

**BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, DC 20268-0001**

RECEIVED
DEC 3 12 44 PM '01
POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

**Complaint on First-Class Mail
Service Standards**

Docket No. C2001-3

**DOUGLAS F. CARLSON
ANSWER IN OPPOSITION TO POSTAL SERVICE
MOTION TO IMPOSE PROTECTIVE CONDITIONS
ON DISCLOSURE OF DATA IN RESPONSE TO DFC/USPS-9**

December 3, 2001

On October 30, 2001, my interrogatory DFC/USPS-9 was filed.¹ This interrogatory read as follows:

This interrogatory applies to every three-digit ZIP Code pair:

- (1) In which at least one of the two three-digit ZIP Codes in the pair is located in the state of Washington, Oregon, California, Idaho, Nevada, Utah, Arizona, New Mexico, Colorado, Montana, Wyoming, or Texas; *and*
- (2) Whose First-Class Mail service standard changed from two days to three days in 2000 or 2001.

For each three-digit ZIP Code pair to which this interrogatory applies, please provide:

- a. ODIS and EXFC data showing on-time delivery percentage, average days to delivery, and proportion of mail delivered in each number of days (e.g., 40 percent delivered in two days, 55 percent delivered in three days, and five percent delivered in more than three days) for the most-recent period for which data are available;
- b. ODIS and EXFC data showing on-time delivery percentage, average days to delivery, and proportion of mail delivered in each number of days (e.g., 40 percent delivered in two days, 55 percent delivered in three days, and five percent delivered in more than three days) for

¹ Douglas F. Carlson Interrogatory to United States Postal Service (DFC/USPS-9), filed October 30, 2001.

comparable periods in each of the two years prior to implementation of the change in service standards.

The Postal Service filed an objection on November 6, 2001.² On November 20, 2001, I moved for an extension of time to respond to the Postal Service's objection.³ The presiding officer granted my motion on November 21, 2001.⁴ On the same day, before I was aware of the ruling, I filed a revised motion.⁵ In my revised motion, I observed that a party seeking to apply protective conditions has the burden of establishing that protective conditions are appropriate. Revised Carlson Motion at 2. Therefore, the party seeking protective conditions should file a motion to apply protective conditions. *Id.* To request protective conditions in an objection, as the Postal Service did, was procedurally inappropriate. See *Id.* In the Postal Service's reply to my motion,⁶ the Postal Service formally moved for protective conditions, apparently incorporating by reference the arguments against public disclosure that the Postal Service expressed in its objection to public disclosure of volume data in response to DFC/USPS-1 and its

² Objection of the United States Postal Service to Interrogatory of Douglas Carlson ("Objection"), filed November 6, 2001.

³ Douglas F. Carlson Motion for an Extension of Time to Respond to Postal Service Objection to DFC/USPS-9, filed November 20, 2001.

⁴ POR C2001-3/5, filed November 21, 2001.

⁵ Douglas F. Carlson Revised Motion for an Extension of Time to Respond to Postal Service Objection to DFC/USPS-9—Erratum ("Revised Carlson Motion"), filed November 21, 2001.

⁶ Reply of the United States Postal Service to Revised Motion of Douglas Carlson for an Extension of Time to Respond to Postal Service Objection ("Reply"), filed November 26, 2001. The Postal Service motion contains a troubling statement. In its reply, the Postal Service correctly recalled that it used its objection to DFC/USPS-9 to invite me to discuss the application of protective conditions. Reply at 1. The actual objection twice invited discussions about protective conditions that would fully protect the Postal Service's "commercial interests" and under which I could obtain access to the data "strictly for purposes of this litigation." Objection at 2 and 3. My revised motion clearly stated my opposition to protective conditions. Revised Carlson Motion at 2. Yet the Postal Service used its reply to allege that I "prefer[] motion practice." This statement is unfair, untrue, and inappropriate. Inviting a participant to contact postal counsel to discuss the protective conditions to apply to data is a nonstarter for negotiations when the participant is opposed to any protective conditions. My opposition to protective conditions was perfectly clear in my revised motion, *Id.*, yet postal counsel nonetheless levelled the accusation that my failure to commence negotiations signalled my preference for motions practice. Just to be sure, after the Postal Service filed its reply on November 26, 2001, I contacted postal counsel to determine whether the Postal Service might be willing to disclose the data without protective conditions; if so, I suggested that we begin negotiations. The answer, as I concluded when I read the Postal Service's initial objection, was no. Regrettably — not preferably — I now must file a motion to resolve this issue.

opposition to my motion to compel a public response to DFC/USPS-1.⁷ Pursuant to Rule 21(b), I hereby file this answer in opposition to the Postal Service's motion for protective conditions.

