

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

Postal Rate and Fee Changes, 2006

Docket No. R2006-1

**ANSWER OF PITNEY BOWES INC. TO MOTION OF THE UNITED STATES
POSTAL SERVICE TO COMPEL RESPONSES TO USPS/PB-T3-20(c)-(e)**

Pitney Bowes Inc. (“Pitney Bowes”) hereby answers the October 30, 2006 Motion of the United States Postal Service to Compel Responses to USPS/PB-T3-20(c)-(e) (“Motion”). The Motion addresses just three subparts of one question. The Postal Service raises no issue with respect to Pitney Bowes’ responses to its twenty-two other information requests which Pitney Bowes has answered. For the reasons stated below, the Postal Service’s request for relief is wholly without merit and should be denied.

I. The Postal Service’s Motion To Compel Violates The Commission’s Rules By, Among Other Things, Failing To Disclose That Pitney Bowes Has Answered The Portions Of The Objectionable Information Request That Seek Information Concerning Effects On Mailers.

Rule 26(d) of the Commission’s Rules of Practice and Procedure provides, in pertinent part:

Motions to compel responses to discovery. Motions to compel a more responsive answer, or an answer to an interrogatory to which an objection was interposed, should be filed within 14 days of the answer or objection to the discovery request. The text of the discovery request, **and any answer provided** should be provided as an attachment to the motion to compel.

(emphasis added).

The Postal Service’s Motion provides only the text of its own discovery request, and omits – in violation of the Commission’s rules – Pitney Bowes’ responses and partial

objections.¹ Instead, the Postal Service chooses to paraphrase and mischaracterize Pitney Bowes' objections, precisely what the rule is intended to prevent. Moreover, by failing to provide Pitney Bowes' responses as required by the rule, the Postal Service also fails to disclose forthrightly that Pitney Bowes provided complete responses to subparts (a) and (b) of the information request at issue, which seek information regarding "customers' decisions" and "customers' purchases or leases" of postage meters. Pitney Bowes objected only to subparts (c) through (e), which went far afield and expressly sought information that related to Pitney Bowes' own business, and not to customers, mailers, or any aspect of Pitney Bowes' proposal or testimony.

The Postal Service's failure to follow the rules thus leaves a misimpression as to the dispute actually before the Commission, and would itself be grounds to deny the Motion to Compel. Moreover, the entire motion is infected by the same refusal to deal properly with Pitney Bowes' position and with the applicable law.

II. The Objectionable Portions Of The Information Request Do Not Seek Information That Is Relevant Or Likely To Assist The Commission In Making Its Recommendations In This Case.

Pitney Bowes objected to USPS/PB-T3-20(c)-(e) on the following relevance grounds:

The information requested in USPS/PB-T3-20[(c)-(e)] is beyond the scope of the testimony submitted by Pitney Bowes in this case and is irrelevant. The testimony of Pitney Bowes witness Buc proposes a discount for Single-Piece First-Class Letter Mail first-ounce postage evidencing purchased through select retail sales channels that avoids the transaction costs incurred by stamps sold directly by Postal Service employees at USPS owned or leased facilities i.e., stamps sold across USPS retail windows or counters. This workshare discount is premised on the fact that the sale of stamps through traditional Postal Service retail windows is expensive and, therefore, that deaveraging the cost of postage evidencing for different retail sales channels would promote economic efficiency. Under the Commission's well-established practice of setting discounts in conformity with efficient component pricing, the discount proposed, like all

¹ The full text of the discovery requests USPS/PB-T3-20(a)-(e), along with Pitney Bowes's answers to subparts (a) and (b) and its partial objections to subparts (c) through (e) are attached as Exhibit 1.

workshare discounts, is based on the unit avoided costs of the Postal Service; the costs or revenue implications for individual firms are irrelevant. Because the information requested in USPS/PB-T3-20[(c)-(e)] is beyond the scope of the testimony and has no bearing on the appropriateness of the proposed workshare discount the discovery request is improper and irrelevant.

In support of its Motion, the Postal Service fails to point to any portion of the testimony sponsored by Pitney Bowes that deals with its share of the postage evidencing market, or with “the projected increase in revenue to Pitney Bowes” of various postage evidencing discounts. Nor do the requests seek any information regarding mailers or postal customers. The information requests are thus, on their face, beyond the scope of Pitney Bowes’ testimony, and are improper for that reason alone.

