

**BEFORE THE  
POSTAL RATE COMMISSION**

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**REPLY COMMENTS OF UNITED PARCEL SERVICE IN  
RESPONSE TO COMMISSION ORDER NO. 1270  
(JANUARY 11, 2000)**

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Pursuant to Commission Order No. 1270, United Parcel Service ("UPS") submits these reply comments in response to the comments filed by the United States Postal Service ("Postal Service"), the Office of Consumer Advocate ("OCA"), Federal Express Corporation ("Federal Express"), and the Reporters Committee on Freedom of the Press ("Reporters Committee") concerning the Commission's report to Congress under Section 3663 of the Postal Reorganization Act ("the Act"), 39 U.S.C. § 3663.<sup>1</sup>

**The Commission May Prescribe Rules Regarding  
the Timing and Content of Information To Be  
Reported to the Commission by the Postal Service.**

The Postal Service has taken the position that the Commission's attempt to require the Postal Service to produce information different either in content or in form from what the Postal Service normally produces for its own purposes is inappropriate.

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1. Order No. 1270 (at 15, ¶ 1) provides that initial comments were due within 30 days of publication in the Federal Register, or by December 27, 1999. 64 Fed. Reg. 66436 (Nov. 26, 1999). Under the Order (at 15, ¶ 2), reply comments are due "within 15 days after initial comments are due," *i.e.*, by January 11, 2000.

Initial Comments of United States Postal Service (December 27, 1999) ("Postal Service Comments") at 5-6, 8-10. The Postal Service also asserts that the Commission is without authority to set deadlines for the Postal Service's submission of information to the Commission. Postal Service Comments at 4.<sup>2</sup> UPS disagrees.

The Postal Service's position is contrary to the express provisions of the Act. Section 3603 gives the Commission the authority to establish the rules and regulations it deems necessary to carry out its functions and obligations to the United States Government and to the American public. It provides:

The Postal Rate Commission shall promulgate rules and regulations and establish procedures, subject to chapters 5 and 7 of title 5, and take any other action they deem necessary and proper to carry out their functions

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2. Indeed, the Postal Service's comments are replete with indications of its reluctance to provide the Commission with needed information in a timely manner. For example:
- "The Postal Service believes that it would be inappropriate for the Commission to attempt to dictate by regulation the timing of the domestic CRA report . . . ." Postal Service Comments at 6.
  - "The comments addressing the domestic CRA Report, above, also apply to the Cost Segments and Components Report. The Postal Service strongly believes that rules directing the production of these reports on a specific schedule, or in preliminary form, would not be appropriate." Postal Service Comments at 8.
  - "[J]ust as it would be inappropriate for a rule pursuant to 39 U.S.C. § 3663 to dictate a timetable for production of the CRA and Cost Segments and Components Reports, or to dictate provision of preliminary versions, it would be inappropriate for the rule to specify provision of the backup documentation for these reports." Postal Service Comments at 9-10.

and obligations to the Government of the United States and the people as *prescribed under this chapter*. Such rules, regulations, procedures, and actions shall not be subject to any change or supervision by the Postal Service.

39 U.S.C. § 3603 (emphasis added). The Commission's duty to report on international revenues, costs, and volumes is imposed by § 3663, which is part of Chapter 36 of the Act -- the same chapter that contains § 3603. Thus, it is an obligation "prescribed under this chapter." *Id.* Therefore, the Commission may adopt whatever rules and regulations *the Commission* deems appropriate in preparing its § 3663 report.

Section 3603 makes it clear that the Commission is not required to abide by the Postal Service's determination of what is appropriate. On the contrary, § 3603 specifically states that the Commission's rules and regulations "shall not be subject to any change or supervision by the Postal Service." 39 U.S.C. § 3603. While the Commission should consider the Postal Service's suggestions (as well as those of other parties), the Commission's proposed rule requiring certain information by certain dates is well within the Commission's authority under § 3603.

