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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

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

Complaint on First-Class Mail
Service Standards

Docket No. C2001-3

REPLY OF THE UNITED STATES POSTAL SERVICE
TO DOUGLAS CARLSON ANSWER IN OPPOSITION TO THE APPLICATION OF
PROTECTIVE CONDITIONS
TO THE RESPONSE TO DFC/USPS-9
(December 10, 2001)

The United States Postal Service hereby files its reply to the December 3, 2001, opposition of Complainant to the application of protective conditions to data responsive to DFC/USPS-9.

The issues before the Commission in this proceeding relate to whether the First-Class Mail 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 comparable periods before and after the service standard changes at issue in this proceeding, for each of the 849,106 3-digit ZIP Code area origin-destination pairs in the Postal Service's Origin Destination Information System (ODIS) database,¹ or for any of the 90 performance clusters covered by the External First-Class Mail (EXFC) system, DFC/USPS-9 requests that the Postal Service provide the following data: on-time delivery percentage and proportion of mail delivered in each number of days.

¹ But limited to data reflecting mail with either an origin or a destination in 12 specified western states, and for which the service standard was changed from 2-days to 3-days.

Some responsive data can be generated by the Postal Service's Origin-Destination Information System (ODIS). Based upon sampling of the mail stream, ODIS is designed to produce statistically reliable estimates of the volume of First-Class Mail that travels between each of the 849,106 First-Class Mail 3-digit ZIP Code area pairs² on a quarterly basis. ODIS also generates data from which it can be estimated on a quarterly basis what percentage of mail took a specified number of days in transit from the date of postmark until the date of arrival at the delivery unit between each 3-digit ZIP Code pair. On a point-to-point basis, ODIS generates data from which it can be estimated the percentage of mail that spent either one, two, three, four, or five days in transit.

EXFC is not designed to provide statistically reliable point-to-point data. Instead, for each of the 90 participating performance clusters, EXFC generates estimates of on-time percentage for First-Class Mail either originating from or destinating at a particular performance cluster by service standard (overnight, 2-days, 3-days), based upon the seeding of test mail pieces. For each performance cluster, EXFC also can generate data showing what percentage of originating and destinating mail for each service standard (overnight, 2-day and 3-day) took from one to five days to be delivered.

Thus, there is no dispute that the Postal Service has data responsive to DFC/USPS-9. The Postal Service stands ready to provide the responsive data for use in resolving the issues raised by the complaint in this proceeding. However, for the reasons referenced in its November 6, 2001, objection to this interrogatory, the Postal Service insists that such disclosure be made subject to appropriate protective conditions designed to respect the Postal Service's proprietary, commercial and competitive interest in not having the data accessible to its competitors.

² What is commonly referred to as "point-to-point" data.

The instant dispute relating to DFC/USPS-9 is similar, if not identical to disagreement between Complainant and the Postal Service regarding the conditions for access to ODIS point-to-point volume data requested in DFC/USPS-1. In his December 3, 2001, Answer in Opposition regarding DFC/USPS-9, Complainant repeats many of the arguments advanced in his November 7, 2001, motion seeking to compel a response to DFC/USPS-1. The Postal Service respectfully invites the Commission's attention to its November 14, 2001, opposition to that motion, and asks that it be read in conjunction with the instant pleading.

The Postal Service routinely publishes national aggregate ODIS First-Class Mail time-in-transit data, as well as aggregate destinating scores by service standard for each EXFC performance cluster. The Postal Service provides national aggregate ODIS and EXFC days-to-deliver data in response to Freedom of Information Act requests and in response to discovery requests in Commission proceedings.³ Thus, for general purposes, there is arguably a sufficient level of publicly available data with which to make general assessments of the quality of First-Class Mail service.

The complaint in the instant proceeding raises issues that call for a more particularized and detailed analysis of First-Class Mail service than can be made on the basis of publicly available data. Resolution of the issues raised by the instant complaint calls for access to portions of the ODIS and EXFC databases that the Postal Service considers to be commercially sensitive and privileged from public disclosure. Accordingly, to strike a proper balance between the need to protect its commercial interests and the Commission's need to issue a public report under section 3662 to resolve the complaint in the instant proceeding, the Postal Service proposes that Docket

³ For instance, see the Docket No. R2001-1 responses to DFC/USPS-5 and UPS/USPS-T28-13.