The Postal Service instead makes vague and out-of-context references to the “fairness and equity” language of 39 U.S.C. §§ 3622(b)(1) and 3623(c)(1), quotes some of the language from 39 U.S.C. § 3622(b)(4) and 39 U.S.C. § 3623(c)(2), and makes later reference to these sections without any explanation at all. *See* Motion, at 2-3 and 4 n.5. After reciting these provisions, the Postal Service asserts that “[s]urely, the effect that a postage discount may have on *mailers* is among the factors the Commission must consider when recommending nationwide postal rates and fees.” Motion, at 3 (emphasis added). But as noted above, Pitney Bowes has *answered* the subparts of the information request that deal with *mailers and customers*, and has objected only to the portions of the request that seek information on *Pitney Bowes*. Subsections (a) and (b) ask:

- a. In your view, would your proposed postage evidencing discount affect customers’ decisions to purchase or lease postage meters or PC Postage devices? Please explain fully.
- b. Have you, or Pitney Bowes, estimated how the proposed discount would quantitatively affect customers’ purchases or leases of postage meters or PC Postage devices? If so, please provide the estimates and the data that the estimates are based on.

and Pitney Bowes responded:

- a. Yes. Pricing incentives would likely drive demand for these products.
- b. No.

The Postal Service's citation to the law referring to effects on *mailers* thus does nothing to advance its position.

The Postal Service contends that the non-cost factors of the Act support discovery seeking the commercially sensitive market share and revenue information of an individual firm, but does not cite any precedent in support of this position, choosing instead to rely on the conclusory assertion that the information "directly pertain[s] to the ratemaking criteria in the Postal Reorganization Act." *Id.* In fact, Commission precedent establishes that the non-cost factors of the Act should not, without more, be read to support the disclosure of commercially sensitive market share and revenue response information of an individual firm. The Commission's policy regarding the discovery of intervenors' commercially sensitive information is well-established and has been reiterated in a series of rulings – "absent exceptional circumstances, such data need not be produced." Presiding Officer's Ruling ("POR") R2000-1/102, July 31, 2000, at 2 (citing POR R90-1/66, September 7, 1990, at 2 ("The Commission's policy is to refrain, absent exceptional circumstances, from compelling participants to file data that reasonably can be found commercially sensitive."); POR R94-1/64, August 19, 1994, at 5; POR R87-1/148, November 10, 1987, at 2). In its Motion, the Postal Service fails to assert, much less establish, "exceptional circumstances" as required under Commission precedent. Nor could it given the peripheral nature of the information sought relative to the real issues before the Commission.

The Postal Service's attempt to argue that the information is relevant for purposes of impeachment is also without merit. The Postal Service states that "Pitney Bowes' private

interest could still be considered relevant,” Motion, at 3, suggesting that it seeks the commercially sensitive market share and revenue information for impeachment purposes to establish that Pitney Bowes is an interested party. Had the Postal Service provided Pitney Bowes’ response to USPS/PB-T3-20(c)-(e) (as the rule requires), it would have had to concede that Pitney Bowes has expressly (and unsurprisingly) acknowledged its interest in the proposed discount:

At best, information regarding Pitney Bowes’ share of the postage meter and PC postage device markets would establish that Pitney Bowes is an interested party with respect to the Commission’s review of the proposed expanded retail access discount. Setting aside the fact that proposed discount would inure to the benefit of the shared customers of Pitney Bowes and the Postal Service – mail users. The notion that Pitney Bowes is an interested party is self-evident. First, Pitney Bowes, like every other intervenor, is by definition an interested party. Second, Pitney Bowes is the sponsor of the proposed discount.

The Postal Service’s Motion provides no showing that the additional, commercially sensitive information it seeks would add in any meaningful way to this inarguable point.