Of course, the Commission's rulemaking authority is not without limitation. The Commission is subject to chapters 5 and 7 of title 5, 5 U.S.C. § 501 *et seq.* and § 701 *et seq.* (the Administrative Procedure Act). 39 U.S.C. § 3603. In particular, § 706(2) of title 5 forbids agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. §§ 706(2)(A) and (C). However, an "agency's data selection and choice of statistical methods are entitled to great deference" where, as here, "sophisticated data evaluations [are] mandated by [a]

lengthy and complicated statute." *Reynolds Metals Co. v. United States Environmental Protection Agency*, 760 F.2d 549, 558-59 (4th Cir. 1985).

The Postal Service would be hard pressed to make a compelling argument that the Proposed Rule violates these limitations, and in fact it has not even attempted to make such an argument. Rather, the Postal Service seems to believe that its convenience in determining when to produce its own reports is more important than the Commission's obligation to prepare an accurate and complete § 3663 report to Congress. But § 3603 makes clear that the Postal Service's convenience is not determinative in assessing the appropriateness of the Commission's Proposed Rule.

Section 3663 reinforces the fact that the Commission has full authority to prescribe what data the Postal Service should file with the Commission, and when that data should be filed. In fact, that section itself supplies a deadline. Section 3663 provides that

*Not later than March 15 of each year, the Postal Service shall provide to the Postal Rate Commission such data as the Commission may require to prepare the report required under subsection (a) of this section. Data shall be provided in sufficient detail to enable the Commission to analyze the costs, revenues, and volumes for each international mail product or service, under the methods determined appropriate by the Commission for the analysis of rates for domestic mail.*

39 U.S.C. § 3663(b) (emphasis added).

The Postal Service's comments suggest that the March 15 deadline is discretionary, not mandatory. However, by stating that the Postal Service "*shall provide . . . such data as the Commission may require*" (emphasis added) no later than March 15, Congress expressed its intent that the Postal Service should be required to

provide any data the Commission determines it needs by the statutory deadline. See *UAW v. Dole*, 919 F.2d 753, 756 (D.C. Cir. 1990) (use of “shall” “imposes an obligation to act”).

The Postal Service also objects to the Commission’s effort to require any accounting or data collection other than that which the Postal Service normally performs. Postal Service Comments at 3-4. The Commission is well within its § 3603 and § 3663 powers to require whatever specific accounting and reporting procedures it deems helpful in performing its duties. Other administrative agencies, such as the Federal Energy Regulatory Commission and the Federal Communications Commission, impose even stricter requirements for financial reporting than does the Commission and have even gone so far as to require a uniform system of accounts for all entities under their jurisdiction. See, e.g., 18 C.F.R. ch. 1, subch. C, pt. 101 (prescribing uniform system of accounts for public utilities subject to Federal Power Act); 47 C.F.R. § 32.1 (describing revised Uniform System of Accounts established by FCC).

Section 3603 explicitly authorizes the Commission to adopt the rules and regulations necessary to perform its functions. It is to do so free from interference by the Postal Service. Furthermore, the mandatory language of Section 3663 expressly requires the Postal Service to provide any information the Commission deems necessary by the statute’s March 15 deadline. 39 U.S.C. § 3663(b). Accordingly, the Commission’s proposed regulations are well within its statutory authority.

**The Commission Should Publicly Disclose  
Information Concerning International Mail.**

The Postal Service has also asserted that it would be "inappropriate and unauthorized for the Commission to develop procedures under 39 U.S.C. § 3663 that would create public access to the Postal Service's internal international mail records." Postal Service Comments at 12. However, as we have pointed out, § 3603 gives the Commission broad latitude to adopt the rules and regulations it determines to be necessary to carry out its obligations under Chapter 36 of the Act. And as § 3603 itself states, those obligations run not only to the United States Government, but also to "the people." 39 U.S.C. § 3603.

Public disclosure of the data the Commission uses in preparing its report is essential to the Commission's ability to produce the thorough and complete review Congress has mandated, and to the public's ability to evaluate the fairness of the Postal Service's international rates. Pre-report public review and comment is invaluable in assisting an agency to evaluate detailed facts such as those involved in assessing the fairness of postal rates. As Commissioner LeBlanc has said of public participation in domestic rate cases,

The intervenors (and the Office of Consumer Advocate) have played a vital role in the rate making process. As users of the mail system they understand its strengths and weaknesses very well. They have kept the Postal Service accountable and in the process have educated both the Postal Rate Commission and the Postal Service. Our Postal System will be poorer without their input.