Public Interest in Disclosure

In 2000 and 2001, the Postal Service changed the service standard from two days to three days for a significant portion of First-Class Mail originating in and destined to several western states. These changes in service standards resulted from a fundamental change in the definition of two-day First-Class Mail in the years since the Commission reviewed First-Class Mail service standards in Docket No. N89-1. Under the new definition that Mr. Charles M. Gannon described in his declaration,⁸ the Postal Service has virtually abandoned the use of commercial passenger airlines to transport two-day First-Class Mail, choosing instead to slow mail delivery by one day and to transport the mail by truck. This new definition of First-Class Mail, implemented nationwide in 2000 and 2001, has raised serious questions about the adequacy of First-Class Mail service. The issue of the adequacy of First-Class Mail service is specifically included in the scope of issues under review in this proceeding. See Order No. 1320 at 8 and 10.

The changes in service standards, which the Postal Service initially attempted to implement secretly,⁹ became the subject of more than a dozen

⁷ Opposition of the United States Postal Service to Douglas Carlson Motion to Compel Response to DFC/USPS-1 ("Opposition"), filed November 14, 2001.

⁸ Declaration of Charles M. Gannon ("Gannon Declaration"), filed July 30, 2001.

⁹ In its opposition to my motion to compel public disclosure of point-to-point ODIS volume data, the Postal Service took issue with my allegation that the Postal Service attempted to implement the changes in service standards secretly. In support, the Postal Service states that the changes were "published in consecutive issues of the quarterly Service Standards CD-ROM" and that the Postal Service provided information about the changes to me in response to my Freedom of Information Act Request. Opposition at 3-4. Four observations are in order. First, the CD-ROM's provide only service standards; they do not highlight changes or provide "before and after" comparisons. Thus, a person must compare data on old and new CD-ROM's, side by side, to detect changes. Second, my dictionary defines "secret" as "beyond general knowledge or understanding[.]" *Webster's New World Dictionary*, Second College Edition, 1970. Third, if United States Census data are any indication, the Postal Service has approximately 285 million customers. Fourth, the Postal Service made no effort to announce the changes to the public.

newspaper articles in July and August.¹⁰ I counted 10 front-page newspaper articles in newspapers as large as the *San Francisco Chronicle* and the *Denver Post*.¹¹ After the *San Francisco Chronicle* broke the news to the Bay Area, several major radio and television stations reported the changes later in the day. The Associated Press then wrote a story, which the *San Jose Mercury News*, *Los Angeles Times*, and *San Diego Union-Tribune* published in whole or in part. After running stories on the changes, the *San Diego Union-Tribune* and the six newspapers owned by the Alameda Newspaper Group, including the *Oakland Tribune*, published separate editorials criticizing these changes and calling on the Postal Service to reverse the changes.¹² I expect that other articles appeared elsewhere as well.

Most newspaper articles discussed my complaint and emphasized the Postal Service's failure to inform the public. Without any question, the widespread, prominent publicity that news of the changes in service standards and my complaint received confirms that a strong public interest exists in a public hearing on these changes in First-Class Mail service standards.¹³

Therefore, it is hard to believe that disseminating service standard CD-ROM's to post offices and information about the changes in service standards to *one* customer in response to his FOIA request resulted in knowledge of these changes being communicated to any noteworthy number of customers outside the Postal Service, let alone any proportion of the United States population that would constitute "general knowledge or understanding." "Secrecy, indeed[]", the Postal Service remarked sarcastically. Opposition at 4. Minus the sarcasm, I couldn't agree more.

¹⁰ See Douglas F. Carlson Answer in Opposition to Postal Service Motion to Dismiss at 40, fn. 23 and 24, filed August 14, 2001 ("Opposition"). The *San Francisco Chronicle* article subsequently appeared in at least two other newspapers, the *Santa Cruz Sentinel* and the *Ventura County Star*.

¹¹ See Opposition at 40, fn. 23. After I filed my opposition to the motion to dismiss, a front-page article appeared in *Tulsa World* on August 26, 2001.

¹² The *San Diego Union-Tribune* editorial appeared on August 14, 2001. It is no longer available on the newspaper's Web site. The *Oakland Tribune* editorial appears in Opposition at Exhibit 1.

¹³ In its opposition to my motion to compel public disclosure of point-to-point ODIS volume data, the Postal Service seemed to take some pleasure in announcing to the Commission that I had spent "time and energy" contacting some newspapers to inform them of the changes in service standards. Opposition at 4, fn. 4. The point of the Postal Service's announcement is unclear. Is the Postal Service suggesting that the newspaper articles were somehow less newsworthy or of less public importance because I brought the issue to the attention of some of the newspapers? Surely newspaper editors are more sophisticated in their independent judgment of newsworthiness of stories than the Postal Service seems to give them credit for. The fact that I informed some newspapers of the story was irrelevant to the discussion in my motion, and

In fact, in just the past week, a newspaper reporter contacted me to ask for an update on the progress of the litigation. The reporter suggested that the editorial board of the newspaper may be interested in revisiting this story.