No. C20001-3 intervenor access to data requested by DFC/USPS-9 be made subject to protective conditions. It has been the long-standing policy of the Postal Service to not publicly disclose point-to-point ODIS time-in-transit data⁴ 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.⁵ Public disclosure of point-to-point ODIS time-in-transit data 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 a policy of limiting public access to certain commercially valuable data, such as point-to-point First-Class Mail ODIS time-in-transit data or days-to-deliver data from ODIS or EXFC. 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,

⁴ Or days-to-deliver data from either ODIS or EXFC.

⁵ See, generally, Docket No. R2001-1, USPS-T-10.

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 point-to-point transit or delivery times of shipments they carry between various origin-destination pairs.⁶

It is the view of the Postal Service, as expressed in its November 14th opposition to the motion regarding DFC/USPS-1, that the principles underlying section 410(c)(2) should be read in harmony with the Commission's Rules of Practice and Procedure.⁷ 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 time-in-transit data and point-specific ODIS and EXFC days-to-deliver data.⁸ The Postal Service acknowledges that

⁶ Nor are any of these firms known to publish the percentage of shipments that are delivered by day for each service standard applicable to each origin-destination pair or to a particular origin or destination.

⁷ Thus, contrary to the assertion at page 9 of Complainant's December 3rd answer in opposition, the Postal Service does not argue that the Commission's Rules of Practice and Procedure are subordinate to section 410(c)(2).

⁸ The Postal Service's response to DFC/USPS-9 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. There is no reason to expect that such agreements cannot again be reached in the future for purposes of legislative oversight activity. Should the legislative oversight process one day extend to matters at issue in Docket No. C2001-3, the Postal Service anticipates that the Congress will continue the practice of fulfilling its responsibilities while respecting the commercial, and competitive interests of the Postal Service.

protective conditions represent an extraordinary remedy for discovery disputes.

Accordingly, requests for such relief are rarely made.

At page 3 of his December 3rd answer, Complainant argues that the requested data are relevant to a determination of the "adequacy" of First-Class Mail service under the current service standards, within the meaning of sections 403(a) and 3661(a). At pages 5 and 6, he argues that the requested data are relevant to a determination of whether the service standard changes at issue have affected the "consistency" with which First-Class Mail service has been provided. The Postal Service does not disagree. However, Complainant does not argue that disclosure of the requested information under protective conditions would frustrate his ability to pursue resolution of these issues. Instead, his December 3rd pleading focuses on his desire to use the requested data for purposes outside the scope of this docket or after its conclusion.

At the top of page 9, in his zeal for unrestricted access, Complainant goes so far as to argue that the Commission should deny the Postal Service's request for protective conditions and require public disclosure of the requested data as a punitive measure. In other words, because he has alleged that the Postal Service did not comply with section 3661, when it did not submit the finalization of Phase 2 of its Docket No. N89-1 realignment plan for a second round of Commission review, the Commission -- before reaching a legal conclusion in response to that allegation -- should punish the Postal Service by withholding protective conditions. Such a suggestion is offensive and contrary to any system of due process.

At page 6, Complainant argues that the Commission has a duty to ensure that the public has a right to evaluate evidence related to the service standard changes at issue in this proceeding. With all due respect, the Postal Service considers that Commission's duty is more limited. The Commission's Rules of Practice and Procedure

do not operate for the purpose of establishing the Commission as a gatekeeper or decision-maker for public disclosure of records within the control and custody of the Postal Service. However, the Commission does have responsibility for managing intervenor access to postal data that the Commission deems to be relevant and necessary to the resolution of specific issues in its docketed proceedings.⁹ And when those data are privileged in nature, in accordance with its own rules established for this purpose, the Commission's responsibility extends to the establishment of protective conditions that respect the commercial and proprietary interests involved, while permitting intervenors access to the data strictly for use in resolving the specific issues in that docket to which the data relate. The circumstances facing the Commission here are not unusual in this regard. See generally, Docket No. R2001-1, Presiding Officer's Ruling No. R2001-1/17 (December 7, 2001).

