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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

PRESIDING OFFICER'S
RULING NO. R2001-1/20

UNITED STATES OF AMERICA
POSTAL RATE COMMISSION
WASHINGTON, DC 20268-0001

Postal Rate and Fee Changes

Docket No. R2001-1

PRESIDING OFFICER'S RULING ON
OCA MOTION TO COMPEL PRODUCTION
OF INFORMATION REQUESTED IN
OCA/USPS-64(c), 65-73, 77-78

(Issued December 14, 2001)

On November 13, 2001, the Office of the Consumer Advocate filed a motion¹ to compel the production of a variety of documents and other objects by the Postal Service. The Service had objected to OCA's requests on several grounds, including irrelevance, overbreadth, undue burden, confidentiality, and other forms of privilege;² it amplified on the bases of its objections in an Opposition³ filed on November 20.

In view of the number of interrogatories at issue, they will be grouped by general subject matter for consideration below.

OCA/USPS-64(c) and -65. These interrogatories concern the American Customer Satisfaction Index (ACSI), a national indicator of customer satisfaction with the quality of goods and services available to household consumers in the United States, the Postal Service's participation in it, and OCA's requests to provide its results.

OCA/USPS-64(a) asks whether the Postal Service participates in the ACSI. The Service voluntarily responded that it is included in the Index. Following up on this affirmative response, OCA/USPS-64(c) asks the Service to "furnish copies of all

¹ Office of the Consumer Advocate Motion to Compel Production of Documents Requested in OCA/USPS-64(c), 65-73, 77-78, November 13, 2001.

² Objections of United States Postal Service to Interrogatories OCA/USPS-64-73, 77-78, October 29, 2001.

³ 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.

results.” Similarly, OCA/USPS-65 asks whether the Postal Service has ever participated in the ACSI and, if so, to furnish copies of the results. The Service responded that it has been included in the Index since its inception, as part of the Transportation, Communications and Utilities sector. However, as with OCA/USPS-64(c), it objected to providing results on the grounds of irrelevance, overbreadth, and confidentiality.

In its Motion to Compel, OCA argues that the requested ACSI results are relevant, and the Service should be required to produce them. According to OCA, the Service’s claim that such results are irrelevant because they cannot be tied back to any specific postal class or service was definitively rejected in P.O. Ruling R2001-1/7.⁴ OCA Motion at 5-6. OCA also reiterates its argument that such results would yield information on quality of service issues, which in turn bear on the estimated size of a reasonable provision for contingencies. In OCA’s view, P.O. Ruling R2001-1/7 establishes the relevance of information on consumer satisfaction and validates this line of argument. *Id.* at 6-7.

Regarding the Service’s objection that it is under contractual obligation not to release the ACSI results, OCA responds that this concern may be remedied by adopting protective conditions providing for limited access, as provided for in other rulings to date. OCA also submits that the Service should be required to explain why it has entered into contractual arrangements that limit its ability to provide the Commission with relevant information that has foreseeable rate applications. *Id.* at 5.

In its Opposition, the Postal Service “continues to argue strenuously that the requested information from the American Customer Satisfaction Index is irrelevant.” Opposition at 3. According to the Service, OCA’s reasoning concerning the purported interrelation of service quality, mail volume, and the size of a reasonable contingency provision is inadequate to establish the relevance of the information sought, and “appears to be inviting the Commission to range far beyond the scope of this case, and

⁴ Presiding Officer’s Ruling No. R2001-1/7, Presiding Officer’s Ruling Granting, in Part, OCA Motion to Compel, November 7, 2001.

beyond its statutory authority, generally.” *Id.* Furthermore, the Service claims that information on aggregate customer satisfaction levels cannot inform the process of volume estimation as established in Commission proceedings to date, which forecasts on a class-by-class basis rather than for the total mailstream. *Id.* at 4.

The Service also disputes OCA’s argument that release under protective conditions would be sufficient to allay concerns regarding the confidentiality of the ACSI results, claiming it “misapprehends the nature of Postal Service’s control over the information.” *Id.* at 2. The Service represents that the American Society of Quality owns the results in its possession; that, as a subscriber to the Index, the Service is bound by guidelines that strictly limit the use and distribution of the information; and that even release under protective conditions would violate the terms of the subscription contract. Accordingly, the Service claims that it cannot provide the non-public ACSI data to the Commission. However, the Service adds, nothing would appear to bar the OCA or the Commission from obtaining access to the results, provided there is a willingness to pay for a subscription and abide by the terms of the subscription contract. *Id.* at 2-3.

