

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

Complaint on First-Class Mail
Service Standards

Docket No. C2001-3

OPPOSITION OF THE UNITED STATES POSTAL SERVICE
TO DOUGLAS CARLSON MOTION TO COMPEL
RESPONSE TO DFC/USPS-1
(November 14, 2001)

The United States Postal Service hereby files its opposition to the November 7, 2001, motion of Douglas Carlson seeking to compel a response, without protective conditions, to the following interrogatory filed on October 17, 2001: DFC/USPS-1. For the reasons below, the motion should be denied.

The issues before the Commission in this proceeding relate to whether the service standard changes described in the July 30, 2001, Declaration of Charles Gannon were implemented in a manner consistent with § 3661 and whether, under § 3662, the current standards result in the provision of service consistent with the policies of the Act.

For each originating 3-digit ZIP Code area in 11 western states and New Jersey, DFC/USPS-1 requests that the Postal Service provide the typical daily volume of outgoing First-Class Mail that is destined to every 3-digit ZIP Code area in the country.

Responsive data can be generated by the Postal Service's Origin-Destination Information System. ODIS is designed to produce statistically reliable estimates of the volume of First-Class Mail that travels between each 3-digit ZIP Code area pair.¹ On October 24, 2001, the Postal Service filed an objection to disclosure of the requested

¹ What is commonly referred to as "point-to-point" data.

information without protective conditions. The Postal Service's objection to the DFC/USPS-1 is with Complainant's expectation that the requested disaggregation of point-to-point ODIS data be provided unaccompanied by protective conditions designed to respect the Postal Service's proprietary, commercial and competitive interest in not having the data accessible to its competitors.

First-Class Mail ODIS point-to-point volume data are used by postal management to plan and organize the First-Class Mail processing, transportation and other logistical operations among the 849,106 3-digit ZIP Code area pairs. However, it has been the long-standing policy of the Postal Service to not publicly disclose such point-to-point ODIS data because of the commercial value of the data and the harm to the Postal Service's competitive interests that could result from such disclosure. Notwithstanding the restrictions on competition for the delivery of the letter portion of the First-Class Mail stream imposed by the Private Express Statutes, that mail stream is subject to competition from a variety of sources: private delivery firms, messenger services, electronic funds transfer services, and internet service providers. Public disclosure of point-to-point ODIS information would harm the commercial interests of the Postal Service by providing its competitors with valuable information regarding the relative degree to which various origin-destination city pair markets or lines of traffic are susceptible to penetration by the providers of various communications and delivery services that compete to transmit matter presently sent by First-Class Mail.

The Postal Service's status as a Federal agency with numerous public service responsibilities and its obligation to publicly report on the general nature of First-Class Mail service as a whole is not in conflict with its policy of limiting public access to certain commercially valuable data, such as point-to-point First-Class Mail ODIS volumes. By operation of 39 U.S.C. § 410(c)(2), Congress has extended special protection to the

commercial interests of the Postal Service by exempting from public disclosure “information of a commercial nature . . . which under good business practice would not be publicly disclosed.” Thus, the same Congress that established the Postal Service’s various public service obligations also extended a strong measure of protection to the Postal Service’s commercial interests, on par with that enjoyed by its private sector competitors, none of which is known to routinely publicly disclose the volume of shipments they carry between various origin-destination pairs.

Section 410(c)(2) should be read in harmony with the Commission’s Rules of Practice and Procedure. In particular, Rule 27(c) allows for all parties subject to discovery requests, including the Postal Service, to assert evidentiary privileges. And Rule 27(e) enables the Commission to respect those privileges through the issuance of orders accompanied by appropriate protective conditions. Accordingly, the Postal Service has objected to public disclosure of requested point-to-point ODIS data.²

Complainant does not argue that disclosure of the requested information under protective conditions would frustrate his ability to pursue resolution of issues he has brought to the attention of the Commission in this proceeding. His motion identifies no issue within the scope of the litigation of Docket No. C2001-3 for which disclosure is sought. Instead, the motion focuses on Complainant’s desire to use the requested data for purposes outside the scope of the litigation of this docket.

