

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

OPPOSITION OF UNITED STATES POSTAL SERVICE  
TO OCA MOTION TO COMPEL PRODUCTION OF DOCUMENTS  
REQUESTED IN OCA/USPS-64(c), 65-73, 77-78  
(November 20, 2001)

On November 13, 2001, the Office of the Consumer Advocate (OCA) moved to compel the production of certain documents requested in interrogatories OCA/USPS-64(c), 65-73, and 77-78, filed on October 17, 2001. The Postal Service objected to these interrogatories on October 29, 2001. The Postal Service hereby opposes the motion to compel.

OCA/USPS-64(c), 65

These interrogatories concern the American Customer Satisfaction Index (ACSI), the Postal Service's participation in it, and provision of results from the ACSI. Interrogatory 64(c) first asks whether the Postal Service currently participates in the American Customer Satisfaction Index (ACSI), as do "approximately 30 government agencies". If the answer is negative, an explanation is sought, with supporting documentation. If the answer is positive, the OCA seeks copies of all results. In its Motion to Compel, the OCA simply seeks copies of all results. Interrogatory 65 again makes an unlimited request for results, and inquires as to the Postal Service's reasons for participating. The Postal Service objected that it may not disclose this proprietary, commercially-sensitive, confidential information, and on the grounds of relevance. In its

objection, the Postal Service noted that it did not choose to participate, but was included in the index by its creators.

In the OCA's view, the Postal Service's objections are baseless because the Commission can afford the needed protection upon proof that the information is confidential and merits protection from wide-spread release. The OCA's argument misapprehends the nature of Postal Service's control over the information.

As stated in its objection, the Postal Service pays a substantial fee for this confidential information, and is under contractual obligation not to release it. Objection at 2. The results of the ACSI are not owned by the Postal Service. Rather they are owned and controlled by American Society of Quality, which conducts the ACSI and sells the results. The Postal Service merely subscribes to the Index. Attached are the guidelines for use of the ACSI that the subscribers must follow.

The guidelines strictly limit the use and distribution of the information. Clearly, the American Society of Quality would not be able to sell the survey results, if they were to be made available publicly for free. Even release of the information under protective conditions, as the OCA suggests, would violate the subscription contract.<sup>1</sup> The Postal Service also notes that these terms are standard for subscribers. Contrary to the OCA's contention, nothing in the agreement was directed at barring the Commission from access to this data in a rate proceeding. In fact, nothing appears to bar the Commission, or the OCA for that matter, from obtaining access as long as it is willing to

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<sup>1</sup> Under the guidelines subscribers may not publicly use, distribute or reproduce any data or information from ACSI that has not been previously published or released for publication by the American Society for Quality. See Attachment, para. 1

pay for a subscription and abide by the subscription contract.

The Postal Service's inability to provide the ACSI data to the Commission, renders moot the OCA's discussion of OCA/USPS-65 which seeks copies of all ACSI results, without defining a time period. The Postal Service cannot provide the non-public ACSI data from any of the years for which it subscribed. Thus, there is no need to address the OCA's argument that "it [is] not the burden of the OCA to limit an interrogatory to a reasonably current time period."

With regard to relevance, the Postal Service continues to argue strenuously that the requested information from the American Customer Satisfaction Index is irrelevant. This is clear from the OCA's Motion to Compel, where it outlines how it intends to use that information, in the areas of volumes and the contingency.

To begin with, the OCA makes the conclusory statement that "mailer's perceptions of the quality of mail service ... are relevant to the level of mail volume and revenue." Motion to Compel at 5. Next, the OCA claims that "mail volume can be increased through service quality improvements", and complains that "witness Tolley has not taken this possibility into account in estimating volume ... [n]or has witness Tayman." *Id.* It is entirely unclear, however, what it is that the OCA believes the witnesses ought to have done. The OCA goes on to argue that "[i]f the opportunities for improving service quality are considered to have an impact on mail volume, then the estimated size of the contingency may be lessened." *Id.* This reasoning is inadequate to establish the relevance of the information sought. In fact, the OCA appears to be inviting the Commission to range far beyond the scope of this case, and beyond its statutory authority, generally.

The Commission lacks the authority either to direct postal management to respond to consumer complaints in specific ways so as to “ease developing shortfalls in mail volume estimates” (*Id.*), or to punish the Postal Service, through its rate recommendations, for failing to do so. Pursuing the latter course would involve the Commission in groundless speculation, jeopardizing the Postal Service’s financial stability in the process. The OCA is asking for “mailer’s perceptions” of service quality, not for established service quality measurements. Following the OCA’s line of argument, as laid out in its Motion to Compel, the Commission would be forced to speculate that consumers would respond positively in the test year (i.e., with more volume) to management’s response to particular complaints, and by how much. Thus, it is suggested, the Commission would then be able to cut the Postal Service’s revenue requirement, by “lessening” the contingency by some specified amount. This would be a groundless and entirely irresponsible course of action for the Commission to pursue. It is far too tenuous a basis for ordering the production of commercially sensitive consumer information.

