

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

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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

Postal Rate and Fee Changes, 2001)

Docket No. R2001-1

OFFICE OF THE CONSUMER ADVOCATE
RESPONSE TO UNITED STATES POSTAL SERVICE
MOTION FOR PROTECTIVE CONDITIONS FOR RESULTS
OF CONSUMER SATISFACTION SURVEYS
(November 19, 2001)

The Office of the Consumer Advocate ("OCA") hereby responds to and opposes the Postal Service's motion for protective conditions for customer opinion surveys,¹ some of which the Service was ordered to produce in the Presiding Officer's Ruling of November 7, 2001.² Pursuant to the filing schedule set forth in that ruling, OCA files its timely response on November 19, 2001.

In POR 1/7, the Presiding Officer granted, in large part, OCA's motion to compel production of documents in response to OCA/USPS-7,³ and ordered the Service to produce the survey results for specific questions and subparts of questions in two identified surveys for FY 2000 and FY 2001.⁴ That ruling rejected the Postal Service's blanket objections to interrogatories aimed at consumer satisfaction, surveys, and of

¹ "[United States Postal Service] Motion for Protective Conditions for Results of Consumer Satisfaction Surveys," filed November 13, 2001 (hereinafter "USPS Motion").

² POR No.R2001-1/7 (November 7, 2001) (hereinafter "POR 1/7").

³ "Office of the Consumer Advocate Motion to Compel Production of Documents Requested in OCA/USPS-7," October 23, 2001

⁴ These surveys were the USPS Customer Satisfaction Survey (Residential) and USPS Business Customer Satisfaction Survey.

other issues relating to consumer choice.⁵ It also noted that the Service had advanced no justification for protective conditions and reminded the Service that in another order participants were cautioned "to seek protective conditions only in circumstances where they are clearly necessary."⁶ The Service was told to detail the public harm that disclosure might entail.

The Postal Service filed a motion for protective conditions that encompassed not only the compliance ordered by the Presiding Officer in POR 1/7 but also related survey information contested in another motion to compel filed by OCA.⁷ The Service stated its intent to produce information responsive to earlier versions of the two surveys already discussed (for FY 94 and FY 97).⁸ The Service also stated that it would produce responses to analogous questions in two other surveys, its National Accounts Survey and its Premier Accounts Survey, for the four fiscal years FY 94, FY 97, FY 2000, and FY 2001.⁹ The Service sought protective conditions for the FY 94 and FY 97 information even though the survey forms and most of the results were "archived" and, therefore, the Service did not know what the questions were or what the responses had been.¹⁰ The Service nonetheless alleged that the release of this information (whatever

⁵ POR 1/7 at 2-3.

⁶ POR 1/7 at 4, *citing* POR No.R2001-1/2 (October 12, 2001) at 2.

⁷ "Office of the Consumer Advocate Motion to Compel Production of Documents Requested in OCA/USPS-51-57," October 30, 2001.

⁸ In its Motion to Compel on OCA/USPS-51-57, OCA had agreed to a number of search and scope limitations, including a limitation to surveys for FY94, FY 97, FY 2000, and FY 2001.

⁹ The Service takes the position that only the FY2000 and FY 2001 information for the surveys identified in footnote 4, *supra*, were responsive to OCA/USPS-7. The two additional surveys described in the text are conceded to be responsive to OCA/USPS-51-57, as is data for the surveys described in footnote 4 for the earlier years, FY 94 and FY 97.

¹⁰ USPS Motion at 2.

it might be) would cause great competitive harm and sought blanket protection for whatever it might release.¹¹

I. General Problems with the Postal Service's Claim of Commercial Sensitivity

OCA is sensitive to the need to protect confidential information and is clear that the rulings already entered by the Commission on this subject in this proceeding demonstrate the Commission's high level of concern for protecting truly confidential information where there is a realistic and demonstrated risk of competitive harm.¹² That is simply not the case here. An examination of the fragmentary data already released by the Service and alleged justifications asserted in the USPS Motion lead to the unavoidable conclusion that the Service is making blanket claims that cannot withstand scrutiny.

This section of the response will address policy questions and underlying basic issues that the Postal Service fails to recognize or address. The next section (Part II) will address the narrow arguments that the Service did make. OCA submits that those arguments fail to identify any mandatory, or even mildly persuasive, reason for granting confidentiality.

Initially, OCA must object to the blanket request for protective conditions for information that the Postal Service has not seen and whose contents are unknown. The Service candidly admitted that the material for FY 94 and FY 97 is archived and had

¹¹ OCA notes that it has no way of knowing what "analogous" information the Service will release for the surveys allegedly not involved in POR1/7 and reserves the right to move for full compliance if it believes that other material should have been released.