The Postal Service’s suggestion that its request is analogous to assessing the credibility of a witness in a court proceeding is also well wide of the mark. Pitney Bowes’ recommendation is based on avoided transaction costs related to the retail sale of postage incurred by the Postal Service; it has nothing to do with any conduct of Pitney Bowes. The “criminal and civil courts” to which the Postal Service refers have in fact been careful to avoid allowing trials to be diverted into collateral matters through the guise of proving up matters related to credibility. *See, e.g., United States v. LeCompte*, 108 F.3d 948, 951 (8th Cir. 1997) (noting that the rule against allowing extrinsic evidence as to credibility is designed to prevent mini-trials on peripherally related or irrelevant matters); *United States v. Beauchamp*, 986 F.2d 1, 3 (1st Cir. 1993) (it is “well established that a party may not present extrinsic evidence to impeach a witness by contradiction on a collateral matter”).

The Postal Service’s hypothetical “scenario” also fails to establish that compelling the production of commercially sensitive market share and revenue information from Pitney Bowes will lead to relevant and helpful evidence. *See* Motion, at 4. First, it again ignores Pitney Bowes’ response to USPS/PB-T3-20(a), which acknowledges that pricing incentives may affect consumer decisions regarding what postal sales channel or form of postage evidencing they will use. Second, even if the Postal Service had provided some case law support (which it has not) for its claim that fairness and equity considerations within the scope of the Act are raised by its “scenario” that the proposal “would also favor mailers that already have a postage meter over those that do not,” Motion, at 4, this point is not related to the commercially sensitive market share or revenue information it seeks from Pitney Bowes.

Accordingly, the Postal Service has failed to establish the “exceptional circumstances” necessary to compel the disclosure of commercially sensitive information and has failed to show that the portions of the information request to which Pitney Bowes has objected are likely to lead to relevant and helpful evidence.

II. The Objectionable Portions Of The Information Request Are Harassing and Would, If Permitted, Have A Chilling Effect On Participants Before the Commission.

Pitney Bowes objected to USPS/PB-T3-20 (c)-(e) on the grounds of harassment for the following reasons:

At best, information regarding Pitney Bowes’ share of the postage meter and PC postage device markets would establish that Pitney Bowes is an interested party with respect to the Commission’s review of the proposed expanded retail access discount. Setting aside the fact that proposed discount would inure to the benefit of the shared customers of Pitney Bowes and the Postal Service – mail users. The notion that Pitney Bowes is an interested party is self-evident. First, Pitney Bowes, like every other intervenor, is by definition an interested party. Second, Pitney Bowes is the sponsor of the proposed discount. The interrogatory appears nonetheless intended to harass Pitney Bowes by forcing it to produce, or estimate, commercially sensitive information without any apparent benefit to the Commission or the proceedings.

In response to this objection, the Postal Service states that “[it] fails to see how an estimate of Pitney Bowes’ market share or projected revenue increases could be commercially sensitive.” Motion, at 5. This statement is inconsistent with common sense and with the uncontradicted weight of precedent, and completely undermines both the seriousness and legitimacy of the Postal Service’s Motion. Courts that have considered the issue have uniformly considered firm-specific market share and revenue information to be commercially sensitive, with one recent court flatly stating that the position the Postal Service advances here is “unreasonable.” See, e.g., *Spartanburg Regional Healthcare System v. Hillenbrand Industries, Inc.*, 2005-2 Trade Cases P 74,980 (W.D. Mich. 2005) (“**it is unreasonable to assert** that such requests [for sales revenue and market share] do not seek the production of confidential and proprietary business information”) (emphasis added); *Spinturf, Inc. v. Southwest Recreational Industries, Inc.*, 216 F.R.D. 320, 324 (E.D. Pa. 2003) (“past and future market share, the size of future markets, . . . and proprietary information regarding the development of [the] product line” is information that “is confidential and sensitive” and taken together, “constitutes confidential commercial information”); *Allen v. Howmedica Leibinger*, 190 F.R.D. 518, 526 (W.D. Tenn. 1999) (sales data, sales projections, and product details “are the type of information which give one an advantage over competition and have traditionally been protected;” denying plaintiff’s motion to compel discovery).