At pages 3-4 of his December 3rd answer in opposition, Complainant recounts the media attention he generated after filing his complaint, reveals the possibility of a follow-up interview by one newspaper,¹⁰ and argues that such activity confirms that a strong public interest in a public hearing on . . . the changes in First-Class Mail service standards " That hearing has been granted by operation of PRC Order No. 1320 (September 12, 2001). However, nothing in that Order nullifies the application of the

⁹ In certain respects, the Commission's rules are a testament to public access and participation in litigation of matters of public import. In contrast to civil court litigation where participation is often restricted to named parties and their representatives, literally any member of the public who intervenes in a particular Commission docket in a timely manner can engage in discovery and obtain access to information deemed relevant and necessary to the resolution of the issues in that docket. Thus, whether two or two hundred members of the general public intervened in this proceeding in a timely manner, each of them could obtain access to any information filed under seal, subject to any applicable protective conditions.

¹⁰ Presumably, not the *Chicago City Paper*.

Commission's rules regarding the application of protective conditions for relevant, but privileged data. Complainant's assertion ignores the distinction between the determination to conduct a public hearing under 39 C.F.R. § 3001.81 *et seq.* and the resolution of the question of whether all data arguably relevant to the issues raised in that hearing should be publicly disclosed.

Complainant apparently fails to grasp the impact of protective conditions that might be applied in this instance. At page 9 he argues that, if they are applied, and if the data "show that mail delivery is now less consistent between many ZIP Code pairs than it was before the Postal Service changed the service standards, . . . [he] conceivably may be barred from discussing this conclusion in public." As the Commission is well aware, under appropriate circumstances, it is a simple enough task to publicly state certain general legal or factual conclusions which are based, in whole or in part, upon privileged data without revealing or implying what those privileged data specifically state, or otherwise compromising their privileged nature.¹¹

At page 9 of his December 3rd answer in opposition, Complainant raises the specter of having to file testimony and a brief, at least in part, under seal.¹² He argues

¹¹ Thus, one could publicly state the conclusion that a particular privileged datum reflected a higher or lower score than another, or that a particular privileged score had gone up or down in comparison to a privileged baseline score, without revealing or indicating what any of the specific privileged data are, and not be in violation of applicable protective conditions. The Postal Service presently cannot judge whether any public statements that Complainant has yet to specify or utter would violate any particular protective conditions. And assuming the application of protective conditions here, the Postal Service does not intend to offer its counsel for the purpose of guiding Complainant through his next public media campaign.

¹² In response to similar concerns expressed informally, the Postal Service has already informally offered to assist Complainant with that process, as the time for filing of testimony or briefs becomes imminent.

that any such protective conditions “run contrary to all American principles of open and accessible public proceedings.” To the contrary, to the extent that the Commission’s rules operate to protect privileged information from public disclosure, but permit intervenor access to such data to resolve issues of public importance, the Commission’s rules should be viewed as yet another facet of the brilliant gem of due process.

At page 7 of his answer in opposition, Complainant argues that the Postal Service has not specifically explained how disclosure of the requested ODIS and EXFC data would harm its legitimate interests sufficiently to outweigh the public’s interest in knowing whether the Postal Service’s justification for the service standard changes at issue in this proceeding withstand scrutiny. To the contrary, that explanation was offered in the materials referenced in the Postal Service’s November 6th objection to DFC/USPS-9 and is further clarified below.

First-Class Mail ODIS point-to-point time-in-transit data are used by postal management to evaluate First-Class Mail processing, transportation and other logistical operations among the 849,106 3-digit ZIP Code area pairs, to isolate potential links in the mail processing system and transportation network as problem areas and to target them for appropriate diagnostic or corrective action. The data also have the added value of helping postal management to assess where competitors influenced by considerations of the level of service provided in particular localities or between specific city-pairs might seek to increase their market share¹³ to the detriment of the Postal Service. These data, therefore, help postal management to determine how to efficiently deploy its limited resources in taking steps to preserving postal market share.