At page 3 of his motion, Complainant insinuates that the service standard changes at issue in this proceeding were shrouded in secrecy. The Postal Service

² The Postal Service’s response to DFC/USPS-1 is consistent with its approach to Congressional and General Accounting Office requests for First-Class Mail ODIS volume and time-in-transit point-to-point data. The Postal Service has consistently responded to such requests, subject to the explicit understanding that the data would not be publicly disclosed for the reasons expressed in this pleading.

leaves it up to him to reconcile this bit of hyperbole with the fact that the service standard changes at issue were made over the course of four fiscal quarters spanning 2000 and 2001 and were, therefore, published in consecutive issues of the quarterly Service Standards CD-ROM, which is disseminated to post offices responsible for informing the public about applicable service standards. Not should it be forgotten that the material information about the service standard changes at issue in this proceeding that was submitted by Complainant in Library Reference DFC-1 was provided to him by the Postal Service in response to a Freedom of Information Act request before the complaint was filed. Secrecy, indeed.³

At pages 2-3 of his motion, he refers to “10 front-page newspaper articles” about his complaint and argues that “the relevance of point-to-point volume data is implicit in the decisions of newspaper editors to place these articles on the front page.” With all due respect to the editors of the newspapers to which Complainant alludes, it is still the Postal Service’s impression that the relevance of all discovery requests in proceedings conducted by the Postal Rate Commission is governed by the Commission’s Rules of Practice and Procedure and not the editorial judgment of newspaper editors.⁴

³ At page 4, Complainant argues that it would be ironic and tragic for the Commission to impose protective conditions out of respect for the Postal Service’s concerns about public disclosure of point-to-point ODIS volume data. Some hyperbole is hard to ignore. Complainant’s grasp of what actually constitutes an ironic tragedy in the postal world would have been immeasurably enhanced by his attendance at yesterday’s memorial service in Washington D.C., for the two postal employees who were the unintended victims of the recent terrorist mailing of anthrax-laced letters to certain public figures.

⁴ Contrary to the assertion on page 4, the standard for resolving discovery issues before the Commission is not whether the editors of the San Francisco Chronicle elect to publish a story on page 1 or whether on a particular news day, that story appears above or below the fold. From sitting in on the numerous newspaper interviews of Mr. Gannon conducted by the authors of almost all of the newspaper articles to which Complainant alludes, it is clear that Complainant exercised his right to be very industrious in bringing his June 19, 2001, complaint to the attention of various reporters. There is no reason

It serves no purpose to debate whether Complainant's ability to generate publicity for his complaint, by itself, transforms his interest in the data sought by DFC/USPS-1 into a matter of "intense public interest," as he asserts at page 3. To the Postal Service's knowledge, discovery issues in Commission proceedings have not previously been resolved on the basis of a party's devotion to or success in generating media attention.

Further at page 3, Complainant argues that "[t]he widespread, prominent publicity that news of changes in service standards and . . . [his] complaint received confirms that a strong public interest exists in a public hearing on . . . [the] changes in First-Class Mail service standards." This assertion ignores the distinction between the determination to conduct a public hearing under 39 C.F.R. § 3001.81 *set seq.* and the resolution of the question of whether all data arguably relevant to the issues raised in that hearing should be publicly disclosed.

Because of the its need to resolve the issues in this docket in a manner which protects its vital commercial interests, the Postal Service cannot help but be concerned about the expressed motivation for the interrogatory at issue. At page 3 of his motion, Complainant argues that "the Commission must ensure maximum public access to the information to enable . . . [him] and other interested parties to communicate the information to the public and members of Congress." He argues that:

ultimately public and political pressure . . . will be necessary to convince the Postal Service to restore two-day standards. The task of mounting this pressure will be considerably more difficult for members of the public . . . if they do not

why he should have been so modest about that expenditure of time and energy in his motion. At the same time, he also should consider whether it would have been more forthcoming on page 3 of his motion to concede the possibility that his complaint "came to the attention" of Congressman Burton because he wrote a letter to the Congressman on August 20, 2001, about it.

have access to the data necessary to press their case.

Motion at page 4. In reviewing the motion to compel, the Commission may have been struck, as was the Postal Service, by the absence of any description of the purposes to which the requested information would be put during the litigation of Docket No. C2001-3 in resolving the issues raised by the complaint. Such a statement of purpose might have helped the Commission determine if the Postal Service should be required to provide the requested point-to-point ODIS data in response to discovery in this proceeding and, if such disclosure is ordered, to what degree intervenor access to the data should be regulated.

Under the heading of Public Interest in Disclosure, Complainant makes a number of assertions in support of his motion. At page 3, he argues that:

The Commission must ensure maximum public access to the information to enable . . . [him] and other interested parties to communicate the information to the public and members of Congress.

Complainant misapprehends the role of the Commission in this proceeding. In the context of the instant proceeding, the Commission's rules of discovery are not intended to enable a public relations or political campaign. They are intended to serve the limited function of regulating access to information relevant and necessary to the resolution of issues raised by the complaint in a manner which, under appropriate circumstances, protects the proprietary and commercial interest of information providers.⁵

Reduced to its essence, Complainant's argument for disclosure of the requested data is as follows:

⁵ Irrespective of the purposes to which postal records would be put, public disclosure determinations are made by the Postal Service under the Freedom of Information Act, 5 U.S.C. § 552.

