

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

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COMPLAINT ON POST E.C.S.

Docket No. C99-1

MOTION OF THE UNITED STATES POSTAL SERVICE
FOR RECONSIDERATION, OR FOR ALTERNATIVE RELIEF
(March 1, 1999)

On October 5, 1998, United Parcel Service (UPS) filed a complaint with the Commission under 39 U.S.C. § 3662, alleging that the Postal Service is acting unlawfully by offering Post E.C.S. to the public without first submitting to the Commission a request for a recommended decision on classification provisions and rates associated with this service under 39 U.S.C. §§ 3622, 3623. On November 5, 1998, the Postal Service moved to dismiss the complaint on two grounds. First, the Commission does not have jurisdiction to entertain the question of whether Post E.C.S. is a "postal" service. Second, even if the Commission has jurisdiction to consider the complaint, Post E.C.S. is plainly not a postal service according to the definitions of that term put forth by the courts, the Commission, and the Governors. On December 16, 1998, UPS filed an opposition to this motion.

On February 17, 1999, the Commission issued Order No. 1229 in this docket. The order does not resolve the controversy raised in the Postal Service's Motion to Dismiss; rather, the Commission requests that the Postal Service respond to several questions relating to Post E.C.S. service, in order to "clarify the issues presented by this controversy" These questions touch on a number of issues, including whether the test is ongoing or has expired, future plans for offering the service, the number and

location of authorized users, the degree to which the service is used for international communications, and the degree of substitutability between Post E.C.S. and Express Mail and other services. Question 4(a) in the Commission's order requests that the Postal Service "provide a copy of each convention, memorandum of understanding, contract, or other instrument governing the joint provision of Post E.C.S. service under the international arrangement referenced in [paragraph 31(a) of the Postal Service's Answer]." The Order states that the purpose of these questions is to "clarify the issues presented by this controversy" The order directs the Postal Service to respond to the Commission's request by March 1, 1999.

As thoroughly discussed in Part I of the Postal Service's Motion to Dismiss, nothing in Title 39, United States Code, gives the Commission authority to review the Postal Service's exercise of its independent authority to carry out its own powers and duties under the statute:

there is nothing in the language of section 3662 which suggests any intent on the part of Congress to grant the Commission the authority to declare independent actions of the Postal Service to be either lawful or unlawful. The subject of a rate complaint was intended to be "rates," not the issue of whether or not a service had been lawfully established. UPS is seeking from the Commission something which the Commission has no authority to grant under the plain language of section 3662.¹

Part I of the Motion to Dismiss raises a relatively straightforward question of law regarding the Commission's authority to entertain complaints about the nonpostal versus postal status of a service offering. The Postal Service believes that it is unnecessary for the Commission to engage in factfinding, simply because the relief requested by UPS is not within the scope of the Commission's complaint adjudication

authority under 39 U.S.C. § 3662. The responses to questions posed in Order No. 1229 would not enhance the Commission's understanding of the jurisdictional issue. Indeed, with the exception perhaps of question 1(a) which appears to gauge the mootness of the controversy, the request appears to be designed to test representations made by the Postal Service regarding the nonpostal and international nature of Post E.C.S. In this regard, the Postal Service respectfully requests that the Commission reconsider whether responses to the questions posed in Order No. 1229 are necessary to resolve the issues presented in the Postal Service's Motion to Dismiss.

If the Commission determines that responses to the questions posed in Order No. 1229 are essential to its resolution of the Motion to Dismiss, the Postal Service is prepared to promptly provide responses to questions 1, 2, 3, and 4(b). Should it be required to provide responses to these questions, however, the Postal Service does not intend to waive its right to contest the Commission's authority to entertain UPS's Complaint.

