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PRESIDING OFFICER'S
RULING NO. R2001-1/33

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

Postal Rate and Fee Changes

Docket No. R2001-1

PRESIDING OFFICER'S RULING
DISPOSING OF UPS MOTIONS TO COMPEL

(Issued January 15, 2002)

On December 7, 2001, United Parcel Service (UPS) filed two motions to compel. Both were prompted by the failure of the Postal Service to respond to the interrogatories at issue or to file objections within the time allowed by the Commission's rules of practice. In both, UPS asserts that it filed its motion after unsuccessful attempts to obtain responses through informal contacts with Postal Service counsel. In both, UPS asserts that the Postal Service's inaction should be treated as a waiver of its right to object to the subject interrogatories.

With respect to the Motion of United Parcel Service to Compel Responses to Interrogatory UPS/USPS-13, the issue of whether the Postal Service waived its right to object appears to have become moot. An answer to this interrogatory was due on November 19, 2001. UPS's motion to compel was filed on December 7, 2001. On December 11, 2001, the Postal Service filed a response to the interrogatory. Although the Postal Service's response did not acknowledge that it was subject to a motion to compel, its response did include a motion that it be accepted out of time. Because there was no objection from UPS to the Postal Service's motion for acceptance out of time, the Presiding Officer granted it in P.O. Ruling R2001-1/25.

UPS/USPS-13 asks about the cause of legal expenses incurred to defend allegedly deceptive advertising claims for Priority Mail. The answer that the Postal Service filed appears to be as responsive as can be expected to such an interrogatory.

UPS did not seek follow-up discovery. Under these circumstances, it is appropriate to dismiss the motion to compel a response to this interrogatory as moot.

The other motion to compel that UPS filed on December 7, 2001, applies to UPS/USPS-T28-5, 14, 15 and 20. Answers to these interrogatories were due on November 21. On that day, the Postal Service filed a notice with other interrogatory responses that responses to UPS/USPS-T28-14, 15 and 20 "are forthcoming." No mention was made of UPS/USPS-T28-5.¹ UPS filed its motion to compel on December 7. On December 26, the Postal Service answered UPS/USPS-T28-14 and 15.² There was no Postal Service motion to accept its late-filed responses to UPS/USPS-T28-14 and 15.

On December 31, the Postal Service submitted a "partial objection" to UPS/USPS-T28-20, and a motion asking for its acceptance as a late filing. Interrogatory UPS/USPS T-28-20 asks for each quarterly EXFC report since the beginning of FY 2000. The Postal Service objects to disclosing service performance data for First-Class mail between "Areas" and between Performance Clusters, the former on the ground of relevance, the latter on the ground of commercial sensitivity. On January 3, 2002, the Postal Service responded to UPS/USPS T-28-20 by filing USPS-LR-J-211. It contains EXFC reports for the period requested in which data aggregated to the national level data are disclosed, but the Area and Performance Cluster data are redacted.

To summarize what the Postal Service failed to file, it did not file an answer to the December 7 motion to compel responses to T28-5, 14, 15 and 20, nor did the Postal Service file a motion to accept the responses that it filed late to T28-14, 15 and 20. It filed nothing with respect to T-28-5.

Interrogatory UPS/USPS T28-14 asks for recent national performance data from the Priority Mail End-to-End ("PETE") measurement system, categorizing Priority Mail

¹ See Responses of United States Postal Service Witness Moeller to Interrogatories of United Parcel Service (UPS/USPS-T28-6-13, 16-19).

² The following day it refiled these answers with an errata saying that they should have been filed as institutional answers redirected from witness Moeller.

by shape and type. The Postal Service answered that the PETE data do not capture such characteristics. Interrogatory UPS/USPS T28-15 asks the Postal Service to compare EXFC and PETE quarterly data for the 85 Performance Clusters to determine the instances in which Priority Mail is delivered as fast or faster than First-Class Mail. The Postal Service's answer included a table providing the information sought. The UPS motion to compel answers to these interrogatories is moot at this point, since the Postal Service appears to have answered them as fully as it can, and UPS has not sought follow-up discovery. Accordingly it will be dismissed.

