

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

Complaint on Removal
of Collection Boxes

Docket No. C2003-1

INITIAL COMMENTS OF THE UNITED STATES POSTAL SERVICE
UPON CERTIFICATION OF PRESIDING OFFICER'S
RULING NO. C2003-1/2
(August 11, 2003)

Presiding Officer's Ruling No. C2003-1/2 was issued on July 14, 2003. It constitutes a ruling on the Postal Service's December 20 motion for the establishment of protective conditions with respect to certain information that, but for the Postal Service's established policy of using proprietary Customer Satisfaction Measurement (CSM) results exclusively for internal management purposes, would have been incorporated into the Postal Service's Answer in this proceeding, also filed on December 20, 2002. After an interim Ruling (February 12, 2003) directing the Postal Service to submit the previously-identified CSM information for *in camera* review by the Presiding Officer and staff advisers, Ruling No. C2003-1/2 denied the request for the establishment of protective conditions. The Postal Service moved for reconsideration by the Presiding Officer of the Ruling on July 21, 2003. In response, the Presiding Officer on July 24, 2003, certified the following question to the Commission:

Whether regardless of the sensitivity of the information involved, the Service's internal policy to use most CSM results "exclusively for management purposes," Reconsideration Request at 1, outweighs the need for Commission decisions to be based on open and public information.

The Commission accepted certification in Commission Order No. 1379, issued on July 25, 2003.

Background

In order to address the certified question appropriately, it is necessary to understand the context in which it is presented. Mr. Carlson initiated this proceeding pursuant to section 3662, a provision which allows interested parties to file complaints challenging service conditions which they believe do not conform with the policies of the Act. Essentially, Mr. Carlson is alleging that removals of collection boxes have caused collection service to no longer be “adequate” in accordance with statutory policies. As the Commission recently suggested at the conclusion of a similar service complaint initiated by Mr. Carlson, however, allegations of service inadequacy ultimately require information regarding whether the service in question meets the needs and expectations of customers. See, Commission Report, Docket No. C2001-1, Nov. 5, 2002, at 44-48. Commission Rule 82, moreover, clarifies that proceedings under section 3662 will be limited to those raising matters of policy on a substantially nationwide basis.

Once a service complaint is filed, the next step is for the Commission to exercise its discretion to determine whether hearings on that complaint are warranted. For this purpose, it is noteworthy that, while the Complaint alleges (¶ 51) that the “removal of collection boxes affects many, if not most, customers nationwide,” Mr. Carlson has not presented any factual information that would support this broad assertion. Instead, this statement consists merely of his personal view of the situation, and, as the Commission itself noted in Docket No. C2001-1 (Report at 44), “his views represent only one of

millions of possible views.” Nothing presented by Mr. Carlson suggests any basis for the Commission (once again using words from page 44 of the Docket No. C2001-1 Report) “to scientifically gauge, statistically or otherwise” whether the conditions he has alleged have had any material affect on the adequacy of collection service on a substantially nationwide basis, or whether they are merely manifestations of the normal ebb and flow of adjustments to the collection network corresponding to changing operating conditions, customer demographics, and mailing practices. In terms of addressing the threshold issue now facing the Commission – has the complainant identified issues raising policy matters on a substantially nationwide basis that warrant formal hearings, or are his assertions attempting to focus disproportionate attention on relatively minor local matters – the complaint is clearly deficient.

These deficiencies, moreover, are entirely of the complainant’s making. As the Postal Service observed in its January 3, 2003 response to Mr. Carlson’s motion for leave to respond to the Answer, contrary to his accusation that the Postal Service “controls” the information necessary to initiate a complaint, everyone is on an equal footing when it comes to the analytical ability to attempt to measure the relationship between the Postal Service’s service and the needs and expectations of customers. Customer survey research requires no access to the Postal Service’s internal financial or operating data. Entities completely independent of the Postal Service can conduct customer satisfaction measurement surveys – the most recent example being that presented to the President’s Commission. In preparing his complaint, Mr. Carlson had the option of arranging for the conduct of such research on his own, attempting to convince some type of public interest or media organization to conduct the research, or,

perhaps if he was lucky, locating results of current or previous research by some such organization that might aid his cause. Each of these possibilities existed to allow him to meet his threshold burden of showing that the matters he is trying to raise encompass substantially nationwide issues. Had he obtained relevant and reliable information via any of these channels, he would have been free to use that information under any conditions that best suit his purposes, including full public disclosure.