This complaint has attracted the attention of Congress as well. On October 4, 2001, the Honorable Dan Burton, chairman of the House Committee on Government Reform, sent a letter to the postmaster general asking him to justify the new service standards and explain whether the Postal Service followed the necessary procedural requirements in adopting the new service standards.

Rarely does a change in postal services generate such intense public interest. Fortunately, in this instance review of this change in postal services rests with the Commission in a proceeding under section 3662. The Commission must ensure maximum public access to the information provided in this proceeding to enable me and other interested persons to communicate the information to the public and members of Congress.

In this instance, the point-to-point ODIS and EXFC performance data may provide compelling evidence undermining the Postal Service's central justification, in Docket No. N89-1 and now, for slowing the mail service of millions

therefore I had no reason to mention it. In light of the Postal Service's statement, it also is worth noting that three newspapers, including the *San Francisco Chronicle*, contacted me on their own after they learned about the story elsewhere. The San Francisco radio and television stations, as well as the Associated Press, likewise pursued the story on their own initiative. If anything, the Postal Service's observation suggests that the public would not have known about the changes in service standards if I had not informed some newspapers.

Similarly, in response to another Postal Service statement in footnote 4, the fact that I contacted Congressman Burton about these changes in service standards is totally irrelevant to the fact that Congressman Burton has asked the Postal Service to justify the new service standards and explain whether the Postal Service followed the proper procedural requirements in adopting the new service standards. The Postal Service does not appear to give either newspaper editors or the chairman of the House Committee on Government Reform much credit for independent thinking and judgment. And if I were trying to hide the fact that I contacted Congressman Burton, as the Postal Service seems to suggest in footnote 4, the Postal Service should reconcile this belief with interrogatory DFC/USPS-6, which asks the Postal Service to produce copies of inquiries from Congress concerning the changes in service standards — an interrogatory that surely would produce evidence of my correspondence with Congressman Burton.

The Postal Service should limit the contents of its pleadings to discussions that are relevant to resolving the issues at hand.

of customers. The Postal Service describes these reductions in service as improvements in service because the changes in service standards allegedly improve “consistency.” Mr. Gannon stated the goal of improving consistency in paragraph 18 of his declaration. Gannon Declaration at ¶ 18. Thus, in both Docket No. N89-1 and this proceeding, the Postal Service has stated *to the public* that these service standards somehow are justified because they improve consistency of delivery. The *Tulsa World* newspaper even quoted Mr. Gannon as saying that airlines did not provide “consistent” service. Point-to-point ODIS and EXFC data will settle the question and establish whether postal customers’ slower service is more consistent. Absent greater consistency, slower delivery could not possibly be justified even under the Postal Service’s questionable view of public preferences and customer needs.

Issues of consistency and speed are fundamentally relevant to resolving the question of whether the Postal Service is providing adequate mail service, as 39 U.S.C. § 3661(a) requires. Given the strong public interest in these changes in service standards, the Commission has a duty to ensure that the public has a right to evaluate the Postal Service’s evidence that allegedly supports slower mail delivery. By slowing mail delivery and then using the argument of greater consistency to justify the changes, the Postal Service, by its own actions, has made point-to-point ODIS and EXFC performance data a legitimate issue of public inquiry.¹⁴ Only point-to-point performance data will allow an examination of whether the particular downgrades from two days to three days have improved consistency of delivery; aggregated national data will not.

The public has a strong interest in persuading the Postal Service to reverse these changes. While this proceeding likely will conclude with a public report from the Commission, ultimately public and political pressure, based on the Commission’s influential public report, will be necessary to convince the Postal Service to restore two-day delivery standards. The task of mounting this

¹⁴ Mr. Gannon’s public statement presumably was not accidental, given that postal counsel apparently sat in with Mr. Gannon on numerous newspaper interviews. Opposition at 4, fn. 4.

campaign will be considerably more difficult for members of the public, who are the victims of the changes in service standards, if they do not have access to the data necessary to press their case.

Legal Standards

In a public proceeding before the Commission, public disclosure is the default. 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.” POR C2001-1/13 at 6. The burden of establishing that protective conditions are warranted rests squarely on the shoulders of the Postal Service. See POR C2001-1/5 at 6–7.¹⁵ The Postal Service’s burden is “relatively high.” *Id.* Therefore, even if the Postal Service constructs a plausible scenario under which release of this information could cause competitive harm, the presiding officer nevertheless must weigh the Postal Service’s commercial interests against the strong interest in public disclosure.