Allowing the Postal Service to use the discovery process to force individual firms to produce, or estimate, commercially sensitive market share and revenue response information (while at the same time stating falsely that such information is not commercially sensitive) is likely to have a chilling effect on the willingness of individual firms to participate directly in the Commission’s proceedings. Regrettably, the interrogatories at issue here are not an isolated

occurrence. Rather, the written discovery propounded by the Postal Service in this case signals a discouraging trend. *See e.g.*, Responses of Grayhair Software witness Cameron Bellamy to Interrogatories of the United States Postal Service USPS/GHS-T1-7, 11, and 13 (citing improper discovery seeking disclosure of firm-specific revenue information). The Postal Service is entitled to seek discovery on all relevant information. It should not, however, be permitted to harass individual firms by demanding that they produce, or estimate, irrelevant and commercially sensitive information. The Postal Service's arguments in response to Pitney Bowes' claims of harassment are without merit. Indeed, the Postal Service's position that the information it seeks should not even be considered commercially sensitive betrays the lack of care that the objectionable interrogatories represent. That is a workable definition of harassment in itself.

III. The Objectionable Portions Of The Information Request Would Impose an Undue Burden on Pitney Bowes.

Pitney Bowes objected to USPS/PB-T3-20 (c) on the grounds of undue burden as follows:

defining the relevant markets and developing and undertaking meaningful surveys to establish proper market share information is a task requiring careful and often expensive inquiry and analysis. Requiring Pitney Bowes to undertake such an effort on a matter that is peripheral, at best, to this case would impose a substantial and unwarranted burden on Pitney Bowes.

and to USPS/PB-T3-20 (d)-(e) on the grounds of undue burden, in part, as follows:

Pitney Bowes has not undertaken any studies to estimate the projected increase in revenue to Pitney Bowes based on the proposal. To develop and undertake a meaningful survey of customer behavior in response to the proposed discount would impose a substantial and unwarranted burden on Pitney Bowes.

As set forth in the objections, to *meaningfully* respond to the questions posed in USPS/PB-T3-20(c)-(e) would impose a substantial and unwarranted burden on Pitney Bowes because the information is not available, or cannot be made available without significant time,

effort, and expense. The Postal Service's response does not take issue with this observation. Nor could it given that extensive antitrust matters often turn almost entirely on accurately identifying and measuring relevant markets, and the revenue responses within those markets to price increases, which are matters of fact in each individual case and often require expert testimony. *See, e.g., Brown Shoe Co. v. United States*, 370 U.S. 294, 325-330, 335-39 (1962)(noting the many factors that go into determining relevant markets and submarkets, including determining the "reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it."). Instead, the Postal Service seeks to sidestep the entire problem by asserting that burden of its requests is not substantial because it is only seeking to compel "estimates." The suggestion, it would seem, is that such off-the-cuff "estimates" would not be very expensive or burdensome to provide. Regardless, given the potential legal significance of commercially sensitive market share information, providing such off-the cuff "estimates" (whatever the cost or burden) would be irresponsible.

The Postal Service's position on this point further highlights the improper nature of those portions of the information requests to which Pitney Bowes has objected. The Postal Service is arguing that the disclosure of commercially sensitive market share and revenue response information is somehow necessary to the Commission's consideration of this case, while at the same time suggesting that the information it seeks can be based on estimates that are not fully and carefully done. That position merely confirms how peripheral the information it seeks is to the true issues in this case.

Nor is there any basis whatsoever for the Postal Service's unsupported assertion that the costs of requiring the production of commercially sensitive, and legally complex, market share and revenue response information are somehow outweighed by the supposed need for this

EXHIBIT 1

USPS/PB-T3-20 Please refer to your response to USPS/PB-T3-8(c), where you stated that you did not research the cost to customers under your proposal. That interrogatory also asked, in part, to estimate “any recurring annual costs or fees paid to Pitney Bowes associated with the customer’s use” of a Pitney Bowes postage meter or PC Postage device. However, your response did not address the estimated costs or fees that would be paid from Pitney Bowes’ perspective. If you cannot answer any of the following subparts, please redirect them to Pitney Bowes for an institutional response.

