Federal Express proposes that the Commission should require the Postal Service to identify, for purposes of comparison, the commercial information that would qualify for nondisclosure under either standard. Federal Express Comments at 17-18. Ironically, it is doubtful that such a demonstration would have any practical value. As a matter of law, what Federal Express calls the APA standard does not apply to the reporting process under section 3663. In a domestic case, moreover, which would be governed by APA, the Postal Service is likely to take the position (although the Commission might disagree) that little of the international data and information is even relevant, and therefore should not be provided, let alone disclosed. In other words, the Postal Service's views about what information should be made public under the two standards could very well be the opposite of what Federal Express presumes.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorney



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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all participants of record in Docket No. RM2000-1 in accordance with section 12 of the Rules of Practice.



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January 10, 2000