The Postal Service has not specifically explained how disclosure of ODIS and EXFC data would harm legitimate interests of the Postal Service to an extent that would outweigh the public’s substantial interest in knowing whether the Postal Service’s justification for slower mail delivery stands up to scrutiny. In fact, the Postal Service is relying solely on arguments of counsel advanced in the context of volume data, see Opposition, rather than on any evidence or sworn affidavits supporting the fear of commercial harm that would result from disclosure of point-to-point ODIS and EXFC performance data.

Extrapolating from the arguments concerning volume data suggests that the Postal Service would fear competitive harm if point-to-point ODIS or EXFC data revealed poor First-Class Mail service between particular ZIP Code pairs. These data, the Postal Service might argue, would inform competitors of markets susceptible to penetration or competition. This argument would suffer from two weaknesses. First, the Postal Service holds a monopoly over First-Class Mail.

¹⁵ POR C2001-1/5, filed July 18, 2001.

Second, the market would be subject to penetration or competition because customers in that market already would know the facts that the ODIS and EXFC data would show — that First-Class Mail service was deficient. Thus, the *disclosure* of the data would not make the market vulnerable to competition; the poor service would.

Contrary to first impressions, disclosure of data revealing service deficiencies in particular First-Class Mail markets would not necessarily harm the Postal Service because the Postal Service could respond as any good business would — by fixing the problem and making First-Class Mail competitive. The public has a right to know the quality of service that the Postal Service is providing in monopoly products. The solution to poor service is to shine a spotlight on it, not to hide it behind protective conditions.

Stated differently, the Postal Service has no valid claim for protective conditions under this scenario. If the Postal Service responds to an embarrassing disclosure about poor First-Class Mail service between certain ZIP Code pairs by improving the service, the Postal Service will avoid competitive harm by winning in the competitive marketplace. Not only would public disclosure of the data not have caused competitive harm, but the public disclosure also would have created a public benefit — improved First-Class Mail service. On the other hand, if the Postal Service does not respond to an embarrassing disclosure about poor First-Class Mail service between certain ZIP Code pairs by improving the service, the Postal Service might suffer competitive harm. However, the Postal Service should receive little sympathy for competitive harm that essentially was self-inflicted and avoidable. In short, the Postal Service has no legitimate case for applying protective conditions to protect potentially embarrassing First-Class Mail performance data if the Postal Service is not going to rectify the problem and improve the service. The Commission should not apply protective conditions when the main effect of the protective conditions would be to allow the Postal Service to hide its poor performance in providing services over which it holds a monopoly.

Another, broader consideration undermines the Postal Service's request for protective conditions. The presiding officer should not allow the Postal Service to hide behind the veil of protective conditions and secretly litigate changes in service standards that were implemented without the requisite opportunity for public comment that section 3661(b) required *before* the changes were implemented. The Postal Service's initial circumvention of section 3661(b) strongly counsels in favor of public disclosure in this proceeding.

In its opposition to my motion to require public disclosure of volume data in response to DFC/USPS-1, the Postal Service suggests that the Commission's *Rules of Practice* are subordinate to determinations of postal management under the Freedom of Information Act concerning the circumstances under which information in a complaint proceeding should be released to the public. Opposition at 6, fn. 5. The Commission recently rejected this position, holding that public disclosure is the default and that the presiding officer determines the appropriate circumstances for applying protective conditions. Order No. 1331 at 20, filed November 27, 2001.

Ultimately, in resolving this dispute the presiding officer must balance the public's right to evaluate the performance and claims of a public agency against speculative arguments from the agency's counsel about the harm that would result from public disclosure. If the presiding officer rules in the Postal Service's favor and grants protective conditions, and if ODIS and EXFC data ultimately show that mail delivery is now less consistent between many ZIP Code pairs than it was before the Postal Service changed the service standards, I conceivably may be barred from discussing this conclusion in public. Indeed, if these data prove valuable, I may need to file my testimony and brief under seal. I submit that a result that required me to evaluate the Postal Service's justification for these changes in service standards behind the veil of protective conditions would run contrary to all American principles of open and accessible public proceedings.

As a final note, I should clarify that no litigant or member of the public has an obligation to explain his/her use of publicly available information in a Commission proceeding. I have provided examples of possible uses of the ODIS and EXFC data solely for assisting the presiding officer in weighing the benefits of public disclosure against the Postal Service's perceived commercial interests.

For the reasons explained above, the presiding officer should deny the Postal Service's motion for protective conditions and put an end to the secrecy surrounding recent changes to the speed of First-Class Mail delivery — the most fundamentally important service that the Postal Service offers.

Respectfully submitted,

Dated: December 3, 2001

DOUGLAS F. CARLSON

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon the required parties in accordance with section 12 of the *Rules of Practice*.

DOUGLAS F. CARLSON

December 3, 2001
Santa Cruz, California