

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

POSTAL RATE AND FEE CHANGES
PURSUANT TO PUBLIC LAW 108-18

Docket No. R2005-1

OPPOSITION OF THE UNITED STATES POSTAL SERVICE
TO OFFICE OF THE CONSUMER ADVOCATE MOTION TO
COMPEL RESPONSES TO INTERROGATORIES OCA/USPS-60 AND 118
(June 23, 2005)

In accordance with Rule 26(d) of the Commission's Rules of Practice and Procedure, the United States Postal Service hereby files its reply in opposition to the June 15, 2005, Office of the Consumer Advocate (OCA) motion to compel responses to interrogatories OCA/USPS-60 and OCA/USPS-118. The interrogatories read as follows:

OCA/USPS-60. For each of the past three years and for each category or type of (a) Express Mail, (b) Priority Mail (c) Package Services and (d) First-Class single piece letters, please provide nationwide data from ODIS (Origin-Destination Information System), EMRS (Electronic Marketing Reporting System), EXFC (External First-Class (Mail system)) and any other applicable data systems showing the volume of mail delivered after the number of days specified by the applicable service standard. Please provide the frequency –volume, percentage and average – for mail delivered within one to fifteen days after the applicable service standard, broken out for each of the fifteen days. In your response, please include the full calculation for each figure requested, including a description of each figure used in the calculation. Please provide cites to source documents for all figures presented in calculations and provide copies of any documents that have not been previously filed in this docket. (For reference purposes, please refer to Docket No. R2001-1, OCA/USPS-103.)

OCA/USPS-118. Please refer to the Postal Service's response to OCA/USPS-103 in Docket No. R2001-1, and the attachments thereto. For Fiscal Year (FY) 2002, 2003, 2004, and the available quarters of FY 2005, please provide the ODIS-based percent and frequency (i.e., "known delivery days" volume) delivered within 1 to 20 days for a. Parcel Post; b. Bound Printed Matter; c. Media Mail; and d. Library Mail.

In pleadings filed on June 1, 2005 and June 13, 2005, the Postal Service partially objected, on the grounds of commercial sensitivity and relevance,¹ to providing Express Mail and Package Services data regarding late delivery broken out by the number of days such pieces were delivered after the applicable service standard. In doing so, the Postal Service expressly relied upon Commission precedent from Docket No. R94-1, in which the Presiding Officer held that Express Mail data disaggregated according to the number of days in which it was late is commercially sensitive and immaterial to the ratemaking process. The Postal Service then argued that the same concerns as to the commercial sensitivity and irrelevance of such disaggregated Express Mail data apply equally to Package Services mail which, like Express Mail, is offered in a highly competitive market.

In approaching the issue of public disclosure of service performance data, Congress has given the Postal Service the responsibility of striking a balance between conflicting considerations. On the one hand is the need for the public to have *some* information about the quality of service being provided. On the other hand is the need for the Postal Service to protect its commercial and competitive interests from the harm that would result from the disclosure of certain data to postal competitors. This standard is reflected in the Congressional determination that the Postal Service not be

¹ While the OCA's motion decries what it describes as the Postal Service's "bare assertion" of a privilege in the Postal Service's objection to OCA/USPS-118, a reading of that objection clearly shows that the "privilege" being asserted is one of commercial sensitivity. Thus, the OCA's request that the Presiding Officer eliminate "privilege" as one the grounds for the Postal Service's objection to 118 lacks any foundation.

required to publicly disclose “information of a commercial nature . . . which under good business practice would not be publicly disclosed.” 39 U.S.C. 410(c)(2).²

The Commission is responsible for assessing “the value of the mail service actually provided each class or type of mail service” under 39 U.S.C. § 3622(b)(2). This analysis involves an assessment of the how mail is collected or accepted by the Postal Service, what modes of transportation are employed in moving it between origin and destination, and the priority of delivery that mail receives. Other variables, such as coefficients of elasticity, are also considered. To the extent that it is measured by the Postal Service, the general quality of service provided each mail class is a relevant factor that is taken into consideration, but it is not the dominant factor or the controlling factor.

To that end, the Postal Service has, without objection, provided considerable information that permits parties to assess, on a national aggregate level, the percentage of mail in various classes that is delivered on time in relation to the applicable service standards and data regarding the average days to deliver. Thus, the Postal Service has provided, in its responses to OCA/USPS-60 and 118, data with which the Commission can assess the relative percentage of mail that is delivered late or beyond standard for each of the mail classes at issue.