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

¹³ For the delivery of mailable matter as First-Class Mail.

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 local or 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. Access to ODIS First-Class Mail time-in-transit scores between Points A and B and the ability to compare them to the scores between Points A and C or between points D and E would give a postal competitor commercially valuable information with which to better identify the markets in which it should attempt to compete against the Postal Service. In the absence of unlimited access to the ODIS and EXFC databases, competitors must rely on their own resources to compete. They are not able to obtain the unfair advantage of being able to tap into postal databases while their own are immune from postal or other competitor access.

At the bottom of page 7 of his December 3rd answer in opposition, Complainant attacks this argument by asserting that the existence of the Private Express Statutes nullifies any claim of competition or competitive harm. Striking a balance in relation to the various public service obligations of the Postal Service that otherwise would not be assumed if it were purely a market driven private entity, the Private Express Statutes serve the purpose of enhancing the volume of First-Class Mail matter by generally

imposing price restrictions on private competition for the carriage of "letters."¹⁴ The Statutes do not grant a monopoly to the Postal Service or bar private competition in the carriage of the "letter" portion of the First-Class Mail stream or prevent competitors from exploring how and when and where to attempt to increase their respective market shares in the delivery market for matter that could be sent First-Class Mail. Nor do the Statutes restrict the private carriage of the significant "non-letter" portion of the First-Class Mail stream.¹⁵

The Postal Service is not aware of the existence of any firm competing for the carriage or transmission of First-Class Mail matter that routinely publishes point-to-point time-in-transit or days-to-deliver scores. Postal Service access to such data would permit the Postal Service to determine how and when and where to strengthen its efforts to incrementally improve its own market share and to better assess the precise nature of its own vulnerability to diversion. The universal non-disclosure of competitors' data is instructive regarding whether similar postal data are inherently commercially sensitive and whether it would be in keeping with good business practice for a service provider facing competition to routinely publicly disclose such data.

Complainant's second argument, advanced at the top of page 8, is that First-Class Mail:

would be subject to penetration or competition because customers in

¹⁴ As defined by 39 C.F.R. § 310.10(a).

¹⁵ ODIS and EXFC data do not distinguish between matter on the basis of whether it fits the definition of "letter" for purposes of the Private Express Statutes. Thus, despite the different degrees of competition facing different portions of the First-Class Mail stream, the fact that the data do not differentiate between "letters" and "non-letters" requires that protective conditions extend to cover the requested data, even if the Commission were to decide that less protection was warranted for data reflecting "letter" service performance.

that market already would know the facts that the ODIS and EXFC data would show – that the First-Class Mail service was deficient. Thus, the *disclosure* of the data would not make the market vulnerable to competition; the poor service.

The fact that a postal customer who does not have access to point-to-point ODIS data may have a *feeling* or an *opinion* about what the data may show does not eviscerate the commercial, proprietary or privileged nature of the data. There are customers of every service provider who have an idea about the service they experience. Taken to its logical conclusion, Complainant's argument is that if any of these customers should assert to the Commission that they have a *hunch* what the data are likely to show, then the Commission should require those service providers to publish all their service performance data.

The issue is not whether someone would characterize a particular time-in-transit score for any particular origin-destination pair as "poor" or "deficient." To prevent postal competitors from obtaining an unfair advantage in determining how and where and when to focus their competitive efforts, their access to all point-to-point data must be restricted, irrespective of how those scores could be characterized. Accordingly, it is postal policy not to broadcast the point-to-point scores of its highest performing origin-destination pairs, or distinguish between its "least vulnerable" or "most vulnerable" origin-destination pairs. The determination by a private sector competitor to compete in a particular delivery market is driven by a myriad of factors, including the level of service it thinks it can provide relative to its competitors. In different markets, different factors can have a different weight. Every bit of commercially sensitive data one can obtain about a competitor's operations contributes to the mosaic. The only practical approach to the public disclosure or the application of protective conditions under the circumstances is to make a general blanket policy.