¹² See "Presiding Officer's Ruling Granting Motions For Protective Conditions," Ruling No. R2001-1/3, October 23, 2001, and "Presiding Officer's Ruling Granting Motion For Waiver And For Protective Conditions," Ruling No. R2001-1/5, October 31, 2001. See also, "Order on Protective Conditions Appropriate for Application to Sensitive Information Produced in This Proceeding," Order No. 1283, January 28, 2000.

not, at the time the Motion was filed, been retrieved or examined.¹³ It is difficult to imagine how anyone can claim a likelihood of competitive injury arising from the release of almost 10-year-old data that no one has bothered to glance at. The Commission should discourage the filing of such blanket claims (and sweeping objections to relevance) without someone at least troubling to look at the documents. Plainly, the Service cannot justify these claims. They should be denied.

Similarly, the Service makes no distinction for information about competitive services and those for which it has no effective competition. In a recent Opposition to an OCA motion to compel, the Postal Service argued that the public discovery by the Service of an audit report on scanning practices related to a First Class Mail product (Certified Mail) did not imply that a similar scanning practice audit report on Delivery Confirmation was releasable.¹⁴ The Service argued that the cases were distinguishable because First-Class Mail is not a competitive Product while Delivery Confirmation, in conjunction with Priority Mail and Package Services, is a direct competitor of private providers of similar services. OCA agrees that services protected by the Private Express Statutes are not competitive. Indeed, at least one Commission ruling on discovery relating to competitive versus noncompetitive services has flatly stated that First-Class Mail is "a monopoly service," stating that the issue of competitive harm related primarily if not entirely to competitive services.¹⁵ Many of the survey questions at issue focus on noncompetitive services. Since the Service failed to address the issue

¹³ USPS Motion at 2.

¹⁴ "Opposition of the United States Postal Service to Motion of the Office of Consumer Advocate to Compel Production of Documents Requested in OCA/USPS-T36-1(a)," filed November 13, 2001, at 4.

¹⁵ POR No. R2000-1/51 (April 26, 1999) at 5.

after being given ample opportunity to do so, denial of the Motion is appropriate. At a bare minimum, the Service should be required to focus on this distinction and explain how a monopoly service can suffer competitive harm and justify any claim that a given question relates to a competitive service.

The Postal Service is also trying to ignore the very limited nature of the data at issue here. This situation involves expressions of opinion (some of it almost a decade old) by consumers and customers. There is no issue of internal analyses, work product, or accumulated expertise in the delivery of a given product or service. For example, Residential Survey Questions 1(a), (b), (e), and (g) simply ask about delivery to the correct address, condition of the mail delivered, safety from theft or loss, and overall satisfaction. The results at issue would be expressed simply as percent answering "Excellent," "Very Good," etc. No other information is provided. Similarly, Questions 2 (b), (d), and (e) go to the timeliness of delivery with answers expressed in terms of frequency of problems, "Not at All," "Once," "Two or Three Times," again expressed as percentages of interviewees choosing each category. The Service simply fails to address how such data, largely aimed at monopoly services that do not have competition, could possibly harm the Service.

The Postal Service's multiple failures to address these issues are sufficient grounds to deny the motion. In the next section, OCA will show that the arguments that the Service did make are not sufficient to justify protective conditions.

II. The Postal Service Fails to Justify the Protective Conditions Sought

The Postal Service raises several arguments in support of protective conditions. The Service argues that the statutory structure under which it operates militate in favor

of issuing protective conditions. The Service also argues that case law and the fact that the Service does not routinely release this data also support the imposition of protective conditions. OCA submits that all of these arguments are unavailing and that public disclosure is appropriate.

The core of the Postal Service's position is that 39 U.S.C. § 410(c) somehow requires the imposition of protective conditions. This argument distorts the statutory scheme and ignores the duty of the Commission to conduct a fair and open proceeding. OCA submits that allowing discovery and disclosure of relevant information is a mandatory statutory feature of a hearing on the record under the Administrative Procedure Act, a duty imposed by Congress on the Commission.

In particular, Section 410(c), by its terms, does not in any way limit discovery in proceedings under 39 U.S.C. § 3624. As a recent PRC ruling stated:

Production of information in the course of formal Commission proceedings is authorized generally by 39 U.S.C. § 3624(a), which requires the Commission to provide an "opportunity for a hearing on the record under sections 556 and 557 of title 5[.]" In proceedings conducted under these provisions, parties are entitled "to conduct such cross-examination as may be required for a full and true disclosure of the facts[.]" and in general "[a]ny oral or documentary evidence may be received," with the exception of irrelevant, immaterial, or unduly repetitious evidence. 5 U.S.C. § 556(d).

In more specific terms, 39 U.S.C. § 3624(b) provides that "the Commission may (without limitation) adopt rules which provide for . . . (3) discovery both from the Postal Service and the parties to the proceedings[.]"¹⁶

¹⁶ POR No. 97-1/62 (November 17, 1997) at 7.