Furthermore, with respect to witness Tolley’s volume estimation procedures, we reiterate that neither the Postal Service nor the Commission has ever forecast mail volume in the aggregate. Volumes are forecast by service, and information on aggregate customer satisfaction levels can not inform this process.

OCA/USPS-66-73

The OCA characterizes its interrogatories 66-73 as “seek[ing] the actual contents of advertisements, internal Postal Service analyses of their accuracy and truthfulness, and data on consumer perceptions of their accuracy or truthfulness”, explaining that it is

trying “to assess the accuracy of Postal Service advertising and consumer perceptions of the accuracy of such advertising.” Motion to Compel at 8. The OCA ties the relevance of this line of questioning to one of the Commission’s “expression[s] of concern” in the last rate case. *Id.* at 9. That concern had to do with information consumers might or might not be receiving concerning the achievability of published Express Mail delivery standards.

In its opinion in the last case, the Commission restated intervenor arguments that the Postal Service is, in effect, “engaging in false advertising” when it “accepts Express Mail which it knows cannot meet the guaranteed delivery time”. PRC Op. R2000-1, para. 5009. Ultimately, the Commission held the Express Mail cost coverage at 151 percent, in light of what it characterized as a “high on-time failure rate ... which seems inconsistent with a guaranteed service .” *Id.* at para. 5013. In the course of its discussion, the Commission expressed a “[concern] that the Postal Service is not properly informing consumers about the limitations of its delivery network, and that the Postal Service accepts Express Mail knowing that the published delivery standards are impossible to achieve.” *Id.* Accordingly, the Commission “suggest[ed] the Service review its overall advertising and consumer information for Express Mail so that consumers are made aware of potential limitations of the service.” *Id.*

The Commission acted within its discretion when it offered such a “suggestion”, in light of concerns expressed by intervenors on the record. In so doing, however, the Commission did not, as indeed it could not, attempt to assert any authority to direct postal management to conduct such a review, or to itself evaluate the content of Postal

Service advertising. Indeed, caselaw makes it clear that the Commission lacks such broad, FTC-like reviewing authority.

In Governors of the U.S. Postal Service v. Postal Rate Commission, 654 F.2d 108 (D.C. Cir. 1981), the Court concluded from the legislative history that “Congress did not intend that the Postal Rate Commission regulate the Postal Service.” *Id.* at 115. It noted that the Commission’s “authority to assist in ratemaking and classification does not include authority to interfere in management.” *Ibid.* The exclusive authority to manage the Postal Service was to reside with the Governors. *Id.*

More specifically, the court elaborated that the “Postal Rate Commission lacks the general administrative authority found in agencies such as the FCC and CAB.” *Id.* at 116. It cited United Parcel Service, Inc. v. United States Postal Service, 455 F.Supp. 857 (E.D. Pa. 1978), aff’d, 604 F.2d 1370 (3d Cir. 1979), cert. denied, 446 U.S. 957, for the proposition that the Commission can not be analogized to other regulatory agencies with broader mandates over private industry. *Id.* The Court of Appeals in Governors pointed to the UPS court’s characterization of the more limited role the Commission plays in the postal statutory scheme:

The responsibilities of the Postal Rate Commission are strictly confined to a relatively passive review of rate, classification and major service changes, unadorned by the overlay of broad FCC-esque responsibility for industry guidance and of wide discretion in choosing the appropriate manner and means of pursuing its statutory mandate. 455 F.Supp. at 873.

*Id.* at 117.

The OCA’s Motion to Compel must be evaluated in the light of the Commission’s statutory mandate, as elucidated by the courts. Interrogatories OCA/USPS-66, 68, 70

and 72 ask for videotapes (66 and 68) of television advertising for Priority Mail and Express Mail, and cassette tapes (70 and 72) of radio advertising for the same two services. As the Postal Service has already noted in an earlier Opposition to an OCA Motion to Compel and, as the above caselaw makes plain, the Commission lacks authority to regulate the content of Postal Service advertising. See Opposition of the United States Postal Service to OCA Motion to Compel Production of Documents and Information Requested in OCA/USPS-60(a), (b) and (e) (filed, Nov. 13, 2001), at 2. While Congress saw fit to empower the Postal Service to investigate false representation issues (39 U.S.C. 3005), it granted no such authority to the Commission. The scope of the Commission's authority is constrained to those issues appropriate to the conduct of rate proceedings under 39 U.S.C. 3622. The Commission's expression of concern in the last case about the accuracy of Postal Service advertising, made in the context of a discussion of the Postal Service's ability to meet its published Express Mail delivery standards and the "on-time failure rate" for that service, simply does not serve to bring review of the content of such advertising within the scope of the Commission's statutory authority. Even assuming, which we do not, that the content of relatively current advertising would provide any useful information about value of service in the test year, there is no basis for concluding that advertising dating before the period covered by this case would do so.