Apparently, however, he chose none of these options, because he filed a complaint with a major gap, leaving the Commission with no useful means by which to assess the true scope of the concerns he is trying to raise. Instead, he attempted to paper over this gap in ¶ 51 of the Complaint, by mere assertion, with no foundation, that the “removal of collection boxes affects many, if not most, customers nationwide.”

As more fully described in the Postal Service’s original December 20, 2002, motion for protective conditions, this implicit or explicit strategic choice on the part of the complainant presented the Postal Service with a dilemma. It turns out that the Postal Service has Customer Satisfaction Measurement (CSM) data that address the information gap left by the complainant. Those data are produced as part of a comprehensive CSM program conducted by the Gallup Organization on behalf of the Postal Service, in support of its mandate to operate in a business-like manner. The Postal Service uses such CSM data, obtained at substantial expense, as an internal management tool to identify areas of organizational strength and areas of potential opportunity for improvement, to become aware of areas of customer concern, to better

understand the competitive marketplace, and to support strategic initiatives.¹ In accordance with standard industry practice, and in light of its intended internal applications, however, the Postal Service does not publicly disclose CSM data, with the sole exception of an aggregate of favorable responses on the overall performance question. The Postal Service has studiously observed this non-disclosure policy since the inception of the CSM program. Thus, while the Postal Service through its own efforts has obtained CSM information which could shed light on the threshold issue, inclusion of that information in its Answer would have contravened its long-established non-disclosure policy.

To resolve this dilemma, the Postal Service sought a way to address the information gap left by the Complaint, while protecting sensitive information and preserving its non-disclosure policy. Fortunately, a potentially straightforward resolution was readily apparent, in light of the agreement by the Presiding Officer in the last omnibus rate case to allow the Postal Service to provide CSM data in that docket under protective conditions. The Presiding Officer in that case summarized the arguments made by the Postal Service in support of protective conditions for CSM survey data as follows:

In support of its motion, the Postal Service submitted two affidavits, one

¹ Further information about the CSM program can be found in the “Reply of the United States Postal Service to the OCA’s Response to Motion for Protective Conditions for Results of Consumer Satisfaction Surveys,” filed in Docket No. R2001-1 on November 28, 2001. Attached to that pleading were a declaration from the Postal Service’s Vice President and Consumer Advocate, and a declaration from a managing partner of the Gallup Organization, the polling firm. These materials were incorporated by reference on page 5 of the Postal Service’s December 20, 2002 motion for protective conditions in this proceeding.

from Max D. Larsen, a Managing Director of The Gallup Organization (Larsen Affidavit), and the other from Francia G. Smith, Vice President and Consumer Advocate for the Postal Service (Smith Affidavit). The affidavits provide helpful background information concerning the surveys. For example, both Larsen and Smith indicate: (a) that the survey results are not generally made publicly available, (b) that the results are used by managers to improve service, to address specific concerns, and to better understand the markets in which the Postal Service operates, and (c) that public dissemination of the results would disadvantage the Postal Service competitively. See Larsen Affidavit at 2; Larsen Affidavit at 2-4. The harm each envisions is twofold, namely, that competitors might gain access to data to target Postal Service markets, while not having to release comparable data about their own operations. Larsen Affidavit at 2; Smith Affidavit at 3.

Presiding Officer's Ruling Directing the Production of Data Subject to Protective Conditions, P.O. Ruling No. R2001-1/17 (Dec. 7, 2001) at 12. The Presiding Officer explained why, in granting the request for protective conditions, he found these reasons persuasive:

First, as evident from the affidavits, the survey data may be used myriad ways. Aside from any ratemaking implications, the data plainly have commercial value in the markets in which the Postal Service operates. Second, the prevailing business practice, not unique to the Postal Service, is to withhold such data from public dissemination. Larsen Affidavit at 2; Smith Affidavit at 2-4. Thus, to compel the Postal Service to make the data publicly available puts the Postal Service at a competitive disadvantage. Moreover, the harm is compounded because similar data from alternate suppliers remain publicly unavailable.

Id. at 13 (footnote omitted).