The Postal Service’s arguments against the potential relevance of the requested customer satisfaction results are not persuasive. As I found in P.O. Ruling R2001-1/7, arguments against the merits of testimony OCA might sponsor using the requested information are premature at best.⁵ The question to be addressed in the discovery phase of this proceeding is whether the request for information “appears reasonably calculated to lead to the discovery of admissible evidence.” 39 C.F.R. §§ 3001.26(a), 27(a). Inasmuch as the requested ACSI results are likely to quantify the level of satisfaction household consumers report for services provided by the Postal Service, they may illuminate the value such consumers assign mail services both as senders and recipients, in response to the § 3622(b)(2) factor. Thus, as OCA asserts, the requested information is likely to bear on the quality of service issue, which the Reorganization Act directs the Commission to consider in ratemaking. Also, to the

⁵ Presiding Officer’s Ruling No. R2001-1/7, November 7, 2001, at 3.

extent results for successive years bridge the implementation of intervening rate changes, the requested information may also illustrate “the effect of rate increases upon the general public,” in response to the § 3622(b)(4) factor.

However, the Postal Service’s contractual obligation to the American Society of Quality to maintain the confidentiality of the results is a much more serious obstacle to disclosure. Contrary to OCA’s suggestion, I find nothing sinister or questionable about the Service’s agreement to be bound by a non-disclosure obligation of this kind. Such provisions are not unusual in the field of opinion research. Indeed, in a past proceeding the Commission recognized a pledge of confidentiality as a basis for declining to compel the Postal Service to release relevant information sought in discovery.

In Docket No. MC93-1, a Postal Service witness sponsored testimony that reported the results of a survey of the parcel shipping practices of firms in the mail order industry. The results were used to provide evidence of an identifiable market for a small parcel mail classification of the kind the Service proposed in the proceeding. When other participants filed discovery requests seeking production of the raw data underlying the reported survey results, the Postal Service objected on the ground of commercial sensitivity, stating that it obtained data from the surveyed companies under a pledge of confidentiality. After the requesting parties attempted to resolve the impasse informally with the Postal Service, one of them filed a motion to compel production, and the Presiding Officer in the case certified the question to the entire Commission.

In Order No. 976⁶, the Commission weighed the competing interests of participants’ procedural rights against the potential harm of disclosing the requested data. On one hand, the Commission observed “that parties have a fundamental right to test data and the assumptions drawn from those data that the Service relies on in its presentation.” Order No. 976 at 3. On the other, it stated its view that it is “highly desirable for the Postal Service to obtain market survey information, and to have

⁶ Docket No. MC93-1, Order Accepting Certification and Denying Motion of United Parcel Service to Compel Production of Data, May 28, 1993.

analysis of such information presented in our proceedings.” *Ibid.* Recognizing that disclosure of survey data provided under a pledge of confidentiality could chill the Service’s ability to obtain such information in the future, the Commission stated its reluctance to order the production of such information. On the basis of the latter consideration—and even though informal procedures had proven unsuccessful—the Commission declined to direct the Postal Service to produce the requested survey data. *Id.* at 3-7.

In this controversy, the restrictions imposed by the American Society of Quality on the Postal Service’s use of its customer satisfaction results serve as the functional equivalent of a pledge of confidentiality. The first paragraph of the advertising use guidelines attached to the Service’s Opposition of November 20 states that subscribers “should not publicly use, distribute or reproduce any data or information from ACSI...unless and until that data is publicly released or published by ASQ, the University of Michigan and/or CFI Group.” Postal Service Opposition, attachment at 1. Further, the second paragraph states:

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.

The ACSI Application for Subscription for 2001, subsequently filed by the Postal Service, contains similar restrictions.⁷

Independent investigation reveals that the University of Michigan Business School has published overall ACSI scores both for the Postal Service as a whole and

⁷ Notice of Filing of the Postal Service of Supplemental Material to Opposition of United States Postal Service to OCA Motion to Compel Production of Documents Requested in OCA/USPS-64(c), 65-73, 77-78, December 6, 2001, Attachment, under heading “Conditions.”

for the Package and Express services it offers.⁸ The published ACSI scores apply to a period beginning with baseline measurements taken in Summer, 1994, and report first quarter results from calendar years 1995 through 2001. Consequently, the Postal Service is not restricted from publicly releasing these overall results for the reported periods, and I shall direct it to produce them and any other comparable results that it establishes as having been publicly released by ASQ, the University of Michigan or CFI Group.