Nothing in Section 410(c) even mentions the Commission's authority to conduct discovery, much less purports to limit that authority in any way.¹⁷

Further, the Postal Service ignores the importance of its role as a government agency. It is before the Commission in a proceeding seeking higher rates. The Postal Service, in many of its functions, operates as a statutory monopoly. Such a monopoly is required to make disclosures not required from a commercial firm, especially where its noncompetitive services are at issue.¹⁸

Moreover, the one case cited by the Postal Service actually supports OCA's position.¹⁹ In that case the court emphasized that the burden is on the party seeking a protective order to show immediate concrete harm and to do so by more than a lawyer's representations and bald assertion that the movant does not routinely release the information at issue.²⁰ The Presiding Officer will search the USPS Motion in vain for anything more than a lawyer's representations and an assertion that the Service does not routinely release the survey data.

In POR1/7, the Presiding Officer stated that the Postal Service had alleged commercial sensitivity without alleging any harm that would arise from disclosure.²¹

This failure to articulate the harm that would result from public disclosure of the survey

¹⁷ It may be that the Service is trying to bolster its weak case for protective conditions by attempting to assert that the material might be exempt from the Freedom of Information Act. If so, the D.C. Circuit has made it clear that "the mere fact that information falls within a FOIA exemption does not of itself bar an agency from disclosing the information." *Bartholdi Cable Co. v. F.C.C.*, 114 F.3d 274, 281 (D.C. Cir. 1997). Please note that OCA firmly believes that the Postal Service has not established that FOIA exemptions apply to the material at issue in the Motion for Protective Conditions.

¹⁸ See POR No. 97-1/104 (February 27, 1998) at 2.

¹⁹ USPS Motion at 5 citing *Reliance Insurance Co. v. Barron's*, 428 F. Supp. 200 (S.D.N.Y. 1977).

²⁰ 428 F. Supp. at 202-203.

²¹ POR1/7 at 4.

results persists in the Postal Service's Motion for Protective Conditions. As was strongly indicated in POR1/7 at 4, the Postal Service has the burden to prove that protective conditions should be imposed on the compelled material: "the Postal Service has not justified attaching protective conditions to either the information it is willing to provide or that which it opposes releasing." By bare assertions in the Motion for Protective Conditions, the Postal Service falls far short of the justification required by the Presiding Officer.

In its Motion, the Postal Service speculates that the customer satisfaction responses "could be used by postal competitors to the detriment of the Postal Service." Motion at 3. No examples are cited for the use of similar information by competitors in advertisements, even with respect to the Postal Service's publicized service standards. Consumer Reports (December 1998) published a study it performed in which the Postal Service fared badly when compared to Fedex and United Parcel Service, but the Postal Service cites no subsequent advertisements by either carrier in which the Postal Service's lower scores were used against the Service.

Another contention made in the Motion is that: "Every competitor would gain insights into every market in which our products and services compete." Motion at 3. This conclusion is not credible, nor even comprehensible. To meet its burden of proof, the Postal Service would have to use specific examples from the surveys to establish just how this could be accomplished. Such proof is absent from the Motion.

The Service does not explain why this survey data is different from that routinely discovered from the Service in other proceedings.²² The cost of performing the

²² POR No. 97-1/106 (March 6, 1998).

customer satisfaction surveys – “millions of dollars” – is cited; but many times that amount is spent by the Postal Service collecting data that is routinely submitted to the Commission for its consideration and which is publicly disclosed. POR1/7 established the relevance of the survey data. The Postal Service does not make a compelling case for treating this data differently from the other types of data (e.g., data on failure to meet service standards – see response to interrogatory OCA/USPS-103) that is routinely submitted without protective conditions.

In Presiding Officer's Ruling No. C2001-1/13 at 6 (emphasis supplied), the Presiding Officer articulated the principle that “a proposal for protective conditions is *extraordinary relief that is contrary to the requirement that hearings on postal matters be open and accessible to the public.*” Thus, secrecy is disfavored unless a compelling case is made by the proponent of such restrictions.

Balanced against the Postal Service's claims for confidentiality must be the advantages of public disclosure of the survey responses. To the extent that the mailing public may be dissatisfied with elements of the service that it receives from the Postal Service, airing these concerns publicly may influence the Postal Service to do a better job. This is a laudable objective for an institution whose overarching purpose is to serve the public.

It should be stressed that OCA seeks only consumer opinion data, not the identities of the persons answering the surveys or Postal Service internal analyses of the data (the latter would also be discoverable but might be sensitive). In the absence of a concrete showing of harm by the Service, the motion should be denied.

Respectfully submitted,



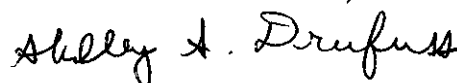
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CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing document upon all participants of record in this proceeding in accordance with Rule 12 of the rules of practice.



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Washington, D.C. 20268-0001
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