In the Docket No. R2001-1 Presiding Officer's Ruling, the Presiding Officer specifically rejected an argument by the OCA that the potential competitive harm from disclosure had not been adequately specified:

The OCA argues that the Postal Service has not established the requisite competitive harm to warrant the protective conditions. OCA Rejoinder at 6-13. For example, it questions how various responses to the Residential Survey could "undermine the Postal Service's competitive position[.]" *Id.*

at 9. The issue, however, is not whether the results could “undermine” the Postal Service’s competitive position, but rather whether their public availability would cause it to suffer any competitive disadvantage. The Postal Service’s practice of limiting the public dissemination of such data is in accord with what are represented to be universal business practices. Given that, to require the Postal Service to make such data publicly available singles it out for exceptional treatment that performance would expose it to competitive disadvantage.

Id. at 13 (footnote omitted). On the same topic, he stated:

The OCA suggests that the public might demand better service if it learned that the Postal Service received “poor scores.” *Ibid.* While that might occur, so too might the harm postulated by Larsen and Smith. If the issue turned solely on the Postal Service’s showing of competitive harm, perhaps the OCA’s arguments that the Postal Service’s assertions lack sufficient specificity may have been persuasive. On consideration, however, subjecting the Postal Service to singular treatment could not be reconciled with prevailing business practices.

Id. at 13, footnote 29.²

² In his December 24, 2002 Answer in Opposition to the Motion for Protective Conditions in this case, at pages 2-3, Mr. Carlson placed great emphasis on the fact that the Private Express Statutes afford the Postal Service what some have been known to refer to as “monopoly” status over letter mail. The significance of this fact, at least according to Mr. Carlson, is that the Postal Service’s instant motion for protective conditions did not specifically address competitive harm in the context of service matters relating to such letter mail. His contention, however, overlooks the fact that the Postal Service’s December 20, 2002 motion for protective conditions at page 5 explicitly incorporated by reference the Postal Service’s November 28, 2001 pleading on protective conditions regarding CSM data in Docket No. R2001-1. (To the extent that Presiding Officer’s Ruling No. C2003-1/2 in this docket at page 4 also appears to be predicated on the notion that the Postal Service failed to address matters of competitive harm, that portion of the Ruling likewise appears to overlook the explicit incorporation by reference of arguments made in the earlier docket.) In its November 28, 2001 pleading at pages 9-10, the Postal Service explained that, despite the existence of the Private Express Statutes, letter mail faces very real competition from entities seeking to encourage, for example, utilization of their electronic bill paying services. It is impossible, in the abstract, to contemplate the complete range of means by which such service providers might be able to integrate CSM data on letter mail service into an aggressive marketing strategy to accelerate diversion, and it is equally impossible, in the real world, to deny the very concrete financial consequences any resulting diversion would have (and similar existing diversion already has) on the Postal

The Presiding Officer in Ruling No. R2001-1/17 summarized the rationale for his decision to grant protective conditions with regard to CSM data in that proceeding as follows:

In sum, to compel production absent the protective conditions would achieve a largely gratuitous result, disadvantaging the Postal Service without any commensurate public benefit. In balancing the interests involved, the prudent course is to issue the protective conditions.

Id. at 14 (footnote omitted). Similarly, for purposes of evaluating the seriousness of the allegations raised by the complainant in this proceeding, the Postal Service determined that the prudent course would be to seek the establishment of protective conditions, commensurate with those granted in Docket No. R2001-1, for purposes of consideration of the CSM results relevant to that exercise.³ Consequently, the Postal

Service's bottom line. Moreover, the Presiding Officer in Ruling No. R2001-1/17 was fully aware of similar arguments by the OCA regarding differences in the competitive status of various postal products (see *id.* at 6) when he made the above-quoted statements on page 13 of that Ruling rejecting the OCA's views in that regard.

³ It bears noting that, of the two CSM items for which the Postal Service proposes to provide results under seal in this case, "Ease of Mailing Letters" and "Convenient Location of a Mail Collection Box", results relating to the first item were included within those covered by the protective conditions granted by the Presiding Officer in Docket No. R2001-1. As noted above, that ruling addressed and rejected extensive arguments by the OCA, presented in numerous pleadings, that the Postal Service had not provided sufficient evidence of potential competitive harm. The Postal Service explicitly incorporated by reference the materials it had submitted in support of its motion for protective conditions in Docket No. R2001-1 into its motion for protective conditions in this docket, on the reasoning that the grounds stated and deemed sufficient to justify protective conditions then would not each need to be redundantly restated in order to justify protective conditions for the same material now. (While results for the second item, "Convenient Location," were not included within the set produced in Docket No. R2001-1, the substantial overlap between the contents of the two items renders it unlikely that anyone would propose treating the two items differently.) Therefore, it is, at the least, puzzling that Presiding Officer's Ruling No. C2003-1/2 in this docket would identify lack of discussion of potential competitive harm as grounds for the denial of protective conditions relating to the exact same (and

Service filed the December 20, 2002 motion for the establishment of protective conditions, which led to the July 14, 2003 ruling by the Presiding Officer (Presiding Officer's Ruling No. C2003-1/2) that is the subject of the instant certification process.