*Hearings on H.R. 3717, The Postal Reform Act of 1996, Before the Subcomm. on the Postal Service, House Comm. on Gov't Reform and Oversight, 104th Cong., 2d Sess.*

120 (1996) (Statement of Commissioner W. H. LeBlanc, III). That should be no less true for international rates. Indeed, the Commission itself has indicated the value of public input by soliciting public comment in connection with the preparation of its initial report. See Docket No. IM99-1, Order No. 1226 (January 15, 1999).

The Postal Service's view of its disclosure obligations is overly restrictive. It even goes so far as to suggest that terms of international agreements need not be disclosed. Docket No. IM99-1, *Comments of the United States Postal Service on the Commission's 39 U.S.C. § 3663 Report* (April 8, 1999), at 8. Section 407(b)(3) of the Act requires the Postal Service to "transmit a copy of each postal treaty or convention concluded with other governments . . . to the Secretary of State, who shall furnish a copy to the Public Printer *for publication*." 39 U.S.C. § 407(b)(3) (emphasis added). Such multilateral or bilateral agreements invariably provide for terminal dues, imbalance charges, or other compensation arrangements. Those charges should be disclosed even if their specific amount is not set forth in the agreement; the Postal Service should not be permitted to shield them from disclosure merely by memorializing them in a separate document.

The parties have presented a variety of views on the appropriate standard for disclosure. UPS's proposed standard is similar to that advocated in the Comments of The Reporters Committee for Freedom of the Press ("Reporters Committee Comments"). The Reporters Committee argues that full disclosure of all information is required unless "substantial competitive harm" would result. Reporters Committee

Comments at 2.<sup>3</sup> UPS supports this standard as one component of the test the Commission should apply when deciding a Postal Service claim that certain information should be exempt from disclosure. However, as stated in our initial comments (at 5-9), the risk of substantial competitive harm to the Postal Service is only part of the equation; that risk must also be carefully weighed against the strong interest of the public in disclosure of the information in question.

Federal Express seems to say that only Congress may determine what to disclose and suggests how the Postal Service and the Commission may advise Congress on the commercial sensitivity of the information. Federal Express Comments at 2, 17. UPS disagrees. The proper role of Congress is to set broad policy guidelines. See H.R. Rep. No. 1104, 91st Cong., 2d Sess. (1970), at 5, 12. Congress is ill-equipped to perform the detailed analysis necessary to determine whether the release of particular information would result in substantial competitive harm to the Postal Service.

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3. The Reporters Committee derives its substantial competitive harm standard from FOIA Exemption 4, 5 U.S.C. § 552(b)(4). Reporters Committee Comments at 2. The Reporters Committee also argues that, under *Church of Scientology of California v. United States Postal Service*, 633 F.2d 1327 (9th Cir. 1980), § 410(c)(2) of the Act does not qualify as an exemption statute within FOIA Exemption 3, 5 U.S.C. § 552(b)(3). Reporters Committee Comments at 2-4. The court of appeals in *Church of Scientology* held that 39 U.S.C. § 410(c)(6) lacks sufficient specificity to qualify as an exemption from FOIA. *Church of Scientology*, 633 F.2d at 1333. Section 410(c)(6) appears to be more specific than Section 410(c)(2) in its delineation of documents exempt from disclosure. Thus, there is some merit to the Reporters Committee's argument. The Commission should carefully weigh the precedential value of the district court opinion in *National Western Life Insurance Co. v. United States*, 512 F. Supp. 454 (N.D. Tex. 1980), against the court of appeals' decision in *Church of Scientology*.



The Commission, on the other hand, with its knowledge of the industry, is far better suited to the task of determining what data used by it in preparing its report would result in substantial competitive harm that is outweighed by the public's interest in disclosure. The Commission is familiar with the relevant legal standard and should be able to apply it fairly and consistently.

In short, the Commission is right to assume the responsibility for resolving disclosure issues and to establish a procedure to resolve them.