I filed a complaint. I have attracted media attention to my complaint. I have written a Congressman about my complaint. As result, there is intense public interest in access to any information I request during discovery in this complaint proceeding, including information responsive to DFC/USPS-1. And I need the requested data in order to mount a public relations and political campaign after the Commission issues a report in this proceeding.

Understandably, the Postal Service is concerned that, under the pretext of discovery, its own limited resources and the even more limited resources of the Commission are being used for purposes unrelated to the resolution of the complaint in this docket.

On pages 5-8 of his motion, in the section addressing competitive harm, Complainant makes several arguments to which the Postal Service responds below.

Referencing Presiding Officer's Ruling No. C2001-1/5 (July 18, 2001), Complainant argues that the Presiding Officer ruled that disclosing facility-specific holiday cancellation volumes would not cause competitive harm because First-Class Mail is a competitive product. A less hasty reading of that ruling makes clear that it was based primarily upon the conclusion that the Postal Service did not, in that particular instance, explain to the Commission's satisfaction why the specific facility-specific originating volume information at issue was commercially-sensitive or how the Postal Service would suffer competitive harm by its disclosure. There is no basis for concluding that the Presiding Officer, in that instance, concluded that the information in question lacked sufficient commercial sensitivity to warrant protective conditions simply because it pertained to First-Class Mail.

In any event, there is a compelling distinction between the data at issue in Presiding Officer's Ruling No. C2001-1/5 and the data at issue here. The data at issue in C2001-1 (how much mail is postmarked and, therefore, originates from particular 3-

digit ZIP Code areas) is similar in nature to the general census data alluded to at the bottom of page 6 of Complainant's November 7, 2001, motion. Whatever conclusion one draws about the commercial nature of originating volumes for specific 3-digit ZIP Code areas, it is infinitely more commercially valuable for postal competitors to know how much of that originating mail destines in Los Angeles, as opposed to Sacramento, Portland, Chicago, or Miami, which is what would be revealed by an unprotected response to DFC/USPS-1.

Complainant argues that there is no need to be concerned about the impact of electronic media on First-Class Mail volume because "fax machines and e-mail have consumed most of the First-Class Mail volume that they are going to claim." Motion at 6. He claims that such technologies are not "in active, direct competition with First-Class Mail." *Id.* Complainant offers no basis for his speculation.⁶ Undercutting his own speculation, however, he concedes that there is still a measure of First-Class Mail volume "unclaimed" by e-mail and fax. *Id.* Thus, even Complainant acknowledges that there is First-Class Mail market share for the Postal Service to protect from competition.

Further, at page 6 of his motion, Complainant states that he can hardly imagine marketers of services competing with First-Class Mail "poring over point-to-point First-Class Mail volume data to mount some advertising campaign."⁷ The limitations of Complainant's imagination aside, the fact is that these data would be valuable to a postal competitor seeking to determine where to focus its capital investment, marketing resources, and pricing strategies in order to maximize the return or minimize the loss on

⁶ Compare, Docket No. R2001-1, Direct Testimony of Peter Bernstein On Behalf Of United States Postal Service, USPS-10.

⁷ Postal competitors cannot imagine it either, given the Postal Service's long-standing policy of non-disclosure of such data.

any such expenditures and efforts.

Complainant also argues that the Postal Service's claims of competitive harm from the disclosure of ODIS data are negated by the fact that census data could be used by postal competitors as a basis for determining where to concentrate marketing efforts. Motion at 6-7. This argument misses a critical distinction. Census data only tell marketers where message senders are. Census data do not tell marketers where the messages from a particular origin are going. Nor do census data, by themselves, allow a marketer to rank city pairs on the basis of per capita message transmissions, which is an infinitely more valuable piece of market research that can be developed via access to point-to-point ODIS volume data.

Beginning on page 7 of his motion, Complainant points to United Parcel Service and Federal Express as examples of postal competitors and offers his speculation that such firms would not be interested in point-to-point First-Class Mail data because they know their own volume patterns.⁸ Surely, the Commission is not so uninformed as to conclude that these firms got where they are by being smug in their knowledge of about their respective businesses. It is knowledge of the wider marketplace – and, in particular, competitors' businesses -- that enhances a firm's ability to compete more effectively and advantageously. Complainant's assertions that prominent postal competitors stand where they do today simply based on what they knew about the Postal Service 20 years ago is patently absurd. Successful competitors do not make decisions or survive long basing today's decisions on what they knew two decades ago.