Question Certified for Review

As noted at the beginning of these comments, the question now certified to the Commission reads as follows:

Whether regardless of the sensitivity of the information involved, the Service's internal policy to use most CSM results "exclusively for management purposes," Reconsideration Request at 1, outweighs the need for Commission decisions to be based on open and public information.

The broad structure of this question appears to be appropriate, because by use of the term "outweighs," the intention is conveyed to view consideration of these matters fundamentally as application of a balancing test. A balancing approach is both proper and well-established as the appropriate framework for these types of analyses. Such an approach, however, often requires consideration of a wide variety of factors, and that is the situation in this instance.

By the same token, what perhaps might be a weakness in the structure of the certified question is the possible implied exclusion of one factor from the balance – "the sensitivity of the information involved." With the exception of the national overall rating score, the Postal Service views all CSM material as "sensitive," which is the foundation

virtually the exact same) types of information as some of that protected in Docket No. R2001-1, following exhaustive exchanges on that topic.

for its policy to treat all other CSM material as internal and proprietary.⁴ Moreover, as explained in Docket No. R2001-1, the Postal Service is far from alone in this view – it is universal business practice for business and governmental organizations to maintain most of their CSM data as internal and proprietary. Furthermore, as a practical matter, as also explained in Docket No. R2001-1, the Postal Service faces competition across all of its product lines from commercial enterprises seeking to entice postal customers to switch to their own alternative service offerings.⁵ Given competitive realities, customer attitudes, opinions, and perceptions of all aspects of postal service have commercial value, and therefore all of the Postal Service’s CSM results are “sensitive”

⁴ To the extent that the phrasing of the question could be construed to suggest that the Postal Service’s non-disclosure policy regarding CSM data exists independently from the Postal Service’s conviction that CSM data are intrinsically “sensitive,” the Postal Service finds that phrasing confusing. If such a conviction were lacking, the Postal Service would have no such policy, and would not be bothered with undertaking the efforts that it does to maintain the confidentiality of CSM information.

⁵ As noted in the Postal Service’s November 28, 2002 pleading in that docket at pages 9-10:

Even services subject to PES, face the possibility of diversion to alternative forms and means of communication, whether through fax, telephone, internet, or electronic mail. In fact, the Postal Service has offered substantial testimony on the effect of diversion on mail volumes and revenues. See generally the Testimonies of Witnesses Tolley (T-7), Thress (T-8) and Bernstein (T-10.) See also the Internet Week article, *supra*. This position has been repeated in discovery in this proceeding. “With rare exceptions (e.g., “free-for-the-blind”), for virtually all of the Postal Service’s products and/or services, there are private sector enterprises seeking to satisfy the needs of the Postal Service’s customers by means outside of the nation’s postal system.” See the Response of the United States Postal Service to Interrogatories of United Parcel Service, UPS/USPS-15, filed November 21, 2001. Thus, as stated earlier, information about customer perceptions of postal services could inform strategies for encouraging customers to use alternatives.

to some degree.⁶ Contrary to what seems to be implied by the question certified to the Commission, that sensitivity merits consideration within any balancing test applied to the issue of public disclosure of CSM information.

Of course, because CSM results are merely the products of customer survey research, they may be viewed as less “sensitive” than prototypical trade secrets, such as the recipe for Coca-Cola. As noted earlier, the conduct of such survey research requires no access to any internal financial or operating data, and, with sufficient resources and effort, competent independent researchers conducting comparable inquiries should be able to approximate the results obtained on behalf of the Postal Service. This situation, however, does not alter the fact that the Postal Service has chosen to expend postal resources to acquire CSM data, has necessarily forgone other potential beneficial application of those resources in order to do that, and should be afforded the opportunity to maximize its net return on the investment made in acquiring CSM results.⁷ Public disclosure can diminish that net return in at least three ways.

⁶ The Presiding Officer reached the same conclusion on page 13 of Ruling No. R2001-1/17 when he found that “the data plainly have commercial value in the markets in which the Postal Service operates.”