- a. In your view, would your proposed postage evidencing discount affect customers’ decisions to purchase or lease postage meters or PC Postage devices? Please explain fully.
- b. Have you, or Pitney Bowes, estimated how the proposed discount would quantitatively affect customers’ purchases or leases of postage meters or PC Postage devices? If so, please provide the estimates and the data that the estimates are based on.
- c. Please provide (or estimate, if accurate figures are unavailable) Pitney Bowes’ share of the postage meter and PC Postage device markets.
- d. Please estimate the projected increase in revenue to Pitney Bowes based on your proposed 0.1 cent postage evidencing discount.
- e. Please estimate the projected increase in revenue to Pitney Bowes based on a postage evidencing discount of:
 - (1) 1.0 cents (as proposed by Pitney Bowes² in Docket No. R2000-1);
 - (2) 2.0 cents;
 - (3) 3.0 cents;
 - (4) 4.0 cents (as proposed by E-Stamp and Stamps.com³ in Docket No. R2000-1).

RESPONSE

- a. Yes. Pricing incentives would likely drive demand for these products.
- b. No.
- c. Pitney Bowes hereby objects to USPS/PB-T3-20(c) as an improper discovery request under Rule 25(a). Pitney Bowes objects to USPS/PB-T3-20(c) on the grounds of relevance, harassment, and undue burden. The information requested in USPS/PB-T3-20(c) is beyond the scope of the testimony submitted by Pitney Bowes in this case and is irrelevant. The testimony of Pitney Bowes witness Buc proposes a discount for Single-Piece First-Class Letter Mail first-ounce postage evidencing purchased through select retail sales channels that avoid the

² See Docket No. R2000-1, Tr. 26/29/13893 at 9-10.

³ See Docket No. R2000-1, Tr. 29/13651 at 3-7; Docket No. R2000-1, Tr. 23/10482 at 5-9.

transaction costs incurred by stamps sold directly by Postal Service employees at USPS owned or leased facilities i.e., stamps sold across USPS retail windows or counters. This workshare discount is premised on the fact that the sale of stamps through traditional Postal Service retail windows is expensive and, therefore, that deaveraging the cost of postage evidencing for different retail sales channels would promote economic efficiency. Under the Commission's well-established practice of setting discounts in conformity with efficient component pricing, the discount proposed, like all workshare discounts, is based on the unit avoided costs of the Postal Service; the costs or revenue implications for individual firms are irrelevant. Because the information requested in USPS/PB-T3-20(c) is beyond the scope of the testimony and has no bearing on the appropriateness of the proposed workshare discount the discovery request is improper and irrelevant.

Moreover, the information requested in USPS/PB-T3-20(c) appears to be designed to harass Pitney Bowes rather than to elicit relevant information. At best, information regarding Pitney Bowes' share of the postage meter and PC postage device markets would establish that Pitney Bowes is an interested party with respect to the Commission's review of the proposed expanded retail access discount. Setting aside the fact that proposed discount would inure to the benefit of the shared customers of Pitney Bowes and the Postal Service – mail users. The notion that Pitney Bowes is an interested party is self-evident. First, Pitney Bowes, like every other intervenor, is by definition an interested party. Second, Pitney Bowes is the sponsor of the proposed discount. The interrogatory appears nonetheless intended to harass Pitney Bowes by forcing it to produce, or estimate, commercially sensitive information without any apparent benefit to the Commission or the proceedings. Accordingly, the information requested in USPS/PB-T3-20(c) is an improper discovery request under Rule 25(a).

Furthermore, defining the relevant markets and developing and undertaking meaningful surveys to establish proper market share information is a task requiring careful and often expensive inquiry and analysis. Requiring Pitney Bowes to undertake such an effort on a matter that is peripheral, at best, to this case would impose a substantial and unwarranted burden on Pitney Bowes.

- d. Pitney Bowes hereby objects to USPS/PB-T3-20(d) as an improper discovery request under Rule 25(a). Pitney Bowes objects to USPS/PB-T3-20(d) on the grounds of relevance, harassment, and undue burden. The information requested is beyond the scope of the testimony submitted by Pitney Bowes in this case. The relevant testimony of Pitney Bowes witness Buc proposes a discount for Single-Piece First-Class Letter Mail first-ounce postage evidencing purchased through select retail sales channels that avoid the transaction costs incurred by stamps sold directly by Postal Service employees at USPS owned or leased facilities i.e., stamps sold across USPS retail windows or counters. This workshare discount is premised on the fact that the sale of stamps through traditional Postal Service retail windows is expensive and, therefore, that deaveraging the cost of postage evidencing for different retail sales channels would promote economic efficiency.