In further reliance on the Commission's expression of concern in R2000-1, the OCA goes beyond the ads themselves and asks: in subpart (a) of the above interrogatories, for internal Postal Service reports, studies, etc. of the accuracy or truthfulness of the identified advertisements; and, in subpart (b) of those interrogatories,

for compilations, studies or tabulations of consumer complaints about the identified advertising.

Turning first to the request for compilations of consumer complaints, we note that we are informed that the Postal Service does not track or tabulate consumer complaints regarding the truthfulness, accuracy, inaccuracy or deceptiveness of particular television or radio advertisements. Even if it did, it is unclear what this would tell us regarding the value of the service being promoted in any given ad. If the OCA is concerned with the actual performance of Express Mail or Priority Mail, it can inquire about available indicators of such performance. The Commission relied on one such indicator, when it used the on-time failure rate of Express Mail as part of its R2000-1 evaluation of the value of that service. PRC Op. at para. 5013. The information sought here would not in any event be relevant.

Turning next to the portions of the interrogatories asking for internal Postal Service documents relating to the accuracy of any identified advertisements (subparts (a)), we note that they do nothing to further the OCA's stated purpose of assessing the accuracy of Postal Service advertising. Such probing into the purely internal decisionmaking processes of the Postal Service would tell the Commission nothing either about representations actually made to the public, or about levels of service actually provided. It is not the Commission's job to regulate the means by which the Postal Service develops or analyzes its advertising campaigns. If the Commission has a role here, it is to determine the rate implications of service actually provided the consumer. With these interrogatories, the OCA invites the Commission to go well beyond that statutory role.



With its purported justification for seeking advertising storyboards (OCA/USPS 67, 69, 71, 73), the OCA even more obviously transgresses the proper scope of this proceeding:

As to relevance, the storyboards are directly relevant to the development of the ads and how the claims were edited or modified in the development process. OCA is seeking to determine whether the advertisements became more or less truthful and accurate as they developed. This information bears on whether the Postal Service is heeding the Commission's clearly expressed concerns about its claims or allowing "puffery" to creep into its advertising.

OCA Motion to Compel at 10. We reiterate, first, that story boards do not exist for radio advertising for the simple reason that radio spots do not employ visuals. As to the television story boards, the Postal Service would argue strenuously that, even if the advertising ultimately presented to the public were to be considered relevant, the Commission has no authority to delve into the "development of the ads", or "how the claims were edited or modified in the development process." What possible light could this shed, for example, on the value of service actually provided to mail users? What are the rate implications of advertisements becoming "more or less truthful and accurate" prior to their release to the public? Assuming for the sake of argument that the Postal Service is, through its internal review processes, "allowing puffery to creep into its advertising", what jurisdiction can the Commission reasonably assert over those processes, and what remedy could it legitimately craft, within the limits of its statutory mandate? The OCA seems to have lost sight of the fact that this is not a "truth in advertising" case. The requested internal documents would provide no new information about representations ultimately made to the public. Even as limited by the OCA, the interrogatories seeking storyboards are clearly irrelevant. Moreover, this type of pre-

decisional information requires protection from disclosure for the simple reason that inquiry into these matters would intrude on the managerial prerogatives of the Postal Service and have a chilling effect on its developmental activities. The OCA Motion to Compel should be denied.

OCA/USPS-77

If the foregoing discussion does not make it clear that the OCA has lost sight of the proper scope of this proceeding, its proffered justification for the information sought in its interrogatory 77 surely does. OCA explains that this interrogatory “seeks information on the cost of sending notification letters to Postal Service customers”, because “[o]ne of the potential remedies that OCA is considering with respect to false or exaggerated claims or advertising is a corrective mailing to customers disclosing the problem and correcting the inaccurate or false claim.” OCA Motion to Compel at 11. Even a cursory review of the postal statutory scheme should reveal that the Commission is completely without the broad regulatory authority to order such a remedy. If it does not, the caselaw discussed above makes that fact abundantly clear. The interrogatory is irrelevant. The Motion should be denied.