⁷ Essentially, having bought and paid for CMS research, the Postal Service has a property right in the results of that research. Application of the concept of property rights in the context of information disclosure controversies is discussed in a law review article by a prominent expert on civil procedure:

In today’s business world, commercial information often has a value that is tangible enough to be bought and sold for huge sums of money, and extraordinary efforts are expended to control it and maintain its security and confidentiality. It is not surprising, then, that our legal system considers information to be property.

Arthur R. Miller, “Confidentiality, Protective Orders, and Public Access to the Courts,”

First, access by potential competitors could cause them to recognize opportunities to divert business from the Postal Service that they might never have even contemplated but for exposure to the Postal Service's CSM results. Second, even if competing commercial entities were fully aware of the range of opportunities they wished to explore with the aid of market research, having the Postal Service's CSM data available to them could save them the cost of conducting their own research, giving them a competitive windfall. Third, competitors could engage in selective reporting of the Postal Service's CSM results in advertising and promoting their own products, and could attempt to enhance the credibility of those efforts by reference to what "the Postal Service's *own* studies" purportedly show. Therefore, sound reasons exist to expect that CSM research results would be treated as "sensitive" and shielded from public disclosure, and the evidence of industry experience provided in Docket No. R2001-1 confirms that businesses and other organizations relying on CSM results do, in fact, conform their practices to such expectations.

The Postal Service, therefore, would not agree that the "sensitivity" of CSM data can be excluded from a balancing test to address the suitability of protective conditions. Such determinations cannot properly be made "regardless of the sensitivity of the information involved," if that is intended to imply that some portions of CSM data are not "sensitive." As explained above, CSM data are inherently sensitive, and are treated as such by the survey research industry professionals and their clients. The Postal has a proprietary interest in all CSM data, and that proprietary interest would be lost if the

105 *Harvard Law Review* 427, 467-68 (Dec. 1991).

data were placed in the public domain.

For that reason, the Postal Service favors the approach employed by the Presiding Officer in Docket No. R2001-1. There, despite invitations from the OCA to the contrary, he did not limit his application of the balancing test to individual CSM items, but instead focused his discussion on the body of CSM data as a whole, and industry standard practice. See Presiding Officer's Ruling No. R2001-1/17 at 11-14. Consistent with its preference for the Presiding Officer's broad approach in Docket No. R2001-1, the Postal Service noted its concerns about a potentially more limited approach when responding to the Presiding Officer's interim ruling in this docket calling for *in camera* inspection of the relevant CSM scores. As stated then:

The Postal Service's policy of nondisclosure of CSM data is not based on piecemeal consideration of the content or the direction of particular survey results.

Response of the Postal Service to Presiding Officer's Ruling No. C2003-1/1 (Feb. 24, 2003) at 2. The Postal Service would, for example, be quite concerned if piecemeal examination of the direction of certain specific results generated an opinion that, because those measurement scores were favorable at that time, competitors would be unlikely to be able to use them to their advantage, and public disclosure would therefore be appropriate. A series of such piecemeal applications, however, if resulting in some disclosure and some withholding, would actually reveal to competitors the areas in which scores were low, based on the items withheld. The end result would be competitive disadvantage to the Postal Service. The obvious protection against this result is the adoption of a uniform policy, such as that consistently adhered to by the Postal Service, that maintains the confidentiality of all CSM scores (with the one

exception), regardless of whether those scores are good, neutral, or bad. The type of analysis applied by the Presiding Officer in Docket No. R2001-1 likewise avoided these pitfalls.

Thus, the Postal Service submits that any balancing test should view all CSM results as sensitive, as was done in Presiding Officer's Ruling No. R2001-1/17. Conceptually, this approach is the most consistent with the standard industry practice, and obviates the need for the type of piecemeal consideration discussed above. Moreover, even if that were not the case, since the protective conditions granted in Docket No. R2001-1 explicitly covered the "Ease of Mailing Letters" responses, and given the close relationship between that item and "Convenient Location of Collection Boxes," there was no apparent reason for the Postal Service to revisit the "sensitivity" of that particular type of CSM information when filing a motion for protective conditions in this case that was so directly linked with the earlier resolution of the same issue. Nevertheless, to the extent that there is a suggestion that specific discussion of the sensitivity of those items merits more discussion relative to the overall CSM sensitivity determined to exist by the Presiding Officer in Docket No. R2001-1, that discussion follows.