With respect to question 4(a), however, the Postal Service questions the utility of providing the Commission with documents memorializing its relations with other parties involved in the provision of Post E.C.S. service. The Postal Service has identified a software development and license Agreement executed by IPC, a software supplier, Canada Post, the USPS, and LaPoste, as well as exhibits and addenda to that instrument, as responsive to the Commission's request. The contents of all of the documents identified by the Postal Service as being potentially responsive to question 4(a) include highly sensitive commercial information. The development and license

¹ Motion of United States Postal Service to Dismiss (November 5, 1998) at 3.

agreement contains commercial software license provisions, including: definitions, development of custom software, license, fees and payment, software provider support and maintenance, warranty, indemnity, term, termination, severability, notice, amendment, and communication procedures among the parties. Addenda and exhibits contain similar types of provisions, as well as proprietary computer code, descriptions of proprietary computer codes, functional requirements of software, a software test plan, and proprietary software integration plans.

The Postal Service sincerely believes that the contents of these documents will in no way enhance the Commission's understanding of the jurisdictional issue or the mixed question of law and fact concerning the nonpostal and international nature of Post E.C.S. service. For this reason, the Postal Service requests that the Commission reconsider whether it needs information responsive to question 4(a), and either withdraw the question or narrow its scope. Moreover, the Postal Service and the four other entities that are signatories to the documents would benefit from an authoritative explanation as to why the documents must be produced.

If the Commission concludes that it must review documents responsive to question 4(a), the Postal Service further requests that the Commission issue an order permitting the Postal Service to redact financial information and file the documents under the protective conditions adopted by the Commission in P.O. Ruling No. R97-1/62, as modified by P.O. Ruling No. R97-1/93.² The documents should be withheld from public disclosure because they contain sensitive commercial information. The

negotiating position of the Postal Service would be seriously “compromised by outright disclosure.” See P.O. Ruling No. R97-1/40. This concern is particularly germane here, where the Postal Service has embarked on a new venture with a software supplier, IPC, and foreign postal administrations. The project is still in pilot form, and the negotiating positions of the parties could change dramatically as customer demand for products like Post E.C.S. service matures.

In addition, public disclosure of the documents would result in commercial harm to the Postal Service, the software supplier, IPC, and the foreign posts. UPS alleges in its complaint that “Post E.C.S. competes with a similar service provided by UPS.” Complaint ¶ 16. The competitive position of all of the participants in Post E.C.S. services would be seriously jeopardized by disclosure of the terms of software licensing agreement. This information would give competitors access to prices charged among the parties. This is precisely the sort of information that the Commission has routinely withheld from public disclosure under protective conditions. See, e.g., P.O. Ruling No. R97-1/62 (PMPC contract price information); P.O. Ruling No. MC97-2/5 (contracts in force in the purchased highway network); P.O. Ruling No. MC97-5/11 (competitor wage costs); P.O. Ruling No. MC96-3/24 (disaggregated volume and unit cost data). The Postal Service accordingly requests that, should the Commission affirm its need for the documents, the Commission issue an order permitting the Postal Service to redact all financial terms from the documents and file the documents under the protective

² In P.O. Ruling No. R97-1/93, the Presiding Officer amended paragraph 1(b) of the protective conditions in P.O. Ruling No. R97-1/62, in order to provide access to outside counsel for UPS, who has a role in advising competitors on the double postage rule.

conditions adopted by the Commission in P.O. Ruling No. R97-1/62, as modified by P.O. Ruling No. R97-1/93.

WHEREFORE, the Postal Service respectfully requests that the Commission reconsider Order No. 1229. If the Commission concludes that the information requested in Order No. 1229 is necessary to its resolution of the issues, it requests that it be permitted to file information responsive to question 4(a) in redacted form and under the protective conditions of P.O. Ruling No. R97-1/62, as modified by P.O. Ruling No. R97-1/93.

The undersigned counsel has sent a copy of the instant motion to counsel for UPS, CAUUC, and AOLP by facsimile transmission.

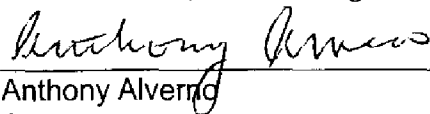
Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

Daniel J. Foucheaux, Jr.

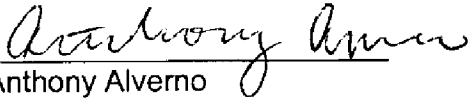
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March 1, 1999

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all participants of record in this proceeding in accordance with section 12 of the Rules of Practice.


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March 1, 1999