Under the Commission's well-established practice of setting discounts in conformity with efficient component pricing, the discount proposed, like all workshare discounts, is based on the unit avoided costs of the Postal Service; the costs or revenue implications for individual firms are irrelevant. Because the information requested in USPS/PB-T3-20(d) is beyond the scope of the testimony and has no bearing on the appropriateness of the proposed workshare discount the discovery request is improper and irrelevant.

Moreover, the information requested in USPS/PB-T3-20(d) appears to be designed to harass Pitney Bowes rather than to elicit relevant information. At best, information regarding the projected increase in revenue to Pitney Bowes from the proposal will establish that Pitney Bowes is an interested party with respect to the Commission's review of the proposed expanded retail access discount. Setting aside the fact that proposed discount would inure to the benefit of the shared customers of Pitney Bowes and the Postal Service – mail users. The notion that Pitney Bowes is an interested party is self-evident. First, Pitney Bowes, like every other intervenor, is by definition an interested party. Second, Pitney Bowes is the sponsor of the proposed discount. The interrogatory nonetheless appears intended to harass Pitney Bowes by forcing it to produce, or estimate, commercially sensitive information and impose a substantial burden without any apparent benefit to the Commission or the proceedings. Accordingly, the information requested in USPS/PB-T3-20(d) is an improper discovery request under Rule 25(a).

Furthermore, notwithstanding the foregoing objections and without waiving the foregoing objections, Pitney Bowes has not undertaken any studies to estimate the projected increase in revenue to Pitney Bowes based on the proposal. To develop and undertake a meaningful survey of customer behavior in response to the proposed discount would impose a substantial and unwarranted burden on Pitney Bowes.

- e. Pitney Bowes hereby objects to USPS/PB-T3-20(e) as an improper discovery request under Rule 25(a). Pitney Bowes objects to USPS/PB-T3-20(e) on the grounds of relevance, harassment, and undue burden. The information requested is beyond the scope of the testimony submitted by Pitney Bowes in this case. The relevant testimony of Pitney Bowes witness Buc proposes a discount for Single-Piece First-Class Letter Mail first-ounce postage evidencing purchased through select retail sales channels that avoid the transaction costs incurred by stamps sold directly by Postal Service employees at USPS owned or leased facilities i.e., stamps sold across USPS retail windows or counters. This workshare discount is premised on the fact that the sale of stamps through traditional Postal Service retail windows is expensive and, therefore, that deaveraging the cost of postage evidencing for different retail sales channels would promote economic efficiency. Under the Commission's well-established practice of setting discounts in conformity with efficient component pricing, the discount proposed, like all workshare discounts, is based on the unit avoided costs of the Postal Service; the

costs or revenue implications for individual firms are irrelevant. Because the information requested in USPS/PB-T3-20(e) is beyond the scope of the testimony and has no bearing on the appropriateness of the proposed workshare discount the discovery request is improper and irrelevant.

Moreover, the information requested in USPS/PB-T3-20(e) appears to be designed to harass Pitney Bowes rather than to elicit relevant information. At best, information regarding the projected increase in revenue to Pitney Bowes at various hypothetical discount ranges will establish that Pitney Bowes is an interested party with respect to the Commission's review of the proposed expanded retail access discount. Setting aside the fact that proposed discount would inure to the benefit of the shared customers of Pitney Bowes and the Postal Service – mail users. The notion that Pitney Bowes is an interested party is self-evident. First, Pitney Bowes, like every other intervenor, is by definition an interested party. Second, Pitney Bowes is the sponsor of the proposed discount. The interrogatory appears nonetheless intended to harass Pitney Bowes by forcing it to produce, or estimate, commercially sensitive information and impose a substantial burden, without any apparent benefit to the Commission or the proceedings. Accordingly, the information requested in USPS/PB-T3-20(e) is an improper discovery request under Rule 25(a).

Furthermore, notwithstanding the foregoing objections and without waiving the foregoing objections, Pitney Bowes has not undertaken any studies to estimate the projected increase in revenue to Pitney Bowes based on the stated discount ranges. To develop and undertake a meaningful survey of customer behavior in response to the hypothetical discount ranges would impose a substantial and unwarranted burden on Pitney Bowes.