In certain critical respects, the sensitivity of the results of those two items may be considered quite high relative to the broader subset of CSM results considered in Docket No. R2001-1. The very recent Report of the President's Commission on the United States Postal Service has confirmed what has been obvious to both serious and casual observers of the Postal Service for many years: far and away, the most serious threat to the Postal Service's long-term financial stability is erosion of the volume base

of First-Class Mail.⁸ Substantially driving such erosion will be the pace of change in the attitudes and behaviors of the members of the bill-paying public. Huge economic incentives exist for commercial entities that can, so to speak, “push the envelope” in terms of convincing customers to abandon hard-copy mail and venture into (or further into) the world of electronic payments. Critical to such efforts have been and will continue to be appeals to customers on the basis of the relative convenience of the competing payment modes. The two CSM items involved in this dispute plainly relate to a whole host of issues of which competitors could hope to take advantage, because they provide insight into the very attitudes and behaviors of letter mailers that are at the core of the struggle.⁹

To publicly disclose those CSM results is to invite the Postal Service’s competitors to scrutinize those data in pursuit of ways to use our own numbers against us. While it may be difficult to predict the likelihood of success of such efforts, there can be no mistake but that the stakes involved are as high as they get anywhere within the broad realm of postal affairs. Even if one were convinced that the relative probability of a bad occurrence caused by public disclosure were low (which would not be an assessment shared by the Postal Service), the “expected harm” would remain substantial because of the enormous size of potential damage to the First-Class letter

⁸ Without even having to plunge into the text of the lengthy President’s Commission Report, that message comes through quite clearly in its 3-page Foreword.

⁹ Understanding consumer attitudes and behaviors is of paramount importance to those seeking to accelerate volume diversion, because the fundamental *technological* barriers to activities such as electronic bill presentation/payment and online banking were largely overcome some time ago.

mailstream.¹⁰ At the very least, there is no firm basis to conclude that the sensitivity of these items of CSM data is any less than that recognized for a broader subset of CSM material by the Presiding Officer in Docket No. R2001-1.

Obviously, of course, in undertaking the balancing test under discussion, other factors are important beyond the sensitivity of the material involved. The Presiding Officer in Docket No. R2001-1 correctly noted that “protective conditions are not without some costs,” although he then concluded that “this inconvenience is insufficient to overcome the concern over the potential harm of public disclosure.” Presiding Officer’s Ruling No. R2001-1/17 at 14. In this case, in its July 21, 2003 request for reconsideration, the Postal Service has already discussed some matters of convenience and logistics relating to the proposed protective conditions. As explained in more detail there, logistics are simplified by virtue of the relatively small number of potential parties involved, and the relatively small amount of material involved. Additionally, although the Postal Service obviously would prefer to avoid any discussion of CSM scores, qualitative discussion of the significance of those scores relative to issues presented for resolution would appear to provide a potentially reasonable means of accommodating the needs of both the Commission and the Postal Service under present circumstances. As noted in the reconsideration request, the nature of the materials and issues involved in the instant matter particularly lend themselves to qualitative discussion that would not necessitate public disclosure of the actual

¹⁰ If one thinks of the Postal Service as a nautical vessel, hits involving First-Class Mail can be thought of as hits below the waterline, and therefore, even if apparently small, as always creating potentially serious threats to the viability of the ship.

quantitative measurement scores. Overall, the inconvenience likely to be caused by the requested protective conditions would be quite modest.

In Ruling No. R2001-1/17, the Presiding Officer noted that providing the disputed CSM materials under protective conditions “does not deprive the OCA of the evidence it needs to make its case.” *Id.* at 14. A similar conclusion would apply in this instance, although additional discussion of the posture of the instant proceeding is warranted. Clearly, assuming he is willing to limit his use of the material to analysis of issues for this proceeding and to protect it from disclosure, the complainant could have access to the scores for purposes of making any arguments based on those scores that he chooses to make. Moreover, recall that, as explained earlier, the role proposed by the Postal Service for its CSM scores is to fill a gap created by the complainant’s failure to show whether he is presenting issues of nationwide policy or not. While the Postal Service would be content merely to allow the complainant to suffer the consequences for failing to meet what is obviously his burden, it also understands that the Commission has an interest in considering relevant information when deciding to initiate hearings or dismiss the complaint. Under these circumstances, the Postal Service is willing to share the relevant information, but submits that allowing it to do so under the same protective conditions previously afforded CSM scores is a perfectly reasonable means of accommodating the interests of all concerned.