With regard to the specific values of variables internal to the ACSI model—customer expectations, perceived quality, value, customer retention and complaints—the guidelines provided by the Service would appear to preclude their voluntary public distribution. It is unclear, however, whether ASQ's guidelines for subscribers' planned use of ACSI results—described in the attachment as "Advertising Use Guidelines"—would reasonably extend to production of this more detailed information for use in a public proceeding such as this rate case.⁹ The availability of protective conditions to prevent public disclosure of commercially sensitive information, and to preclude access by parties who might compromise or misappropriate it, would appear to be sufficient to protect ASQ's proprietary interests in the more detailed information.

However, in view of the American Society for Quality's proprietary interest in the more detailed data, I believe that it should be given an opportunity to inform the Commission of its position on this matter. Consequently, I shall withhold a ruling on this second category of ACSI information, pending the Postal Service's communication with

⁸ See the summary table "Transportation/Communications/Utilities & Services Sector, Industry, and Company Scores 1995-Q1/2001, May 21, 2001" at the rows labeled "U.S. Postal Service—Package & Express" and "U.S. Postal Service," published at: <http://www.bus.umich.edu/research/nqrc/Q1-01.html#usp>.

⁹ In a pleading responsive to the Postal Service's Opposition, OCA argues that "neither the guidelines nor, apparently, the Subscriber application contain any provision for the dissemination of the material pursuant to court order or other legal process in the event information is required to be used or distributed in a non-public manner. The guidelines are silent as to the non-public use of information." Office of the Consumer Advocate Reply to Opposition of United States Postal Service to OCA Motion to Compel Production of Documents Requested in OCA/USPS-64(C), 65-73, 77-78, filed November 28, 2001, at 3. OCA's Reply was accompanied by a motion for leave to file it, which shall be granted.

the American Society for Quality to determine whether it opposes provision of these additional materials.¹⁰ I shall direct the Service to contact ASQ with a request to produce all materials sought by OCA in these interrogatories, specifying that all materials not yet publicly released could be made accessible to participants in the case only under the restrictive conditions in force under earlier rulings, and requesting that ASQ address these matters in a letter to be made available to the Commission.

OCA/USPS-66—73. OCA characterizes this rather lengthy group of interrogatories as seeking “to assess the accuracy of Postal Service advertising and consumer perceptions of the accuracy of such advertising.” OCA Motion at 9. Interrogatories OCA/USPS-66, 68, 70, and 72 ask for videotapes of television ads for Priority Mail and Express Mail and cassettes of radio advertising for those two services. Subpart (a) of each interrogatory asks for internal Postal Service reports, studies, etc. of the accuracy or truthfulness of the identified advertisements. Subpart (b) of each of the four interrogatories asks for compilations, studies or tabulations of consumer complaints about the identified advertising. Interrogatories OCA/USPS-67, 69, 71, and 73 ask for “storyboards” used to develop the advertising identified in response to the immediately previous interrogatory. Collectively, the group of interrogatories seeks the actual contents of advertisements, internal Postal Service analyses of their accuracy and truthfulness, and data on consumer perceptions of their accuracy or truthfulness.

The Postal Service objected to these interrogatories generally on the ground of relevance. It also objected to the four “storyboard” interrogatories as overbroad, redundant and unduly burdensome, and to Subparts (a) of interrogatories 68, 68,70 and 72 on the additional ground that they seek to expose the deliberative, decisionmaking processes of postal management, and encompass privileged and confidential attorney/client communications.

In its motion, OCA argues that the four interrogatories that seek actual advertisements together with studies of their accuracy and consumer perceptions

¹⁰ In light of this disposition, I shall deny the OCA’s Motion of December 11 for leave to file a supplement to its Reply.

thereof are directly relevant because they attempt to elicit information that follows up on the Commission's expression of concern about such matters in the R2000-1 decision. OCA Motion at 9-10. Regarding the requested storyboards, OCA claims they are relevant because they would reveal how advertisements were modified—and thereby became more or less truthful—in the development process; as to the Postal Service's claims of overbreadth and undue burden, OCA attempts to mitigate these possible concerns by agreeing to limit its requests to storyboards for advertisements run in calendar years 2000 and 2001. *Id.* at 10-11.