At page 3 of its Motion, the OCA argues that § 3622(b)(5):

undoubtedly means having the Commission consider the length of time for delivering Express Mail and Package services *and their degrees of lateness*, so that they may be compared to one another and to First-Class Mail and Priority Mail.

² In addition, any comparison between the body of service performance data the Postal Service provides for the public record without objection in these proceedings and the scant data published by its competitors belies any suggestion that postal customers have access to less data.

Is the OCA's lack of doubt based upon a reading of legislative history? No. It cites none. Is the OCA's certainty based on an analysis of Commission precedent? No. It cites none, and in fact even avoids acknowledging Presiding Officer's Ruling No. R94-1/22 (June 3, 1994), wherein the Commission squarely faced the issues raised by the OCA's motion and rejected the arguments that the OCA has advanced in support of its request for disaggregated data regarding the degree of Express Mail lateness. Thus, with respect to the Express Mail data requested in OCA/USPS-60, the OCA blithely argues as if this were a matter of first impression, instead of an issue clearly resolved by long-standing Commission precedent.

In Ruling No. R94-1/22, the Presiding Officer held that the relevance of data of the sort objected to by the Postal Service in response to OCA/USPS-60 and 118 "is not apparent," considering the Postal Service had provided the proportions of Express Mail that had failed to meet the delivery standards in the aggregate. See POR R94-1/22 at 3. The Presiding Officer also stated that in the highly competitive expedited delivery market, "late is late." *Id.* The Presiding Officer in Docket No. R94-1 also agreed with the Postal Service's assertion of commercial sensitivity, finding that "disclosure of such detailed [Express Mail] information could conceivably be used to by competitors to the Postal Service's detriment." When balancing whether the commercial sensitivity outweighed the "minimal contribution that the requested data would make to the record," the Commission concluded that there was not even any justification for ordering that the data be provided under protective conditions. *Id.* at 3-4.

Like the Association of Priority Mail Users (APMU) in Docket No. R94-1, the OCA is seeking disaggregated Express Mail service performance data that shows the

percentage of Express Mail delivered one day late, two days late, three days late, etc. Nothing has changed that would make the Presiding Officer's Ruling in Docket No. R94-1 inapplicable today.

While the Docket No. R94-1 Ruling addressed only Express Mail and the only ratemaking criterion at issue was 3622(b)(2), the concerns expressed by the Presiding Officer in holding that the Postal Service did not need to provide disaggregated late Express Mail data apply equally to Package Services mail and to the other ratemaking criteria. Each of the services identified in OCA/USPS-118 is subject to intense competition from private sector delivery service providers. Public disclosure of disaggregated late data would trigger the harm identified by the Commission in its Docket No. R94-1 ruling. And parties seeking to make relative comparisons among postal alternatives for purposes of § 3622(b)(5) will still have access to aggregate data allowing them to compare the aggregate percentage of late mail for the various classes.

At pages 3-4 of its motion, the OCA blends a discussion of hypothetical scenarios and vague allusions to businesses and mail order recipients dealing with late delivery of mail in support of its argument that more Express Mail and Package Services data need to be disclosed in this proceeding. However, in the footnote at the conclusion of that discussion on page 4 of its Motion, the OCA confesses to the irrelevancy of its hypotheticals and allusions when it admits:

The example cited . . . grew out of egregiously late delivery of Periodicals mail, not package service mail.

The OCA then alludes to the example of a consumer organization that "routinely" re-prints and re-mails (an unspecified percentage of) copies of a local newsletter "because

the Postal Service regularly . . . took 30 days to deliver [some unspecified percentage of the] copies” OCA Motion at 4. Reduced to its essence, the OCA’s argument at pages 4-5 is the following *non sequitor*: a Periodicals mailer had a bad experience with mail being delivered weeks after the delivery date implied by the applicable service standard; therefore, the Postal Service should be required to disclose in rate litigation the degree to which late Express Mail and Package Services mail is late.

At page 3, the OCA focuses on judgments that a hypothetical mailer might want to make when deciding whether to use the Postal Service or when choosing between mail classes. The OCA asserts that this mailer will insist on knowing the likelihood that a mail piece might be delivered within standard vs. 1 vs. 3 vs. 5 vs. 20 days late.