This conclusion is reinforced by the fact that this proceeding was not initiated by the Postal Service. Unlike a case in which it is affirmatively seeking approval of rate or classification proposals, the Postal Service in this case has no agenda except to avoid the expenditure of postal resources in the course of an unnecessary complaint docket.

Instead, what the Commission is faced with in this instance is a single individual who has chosen to file a complaint. At this stage, no finding has yet been made that his allegations are sufficient to warrant a hearing. There is no compelling reason why this solitary act by one person should be sufficient to nullify a policy that is consistent with standard industry practice, and was recognized as such by the Presiding Officer within an omnibus rate case less than a year before the complaint was filed.

The question presented for certification, however, raises the matter of “the need for Commission decisions to be based on open and public information.” This matter is not new, and was also raised in Presiding Officer’s Ruling No. R2001-1/17, which noted “the general rule that the Commission’s proceedings be open to the public.” *Id.* at 12. But, in explaining its holding that protective conditions were appropriate for CSM materials in that docket, the Ruling also stated that “public disclosure, which is favored by the Commission, is subject to legitimate exceptions.” *Id.* at 14. Indeed, were that not the case, there could be no basis for Commission Rule 31a, regarding *in camera* orders, protective conditions, and the like. Thus, while public disclosure is “favored,” to disclose or not is ultimately intended to be determined by the overall balancing test, of which the preference for public disclosure is but one factor.

The weight to be given that factor in this instance would appear to be diminished for several reasons. First, this is not like typical litigation in court, in which the ability to intervene is likely to be restricted by standing requirements. Here, if any members of the public were inclined to view the relevant CSM materials, it would be a relatively straightforward proposition for them to intervene, execute the protective conditions, and receive the information. While these requirements would, hopefully, screen out those

who intended to use the materials for purposes outside of the docket (e.g., potential competitors), and those who wished to explicitly publish the numerical scores, ordinary members of the public would be unlikely to be impeded by either of those constraints. While public access could thus be reduced, the CSM scores would not be vanishing within a black hole, into which legitimately interested parties could never penetrate.

Second, and presumably more much importantly, members of the public probably have very little interest in the exact numerical scores at issue. To the extent that the Commission and the litigants have full access to those numbers, and to the extent that the Commission can meaningfully explain how it relied upon those numbers (if at all) without revealing their precise levels, any further “need” for the public to see the CSM numbers is probably illusory. Exactly that conclusion seems to be reflected in the Presiding Officer’s summarization of his ruling in Docket No. R2001-1/17, in which, having two sentences previously reaffirmed the general Commission preference for public disclosure, stated that “[i]n sum, to compel production absent the protective conditions would achieve a largely gratuitous result, disadvantaging the Postal Service without commensurate public benefit.” *Id.* at 14.

Conclusion

In Docket No. R2001-1, the Presiding Officer applied the usual balancing test for the evaluation of requests for protective conditions to a request by the Postal Service to shield a subset of its CSM scores sought in discovery by the OCA. After extensive pleadings by both the Postal Service and the OCA, and the submission of declarations by the Postal Service’s Vice President and Consumer Advocate, and the managing director of the Gallup Organization, the Presiding Officer issued Ruling No. R2001-1/17.

In that Ruling, after taking into consideration the Commission's practice of favoring public disclosure, the Presiding Officer concluded that, particularly in light of the standard industry practice to shield CSM material from disclosure, the balance tipped in favor of granting the requested protective conditions.

In this proceeding, the complainant alleges that the service conditions he is challenging have affected "many, if not most, customers nationwide." While he provides no factual support for his assertion, the Postal Service has CSM results which bear directly on the veracity of that claim. Understandably wishing to avoid a protracted complaint proceeding which it believes would be unwarranted, the Postal Service is seeking to make available to the Commission the relevant CSM scores, while at the same time preserving its long-standing treatment of sensitive and proprietary CSM scores as confidential. Of the two relevant CSM items, one was included within the subset protected in Docket No. R2001-1, and the other item involves very similar information. The Postal Service contends that application of the same balancing test applied by the Presiding Officer in Docket No. R2001-1 to what amounts to a smaller subset of the same CSM material should yield the same result in this docket –

establishment of the requested protective conditions.

Respectfully submitted,

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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 participants of record in this proceeding.

Eric P. Koetting

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