**Volume and Cost Information for Each of the Individual "Initiatives" Should Be Separately Disclosed.**

The Postal Service states that the Commission's report strikes "appropriate balances with respect to scope and detail." Postal Service Comments at 1. In its report, the Commission aggregated volume, cost, and revenue information for four services classified as "initiatives" -- Global Priority Mail, Global Package Link, Direct Entry, and International Customized Mail. Postal Rate Commission, Report to the Congress: 1998 International Mail, Volumes, Costs and Revenues (1999) ("Report"), at 34. UPS submits that this data should be disaggregated.

In the Commission's report, the initiatives are described as "newer products that are designed to compete directly with privately provided international mail services." Report at 11. The Postal Service argues that data for these services should be aggregated on the ground that they are "particularly vulnerable to competition, because customer loyalty for these products has not matured." Docket No. IM99-1, *Comments*

*of the United States Postal Service on the Commission's 39 U.S.C. § 3663 Report* (April 8, 1999), at 6.

The Postal Service's own conduct towards this purportedly confidential information belies its claim that the Commission must afford it special treatment. The Postal Service itself has publicly disclosed revenue and volume information for Global Priority Mail, for example. United States Postal Service, *1998 Comprehensive Statement of Postal Operations* at 49 (1999). Furthermore, "confidential" information on Global Package Link ("GPL") is also already in the public realm. GPL volume and revenue information for FY 1997 was released in a 1998 General Accounting Office report. U.S. General Accounting Office, Report to the Chairman, Subcommittee on the Postal Service, Committee on Government Reform and Oversight, House of Representatives, *U.S. Postal Service: Competitive Concerns About Global Package Link Service* (June 1998), GAO/GDD No. 98-104 ("GAO Report") at 21. According to the GAO Report, GPL volume for FY1997 was approximately 2,000,000 parcels, and gross revenue from the service was approximately \$33,500,000. *Id.*

The Postal Service's own disclosure of Global Priority Mail information and the GAO's disclosure of Global Package Link information both undercut any claim of confidentiality not only for these products -- two of the Postal Service's most competitive international product offerings -- but also for the other initiatives as well. The Postal Service has not come forward with any credible evidence -- indeed, it has not come forward with any evidence at all -- that these prior disclosures have harmed it in any way. Thus, there is no reason why the same information for 1998 and 1999 should not be made public.

Moreover, these are no longer “newer products” (Report at 11) that allegedly need to be protected in their infancy. See Docket No. IM99-1, *Comments of the United States Postal Service on the Commission’s 39 U.S.C. § 3663 Report* (April 8, 1999), at 6. Global Package Link, first introduced as International Package Consignment Service, has been in existence since December, 1994. Implementation of International Package Consignment Service, 59 Fed. Reg. 65961 (1994). Global Priority Mail has been in existence since 1995. United States Postal Service, *1995 Comprehensive Report on Postal Operations* at 3 (1996).

Any claim that low volume justifies aggregating data for these services should be rejected. Collectively, the “initiatives” account for 33,002,000 pieces, or an average of 8,250,500 pieces per initiative. Report at 34. Since this is an average, the volume for one or more is undoubtedly higher. By comparison, competitive Express Mail International’s volume is separately reported even though its volume is far smaller (4,694,000 pieces, or less than 0.5% of total outbound volume). Report at 34, Table IV-2; Report, Appendix C at 3, Table C-1. The lowest volume outbound service that is reported separately is Parcel Post Surface, with a volume of only 2,312,000 pieces. Report at 34.

The argument that low volume and a competitive environment justify non-disclosure just does not hold water. The Postal Service has demonstrated its willingness to disclose precisely the same type of information for other services which it attempts to protect from public view here. Indeed, the same type of information is routinely disclosed for domestic competitive products with no claims of competitive harm, and, as we have shown, has also been selectively disclosed for some of the very

same "initiatives" at issue here. The Postal Service's claim that these "initiatives" need special protection is arbitrary and has little to do with an objective determination of whether or not competitive harm will result from disclosure.