⁸ If the Complainant is aware whether these firms routinely publish the origin-destination volumes of matter they deliver that could have been sent via First-Class Mail, such a revelation would shed new light on two questions: (1) whether disclosure of similar data by the Postal Service would involve inherently commercially sensitive data and (2) whether it would be in keeping with good business practice.

Further at page 7, if only to demonstrate that his naivete regarding business practices is both broad and deep, Complainant waxes on about less mature, “start-up” postal competitors. Here, he speculates that:

Even if a startup nationwide company wanted to target its marketing toward particular regions, the point-to-point First-Class Mail volume data probably would not reveal any information that is not already obvious: our nation’s major metropolitan areas send and receive the largest volumes of mail.

In other words, according to Complainant, such a firm would be indifferent to ODIS point-to-point information suggesting whether it would be more profitable to concentrate first on the Jackson-to-Atlanta market as opposed to the Richmond-to-Charlotte market. Clearly, such a firm would want to know which city pairs generated the most volume and compare that data to census data and make determinations about per capita volumes between city pairs. Such information would allow that firm to determine where to prioritize its “cream-skimming” competitive activity. Nevertheless, Complainant wants the Commission to join him in imagining that such a firm would strike out willy-nilly in search of a niche or that it would have unlimited resources and personnel with which to pursue all potential customers in all markets simultaneously.

Complainant argues that the Postal Service and the Commission should not be concerned about public disclosure of the data requested by DFC/USPS-1 because his speculation informs him that such a firm would be interested in Express Mail or Priority Mail data, not First-Class Mail data. The argument ignores the overlap in the content of matter carried in each of these mail classes and the desire of competitors to fully inform themselves and assess all potential for growth in market share and opportunities for market penetration.⁹

⁹ And if Complainant is wrong that such firms would not be interested in exploiting public access to First-Class Mail point-to-point ODIS volume data? Once the data are “out of the barn,” a future, more prudent exercise of hindsight would be insufficient to un-do the

As noted above, Complainant argues that the requested data are relevant to the exercise of his right to generate political pressure on the Postal Service after the Commission issues a report at the conclusion of Docket No. C2001-3. Although it has yet to be articulated by Complainant, it seems that the definition of the 2-day service arguably provides a basis for requesting access to some level of information about city pair volumes. The Postal Service anticipates the assertion that it has improperly excluded from consideration for the application 2-day service any city pairs beyond reasonable reach of surface transportation for which there exists a significant business/volume relationship sufficient to trigger consideration of the use of air transportation.

As the Commission is aware, under the current definition of the 2-day First-Class Mail service standard, for any 3-digit ZIP Code area of origin, the Postal Service is to apply a 2-day service standard to two types of destinations beyond the overnight delivery zone:

- (a) those within reasonable reach of available surface transportation; and
- (b) those destinations beyond the reasonable reach of surface transportation with significant business/volume relationships with the origin to which dependable and timely air transportation is available.

See, e.g., PRC Op. N89-1, at 5. In Docket No. N89-1, destinations beyond the reasonable reach of surface transportation from a particular origin were deemed to be candidates for a 2-day service standard (based on operational and transportation feasibility and customer needs) if they received more than 0.5 percent of an originating facility's outgoing volume. See, Docket No. N89-1, USPS-T-2, Appendix A at 16.

harm to the Postal Service's competitive interests resulting from an ill-advised public disclosure of commercially-sensitive point-to-point First-Class Mail ODIS volume data.

Thus, assuming DFC/USPS-1 were asked for purposes of resolving an issue raised by the Complaint in Docket No. C2001-3, it would seem to be for the purpose of identifying which of the origin-destination pairs described in the interrogatory that were downgraded from a 2-day to a 3-day service were potential candidates for retention as 2-day pairs based on considerations of a significant business/volume relationship.

The Postal Service is perfectly willing to publish such a list in response to DFC/USPS-1. One was prepared in connection with the development of the service standard changes in this case. There would be no need to apply protective conditions to it, since it would not reveal the actual origin-destination pair volumes, which are not necessary to resolve issues raised by the complaint in this proceeding. With its disclosure as an alternative to actual volumes, the purposes of Docket No. C2001-3 would be served without the need to resolve the current controversy.

For these reasons, the motion to compel should be denied.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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CERTIFICATE OF SERVICE

I hereby certify that, in accordance with section 12 of the Rules of Practice, I have this day served the foregoing document upon all parties of record in this proceeding.

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