As noted, interrogatory UPS/USPS T28-20 asks for copies of available EXFC reports beginning in the first quarter of FY 2000. The Postal Service's objection to providing the Area Office and Performance Cluster data that they contain was filed over five weeks late. Nevertheless, its motion for late acceptance of that objection will be granted, since it was not opposed. UPS appears to be satisfied with the national-level data provided, filed on January 3, 2002, as LR J-211, since it has not renewed its motion to compel as to Area and Performance Cluster data. Under these circumstances, the UPS motion to compel a response to interrogatory UPS/USPS T28-20 will be dismissed as moot.

Interrogatory T28-5 asks the Postal Service to use its Origin Destination Information System (ODIS) to determine the portion of FY 2000 Priority Mail volume that met its applicable service standard (one-day, two-day, or three-day). Although a response to this interrogatory was due on November 21, 2002, and a motion to compel was filed on December 7, 2001, the Postal Service has filed no information or pleadings that respond to this interrogatory. Five weeks have elapsed, and the Postal Service has yet to respond to this motion to compel.

The UPS motion to compel a response to this interrogatory is granted. The Commission has already recognized the relevance of such delivery performance information to value of service issues for competitive subclasses. See, e.g., P.O. Ruling R2001-1/28 at 3. Because of the extensive and unexcused delay already

experienced by UPS, the Postal Service is directed to provide a response to this interrogatory on or before January 18, 2002.

Although this ruling dismisses the UPS motions to compel filed on December 7, 2001, as moot with respect to most of the interrogatories covered, the Postal Service should not misconstrue this as condoning its conduct. Its conduct demonstrated a general lack of concern for the requirements of the Commission's rules of practice and the rights of participants that they are designed to secure. Its lack of concern was particularly blatant with respect to interrogatories T28-14, 15 and 20. After the due dates for responding to these interrogatories had passed, UPS made efforts to obtain responses to these interrogatories informally, apparently to no avail. The Postal Service filed responses that were between five and six weeks late, without acknowledging either that they were out of time, or that they were subject to an outstanding motion to compel.

UPS did not vigorously pursue its remedies under the Commission's rules of practice. This may be due to the substance of these inquiries, or it may be due to the unique procedural posture of this docket, which is now focused on the prospect of settling most of the rate issues raised by the Postal Service's Request. The Postal Service should be aware, however, that in the context of a normal rate proceeding, unexcused delays of five or six weeks in responding to discovery could provide a basis for granting procedural remedies to the discovering party. For example, if a party were to experience unexcused delays of this length in obtaining responses to discovery that it considered material to its direct case, equity might require that it receive an extension of time for filing its direct case, and a corresponding reduction of time for the Postal Service to discover against it. The Postal Service should bear in mind that, as a general matter, good faith compliance with the Commission's procedural rules will avoid the need to fashion ad hoc remedies to preserve the rights of opposing parties.

RULING

1. The United States Postal Service Motion for Late Acceptance of Partial Objection to Interrogatory of United Parcel Service, filed December 31, 2001, is granted.
2. The Motion of United Parcel Service to Compel Responses to Interrogatory UPS/USPS-13, filed December 7, 2001, is dismissed as moot.
3. The Motion of United Parcel Service to Compel Responses to UPS/USPS-T28-5, 14, 15 and 20, filed December 7, 2001, is dismissed as moot with respect to the Interrogatories UPS/USPS T28-14, 15 and 20.
4. The Motion of United Parcel Service to Compel Responses to UPS/USPS-T28-5, 14, 15 and 20, filed December 7, 2001, is granted with respect to Interrogatory UPS/USPS T28-5. The Postal Service is directed to respond to this interrogatory on or before January 18, 2002.


George Omas
Presiding Officer