At page 8, Complainant argues that public 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.¹⁶ This argument implicitly acknowledges several things. First, that the Postal Service has commercial interests that are threatened by competition. Second, that irreparable harm to those business interests could result from public disclosure of sensitive data. While the Postal Service appreciates Complainant's faith that it could undertake measures to fix problems, the Postal Service still considers the risk of irreparable harm that could result from competitors' access to valuable operating data too great to rely on his faith that things might turn out all right in the end. Lost business is lost revenue. Lost business today can be business lost permanently.

In the final paragraph on page 9, Complainant argues that any harm that would result from public disclosure of the requested data would be "self-inflicted and avoidable." This argument ignores the fact that competitive harm flows from what competitors would do with highly valuable, commercially sensitive operating data, once they got their hands on it and put it to use. The harm does not occur without such access. The mere existence or substance of the data does not result in harm. Complainant apparently believes that the Commission's resolution of this discovery dispute should be motivated by a desire to either chasten the Postal Service for its imperfections or to influence postal management into make certain operational decisions or changes. While the latter of these might be a legitimate objective of a public report issued under section 3662, it would seem inappropriate for the

¹⁶ Any good business also would insist upon protection of its commercially sensitive data from public disclosure. And the fact that one might be a shareholder of that business does not entitle one to unrestricted access to internal company records or the right to publish those records in support of one's personal agenda.

Commission to make discovery determinations in a section 3662 proceeding for the purpose of influencing or coercing postal operational changes about which such a public report might later be issued.

There is a simple solution to this dispute. The parties can be granted restricted access to the requested sensitive operating data. They can then analyze the data and argue about what does or does not need "fixing." This can be accomplished in a manner that provides a basis for a public report from the Commission regarding what does or does not need "fixing" – all subject to conditions that avoid any risk of disclosure of commercially valuable information to postal competitors and competitive harm to the Postal Service. The interests of the public would be served. The commercial interests of the Postal Service would not be harmed.

Complainant argues that the public has a right to know the quality of service that the Postal Service providing in "monopoly" products. The Postal Service agrees that the public is entitled to a certain level of information with which to evaluate the quality of First-Class Mail service and makes certain data routinely available to the public. However, the public's need to come to some conclusion about the quality of First-Class Mail service does not require unfettered public access to all such data any more than it requires unfettered public access to all postal mail facilities by 280,000,000 self-appointed private inspectors general.

The Postal Service shares Complainant's goal that the outcome of this proceeding will be a determination regarding the justification for the service standard changes at issue. The Postal Service has not requested any protective conditions that would have the effect of preventing the Commission from publishing any conclusions about the application of sections 3661 or 3662 to those service standard changes. The Postal Service has not sought limitations on intervention in this proceeding or an

absolute bar on intervenor access to commercially sensitive data that could be useful in resolving the issues raised by the complaint. The views of the Postal Service and the Complainant regarding the legal conclusions which should be reached in response to the complaint in this docket are apparently irreconcilable. Nevertheless, the Postal Service is willing to allow intervenors access to commercially sensitive operating data for the purpose of bringing this docket to a resolution, provided such access is regulated to prevent harm to the commercial's commercial and competitive interests.

In support of this motion, the Postal Service will submit several Declarations no later than Wednesday, December 12th.

For these reasons, the motion to compel disclosure of the data requested by DFC/USPS-9 without protective conditions should be denied.

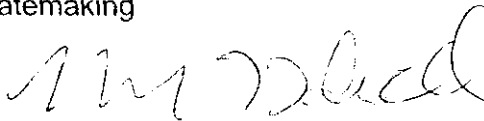
Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

Daniel J. Foucheaux, Jr.

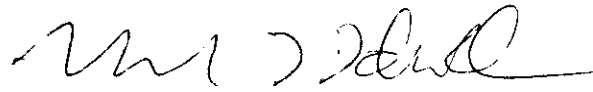
Chief Counsel
Ratemaking



Michael T. Tidwell
Attorney

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.

A handwritten signature in black ink, appearing to read "Michael T. Tidwell", written over a horizontal line.

Michael T. Tidwell

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