OCA/USPS-78

Interrogatory OCA/USPS-78 refers to USPS-LR-J-144, volume 1, and asks for a copy of the video “Customer Perceptions” identified on page 109 of “Module 5: Domestic Mail.” The video requested is used to train retail employees. Its content, however, makes no substantive reference to any Postal Service product, service or experience. Instead, after equating perception with reality in a retail context, the presenter elicits customer experiences *from outside the postal context* that postal retail

trainees have personally experienced; the conclusion of the video simply asks the trainees to reflect on what postal customers would think if they were subjected to the trainees' own worst experiences.

The OCA seeks to compel production of the video stating it wants "to determine if the negative employee behaviors addressed are those actually reported with great frequency by Postal Service customers or if the training is mis-directed." Motion, at 13. Whether the trainee's own non-postal experiences bear any relationship to actual experiences at the Postal Service retail counter could never be determined from this video. If, by some external comparison, the elicited experiences should correspond with actual experiences, this could shed no light on any issue in this omnibus proceeding. At most, it would show that retail environments share some commonalities. Since this conclusion is itself tautological, nothing in this video could possibly be relevant, no matter how far the OCA might try to stretch its argument. In light of the facts that the presenter simply elicits trainee experiences, that the video constitutes no more than sensitivity training, and that it does not discuss any behavior seen or experienced by any retail trainees in a postal context, the requested information simply

is not sufficiently related to the issues of this case to warrant its production.


The OCA Motion to Compel should be denied.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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November 20, 2001

#### CERTIFICATE OF SERVICE

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

  
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## ADVERTISING USE GUIDELINES FOR THE AMERICAN CUSTOMER SATISFACTION INDEX

The Subscriber application contains various terms and conditions associated with a Subscriber's use of the American Customer Satisfaction Index (ACSI). The application refers to Use Guidelines to be used by a Subscriber in those specific situations when the Subscriber may publicly use and distribute ACSI Information and Data. The purpose of these guidelines is to provide assistance and guidance to a Subscriber when it plans to publicly distribute ACSI Information and Data. The guidelines are not intended to change the terms and conditions contained in the Subscriber Application. A Subscriber should carefully review the terms and conditions in its Subscriber application as well as these guidelines for those allowable circumstances when a Subscriber may publicly distribute certain ACSI Information and Data.

The Use Guidelines are as follows:

1. A Subscriber should not publicly use, distribute or reproduce any data or information from ACSI that has not been previously published or released for publication by the American Society for Quality (ASQ), The University of Michigan and/or CFI Group. Even though certain data and information for a particular year has been publicly released or published, a Subscriber is not entitled to publicly use or distribute data or information it receives for a following year's index unless and until that data is publicly released or published by ASQ, The University of Michigan and/or CFI Group.
2. If a Subscriber is entitled to publicly use or distribute data from the ACSI, a Subscriber should only use or distribute overall ACSI scores and should not use, publish or distribute the variables internal to the ACSI model which are customer expectations, perceived quality, value, customer retention and complaints.
3. A Subscriber should not change, misrepresent or misstate the content or meaning of information from the ACSI in Subscriber's public use or distribution of authorized index data and information.
4. All use of scores or rankings by a Subscriber shall accurately state the identity of the corporation, subsidiary, entity, division or business unit that received the score or ranking. A Subscriber shall not represent or advertise that a score or ranking attributed to a subsidiary, division, related entity or business unit was the score or ranking of Subscriber. Instead, Subscriber shall clearly state that the score or ranking was achieved by the correct corporation, subsidiary, division, related entity or business unit. Similarly, a score or ranking of a Subscriber should not be represented to be the score or ranking of a Subscriber's subsidiary, division, related entity or business unit.
5. A Subscriber should not represent that ACSI, or any of the data and information contained in ACSI, constitutes an endorsement of Subscriber, their products or services, or that ASQ, The University of Michigan or CFI Group endorse Subscriber, their products or services.





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6. In the event a Subscriber intends to publicly use, distribute, reproduce or publish permissible information and data from ACSI, a Subscriber is requested to submit to ASQ's New Business Development Department at least 30 days before the intended use of the material the following:

- A. The exact information and data to be used from the ACSI in the format intended to be publicly used by the Subscriber.
- B. A description of the extent, degree and manner of the intended public use by Subscriber.
- C. The placement and styling of the ACSI logo.

Upon receipt of this data and information from Subscriber, ASQ will review it and communicate with the Subscriber regarding the intended use and distribution of the materials.

1. From time to time these Use Guidelines may be amended and Subscribers will receive any amended or new Guidelines.

In the event you have any questions concerning these Use Guidelines or the circumstances and manner in which a Subscriber may publicly use and distribute data and information from ACSI for its own advertising purposes, please call ASQ's New Business Development Department (1-800-248-1946) or write to Rhonda Lang, Program Manager New Business Development c/o American Society for Quality, PO Box 3005, Milwaukee, Wisconsin 53201-3005.