OCA also challenges the Service's grounds for objecting to the request for internal Postal Service documents bearing on the accuracy or truthfulness of the identified advertisements, arguing that the Service's blanket claim of privilege is unsubstantiated and that general objections of this kind have been rejected in past Commission proceedings. According to OCA, the Service should be required to file a detailed privilege log of all responsive documents, and to cite detailed legal authority in support of invoking the deliberative process privilege, accompanied by a sworn affidavit from the Postmaster General. *Id.* at 11-12.

The Postal Service responds that the relevance of the requested documents must be evaluated in light of the Commission's limited statutory mandate, which the Service asserts does not extend to evaluating the content of its advertising or to directing postal management to review its veracity. Postal Service Opposition at 5-6. Notwithstanding the Commission's expression of concern in the R2000-1 decision, which it characterizes as a "suggestion" within the realm of the Commission's discretion, the Service asserts that Express Mail's "on-time failure rate...simply does not serve to bring review of the content of such advertising within the scope of the Commission's statutory authority." *Id.* at 7.

Regarding the specific categories of information sought by OCA, the Service states that it does not track or tabulate consumer complaints regarding the truthfulness of television or radio advertisements, and that such information would not be relevant in any event. *Id.* at 8. According to the Service, the requested internal documents relating

to the accuracy of any identified advertisements are irrelevant because they “would tell the Commission nothing either about representations actually made to the public, or about levels of service actually provided.” Also, in the Service’s view, “[I]t is not the Commission’s job to regulate the means by which the Postal Service develops or analyzes its advertising campaigns.” *Ibid.* Finally, the Service states that the requested storyboards do not exist in the case of radio advertising, and argues that the television story boards are of no relevance or concern to the Commission in the performance of its jurisdictional responsibilities in a rate proceeding. Additionally, the Service asserts that this type of pre-decisional information requires protection from disclosure because inquiry into such matters would intrude on the Service’s managerial prerogatives and have a chilling effect on its developmental activities. *Id.* at 9-10.

I disagree with the Postal Service’s general premise that its advertising activities, and the specific content of its advertisements, lie wholly outside the realm of the Commission’s jurisdictional responsibilities. Advertising—in addition to the officially-published terms and conditions of service—is likely to have a major influence on the public’s perception of the potential values of the various services offered by the Postal Service. Comparing actual service performance with published standards and representations in advertisements is a valuable “reality check” when the Commission is called upon to assess the values of different mail services under § 3622(b)(2). Indeed, this was the nature of the Commission’s analysis in the cited portion of the R2000-1 decision, in which it moderated the rate increase recommended for Express Mail on the basis that “it is already quite costly, and its quality of service can not really be considered ‘premium’.”¹¹ Consequently, the content of advertisements about mail categories under consideration in a Commission proceeding may constitute admissible evidence, and I shall grant OCA’s motion with respect to the requested copies of the television and radio advertisements themselves.

However, I do not find sufficient justification to direct the Service to produce the other requested categories of information regarding the advertisements. The potential

¹¹ PRC Op. R2000-1, November 13, 2000, para. 5013.

relevance of the storyboards for the television advertisements is too attenuated to warrant the burden of conducting a search; they are likely to be largely duplicative of the advertisement itself, and any variances would not have influenced the perceptions of the mailing public. For much the same reason, I find the requested internal Postal Service documents to be insufficiently relevant to order their production. Whatever management views of the truth and accuracy of Postal Service advertisements they may contain, the internal documents would not have influenced the mailing public's perception of the value of postal services. In this regard, the advertisements speak for themselves.

OCA/USPS-77. Citing a newspaper article reporting the Postal Service's intention to conduct a nationwide mailing concerning potential biohazards in the mails, this interrogatory requests a copy of that warning, including an estimate of the costs of preparing and mailing it. The Postal Service objects on the ground that the requested information is irrelevant.