Accordingly, the Commission should report volume, cost, revenue, and cost coverage information for all services separately.<sup>4</sup>

**Losses on Inbound Delivery for a Particular Service  
Should Be Borne by the Corresponding Outbound Service.**

In its comments, Federal Express points out that when inbound delivery services do not meet their costs, the Postal Service is in effect providing these services to foreign postal administrations at a discount. Comments of Federal Express in Response to Order No. 1270 (December 27, 1999) ("Federal Express Comments") at 3-4. Federal Express makes a strong case that

a joint analysis of outbound and inbound mail flows is necessary . . . . The [§ 3663 report] should present costs and revenues of outbound and inbound international mail services both individually and on a combined basis. Moreover, costs for outbound international mail should be stated both without and with an allocation of the cost of the discount afforded the associated inbound international mail service.

Federal Express Comments at 15-16.

UPS agrees with Federal Express that the amount the Postal Service receives from foreign postal administrations for the delivery of inbound international mail is

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4. As we have shown in our initial comments (at 6-9), there is no justification for not disclosing cost coverages, *i.e.*, the extent to which rates cover -- or fail to cover -- costs.

inextricably tied to the Postal Service's use of foreign postal administration to deliver outbound mail. As long as a certain type of inbound mail is being delivered by the Postal Service at a loss, the cost to the Postal Service of the delivery of the corresponding type of outbound mail includes the loss on the corresponding inbound service. That is especially so given the lack of Postal Service flexibility to set inbound terminal dues charges that cover costs. See Report at 30. Proper costing suggests that losses on inbound mail should be charged to the corresponding outbound service.

This approach is also consistent with principles of fairness. It places the burden of the losses incurred on the inbound services on those who benefit from those losses, *i.e.*, the users of the corresponding outbound service which is made possible by the Postal Service's agreement to provide the corresponding inbound delivery services. Fairness dictates that those who benefit from the particular inbound arrangement, either directly or indirectly, should bear the costs of that arrangement.

Accordingly, the Commission should charge the loss incurred on a given inbound service to the corresponding outbound service.

**The Postal Service Should Provide  
Explanations of its Procedures and Methodologies.**

OCA recommends that the Postal Service should be required to file detailed descriptions of the procedures it uses to generate the reports submitted to the Commission, the methodologies it uses to analyze the data, and the types of data used to generate the reports. Office of the Consumer Advocate Comments on Proposed Rulemaking Concerning Commission Reports Prepared Under 39 U.S.C. § 3663

(December 23, 1999) ("OCA Comments"), at 3-7. UPS agrees. UPS also agrees with OCA's suggested procedure for public comment on these explanatory materials. OCA Comments at 7-8.

It is essential that the public be assured not only that the Postal Service's methods and procedures are correct, but also that those methods and procedures are properly applied. This cannot be determined without examining the specific cost, volume, and revenue information generated by these procedures.

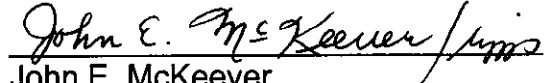
### **CONCLUSION**

Section 3663 gives the Commission the opportunity to exercise its full authority as the watchdog of the Postal Service in an area previously obscured from view. The Proposed Rule is well within the statutory authority granted to the Commission and would give the Commission some of the tools it needs to effectively evaluate the Postal Service's international rates.

However, the Commission should go further. It should provide for public participation through pre-report data disclosure and comment. Public involvement in the process would prove invaluable to the Commission in preparing its report, just as it has proved invaluable in domestic rate cases.

UPS has provided a standard which allows disclosure in a manner that adequately protects both the Postal Service's interests in confidentiality and the public's interest in disclosure. After all, disclosure is what § 3663 is all about.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "John E. McKeever / [unclear]". The signature is written in a cursive, flowing style.

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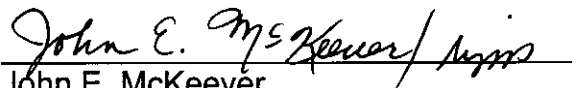
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Dated: January 11, 2000.

CERTIFICATE OF SERVICE

I hereby certify that on this date I have caused the foregoing document to be served by first class mail, postage prepaid, in accordance with Section 12 of the Rules of Practice.

  
John E. McKeever

Dated: January 11, 2000.

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