Putting aside the credibility of the hypothetical, it is still a different matter than the Postal Rate Commission deciding how much information it needs about service performance as one of the elements that goes into its judgment regarding value of service within the meaning of § 3622(b)(2) or a comparison of postal alternatives within the meaning of § 3622(b)(5).

Assuming, *arguendo*, as the OCA asserts at page 6 of its motion that the application of the statutory pricing criteria is a comparative exercise and that congruent sets of data for each mail class should be made available, the Postal Service expects to provide such data by revealing the percentage of mail that is late for each class. In response to the OCA’s motion at 6, the Postal Service concedes that some may view lateness as a 2-dimensional issue in certain contexts: (1) how much and (2) how severe. But, we are presently in the postal ratemaking context, the same context in which the Commission declared that, for purposes of applying the criteria in 39 U.S.C.

§ 3622(b), “late is late.” It is immaterial to the Commission’s task of coming to a general judgment about the quality of service that the OCA’s hypothetical customer would demand an almost infinite amount of service performance minutiae at the service window before choosing between Priority Mail or Parcel Post.

The fact that the Postal Service, without objection, discloses more information about First-Class Mail and Priority Mail in this proceeding in response to discovery is not a concession that all of the requested and disclosed First-Class Mail data are material to the Commission’s ratemaking task of evaluating value of service. Consistent with its approach to public disclosure outside of the context of postal ratemaking, the Postal Service recognizes that the Private Express Status impose an obligation to disclose more data than would otherwise be disclosed in the absence of the protections that the statutes afford. The Postal Service’s more “liberal” approach to First-Class Mail or Priority Mail service performance data disclosure also reflects an expedient recognition that, at times, postal resources are better utilized in rate litigation and unnecessary motions practice should be avoided. The Postal Service often opts not to object to the disclosure certain information despite its dubious relationship to the issues in this proceeding, if that information would otherwise be disclosed in response to a request under the Freedom of Information Act., 5 U.S.C. § 552. This is not to say that First-Class Mail and Priority Mail are so immune from competition that *all* First-Class Mail or Priority Mail service performance data should be accessible to the public. Notwithstanding the competitive protections afforded by the Private Express Statutes, certain data related to each mail class warrants privileged status.

At page 6 of its Motion, the OCA argues that “the Postal Service may not withhold information that reflects unfavorably on its provision of Express Mail and Package Services from the Commission and participants in this proceeding.” Yet, there is no basis for alleging or concluding that the Postal Service’s proposed responses to OCA/USPS-60 and 118 seek that objective. In response to OCA/USPS-60 and 118, the Postal Service intends to disclose data reflecting the aggregate percentage of late mail and the average days to deliver per service standard for each mail class. To the extent that these data reflect “unfavorably” on the Postal Service, so be it. Even with the disclosure of less data for the more highly competitive services not as affected by the Private Express Statutes as First-Class Mail and Priority Mail, the OCA will be able to assess the extent to which the respective mail classes experience late delivery.

In undertaking its important function of recommending rates to the Governors of the Postal Service, the Commission is obliged to respect the Postal Service’s commercial interests while determining the extent to which postal data are relevant to the issues before it and the conditions under which litigants may have access to such data. The issue is not resolved by trenching upon the authority of postal management for the purpose of bringing “sunshine” to every nook and cranny of the Postal Service. It is not resolved by pretending, as the OCA does in its motion, to step into the shoes of a hypothetical postal customer and declaring a right to know all there is to know about service performance before choosing whether to use Express Mail or Priority Mail or Parcel Post. The issue of what some manufactured hypothetical postal customer may wish to know is not instructive on the question of assessing what data are material and useful to a resolution of the issues before the Commission and determining the

conditions for access when data deemed necessary to a resolution of those issues are commercially sensitive. At page 6 of its motion, the OCA argues that “Congress intended that the Commission would have complete access to the information necessary to exercise its responsibilities in a § 3622 proceeding.” However, the OCA fails to take the next step and acknowledge the limits recognized in Presiding Officer’s Ruling No. R94-1/22 as to what data are *necessary* to these responsibilities.

For these reasons, the OCA motion to compel should be denied.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

Daniel J. Foucheaux, Jr.
Chief Counsel, Ratemaking

Keith E. Weidner

475 L'Enfant Plaza West, S.W.
Washington, D.C. 20260-1137
(202) 268-6252; Fax -3084