In its Motion to Compel, OCA states that the interrogatory's objective is to establish the cost of sending notification letters to Postal Service customers throughout the postal system. Inasmuch as OCA may recommend such mailings as corrective measures for allegedly false or misleading claims in previous Postal Service advertisements, it "seeks cost information on the most recent such mailing...so that the record can reflect actual costs for such a mailing and the Commission can consider the proposed remedy on a specific factual record." OCA Motion to Compel at 12-13.

The Postal Service responds by reiterating that the requested information is irrelevant. According to the Service, the use to which OCA intends to put the response would involve a remedy "the Commission is completely without the broad regulatory authority to order...." Postal Service Opposition at 10.

Once again, it is unnecessary to judge the soundness of a party's intended use of requested information in order to rule on whether it should be produced in discovery. The interrogatory at issue asks the Service to provide a description of a nationwide mailing operation it has already conducted, including its estimated cost. Inasmuch as

this activity occurred and generated a cost during an interim period between the Base Year and the Test Year in this case, the cost of that operation is appropriate for consideration in ratemaking. Accordingly, I find this interrogatory could lead to the production of admissible evidence, and shall direct the Postal Service to provide a response.

OCA/USPS-78. This interrogatory requests a copy of a Postal Service training video entitled "Customer Perceptions," which was identified in a library reference filed by the Service in response to an earlier OCA interrogatory.¹² The Service objected to this interrogatory on the ground of irrelevance, asserting that it is used for training purposes only, contains no class- or service-specific information, and features neither the views of actual customers nor actual postal products or services.

In its motion, OCA states that it seeks the training video to determine, among other things, whether the negative employee behaviors addressed therein are those actually reported by Postal Service customers, or if to the contrary the training is misdirected. OCA also argues that the Service's objection on the basis that the video contains no class- or service-specific information is without merit, in light of the substance of P.O. Ruling R2001-1/7. OCA Motion to Compel at 13.

The Postal Service responds that the requested training video "could shed no light on any issue in this omnibus proceeding" because it "constitutes no more than sensitivity training, and...does not discuss any behavior seen or experienced by any retail trainees in a postal context." Postal Service Opposition at 11. According to the Service, the presenter in the video asks the trainees to reflect on their own negative customer experiences from outside the postal context, and to project from those personal experiences what postal customers would think if subjected to similar treatment. *Id.* at 10-11.

Based on the Postal Service's representations of the content of the requested training video, I find the information sought to be irrelevant to matters at issue in this rate proceeding, and shall deny OCA's motion with respect to the interrogatory. While

¹² Library Reference USPS-LR-J-144, filed October 12, 2001.

the requested video might provide some insight into how the Postal Service prepares trainees to interact with postal customers prior to their entry into the workforce, there is no evident nexus between that information and specific issues to be resolved in this case regarding the actual operation of the postal system and its implications for appropriate ratemaking.

RULING

1. The Office of the Consumer Advocate Motion to Compel Production of Documents Requested in OCA/USPS-64(c), 65-73, and 77-78 is granted in part with respect to OCA/USPS-64(c) and 65, as described in the body of this ruling.
2. The United States Postal Service is directed to contact the American Society for Quality to obtain a statement of its position regarding production of all information responsive to OCA/USPS-64(c) and -65, as specified in the body of this ruling.
3. The Office of the Consumer Advocate Motion to Compel Production of Documents Requested in OCA/USPS-64(c), 65-73, and 77-78 is granted with respect to OCA/USPS-66 (opening request for videos); OCA/USPS-68 (opening request for videos); OCA/USPS-70 (opening request for tapes); and OCA/USPS-72 (opening request for tapes).
4. The Office of the Consumer Advocate Motion to Compel Production of Documents Requested in OCA/USPS-64(c), 65-73, and 77-78 is granted with respect to OCA/USPS-77.

5. The Office of the Consumer Advocate Motion to Compel Production of Documents Requested in OCA/USPS-64(c), 65-73, and 77-78 is denied in all other respects.
6. The Office of the Consumer Advocate Motion for Leave to File Reply to Opposition of United States Postal Service to OCA Motion to Compel Production of Documents Requested in OCA/USPS-64(C),65-73, 77-78, filed November 28, 2001, is granted.
7. The Office of the Consumer Advocate Motion for Leave to File Supplement to Reply to Opposition of United States Postal Service to OCA Motion to Compel Production of Documents Requested in OCA/USPS-64(C),65-73, 77-78, filed December 11, 2001, is denied.


George Omas
Presiding Officer