

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

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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

COMPLAINT ON POST E.C.S.

Docket No. C99-1

**UNITED STATES POSTAL SERVICE
ANSWER IN OPPOSITION TO UNITED PARCEL SERVICE
MOTION TO COMPEL ANSWERS TO INTERROGATORIES UPS/USPS-25-33
(July 6, 1999)**

On June 8, 1999, UPS filed interrogatories and requests for production of documents UPS/USPS-25-33. On June 18, the Postal Service filed general and specific objections to UPS's discovery request¹ (hereinafter "Objection"). On June 25, UPS filed its Motion to Compel Responses to Interrogatories UPS/USPS-25 through UPS/USPS-33 (hereinafter "UPS Motion to Compel"). The Postal Service hereby responds to UPS's Motion to Compel.²

I. GENERAL OBJECTION

The Postal Service has previously filed three pleadings in this docket which set forth in great detail the Postal Service's general objection to the discovery currently promulgated by the participants.³ On the same grounds stated in those documents, the

¹ Objection of the United States Postal Service to United Parcel Service Interrogatories UPS/USPS-25-33 (filed June 18, 1999) (hereinafter "Objection").

² Under proposed Special Rule of Practice 2B, answers in opposition to a participant's motion to compel discovery requests "will be considered supplements to the arguments presented in the initial objection." P.O. Ruling No. C99-1/2, Attachment A. Consistent with proposed Special Rule 2B, the Postal Service will not endeavor to repeat the arguments presented in its objection, but rather will supplement those arguments in order to respond to certain arguments raised in UPS's Motion to Compel. The Postal Service does not intend this document to embody all of the grounds supporting its objections to interrogatories 25-33 or that its silence in the instant motion on a ground raised in its initial Objection constitutes waiver; rather, the instant pleading is simply intended to supplement the Postal Service's initial objections.

³ Those pleadings were the Objection of the United States Postal Service to UPS Interrogatories UPS/USPS-1-24 (May 25, 1999) at pages 1-4; the United States Postal

Postal Service maintains its general objection, equally applicable to interrogatories 25 through 33, that UPS's discovery requests are inappropriate until preliminary rulings defining the procedures and scope of permissible discovery are finalized.

II. SPECIFIC OBJECTIONS

Interrogatory UPS/USPS-25. Interrogatory 25 seeks quantitative and descriptive information on any Post E.C.S. sales visits or presentations made by the Postal Service outside the United States. The Postal Service objected to this interrogatory on grounds of relevance and commercial sensitivity. UPS alleges that the information is relevant not to the question of whether Post. E.C.S. is a "postal" service, but rather whether Post E.C.S. is an international service outside the purview of chapter 36 of Title 39, United States Code. UPS's Motion to Compel, however, offers no specific explanation as to how or why sales visits outside the United States inform the product's international status. The interrogatory, moreover, reveals a fundamental misunderstanding of the Postal Service's position in this proceeding. The Postal Service has never represented that Post E.C.S. is international by virtue of the citizenship or location of *its* licensed users. Furthermore, where and how the Postal Service makes sales visits or presentations regarding its Post E.C.S. service is irrelevant to the nonpostal or postal nature of the service. The Postal Service could very well make such presentations and visits inside or outside the borders of the United States, but this would do nothing to prove the postal nature of the service, let alone its international dimension. Prospective customers of any nationality could travel to the United States

Service Motion for Partial Reconsideration of P.O. Ruling No. C99-1/2 (June 8, 1999) at pages 1-5; and the United States Postal Service Answer in Opposition to the Motion of UPS to Compel Answers to Interrogatories UPS/USPS-1-7 (except 5(g)) and 9-20 (June 18, 1999).

or foreign destinations for presentations or sales visits, yet information about these interactions would do nothing to inform the nature of the service.

UPS also challenges the Postal Service's objection on grounds of commercial sensitivity. The Postal Service's objection on this basis is entirely appropriate. Interrogatory 25 again reveals UPS's appetite for the Postal Service's marketing strategies for Post E.C.S. Disclosure of the location of sales presentations and visits of postal representatives would give competitors insight into marketing strategies and sales tactics. This not only enables competitors to evaluate the strengths of the Postal Service's marketing strategies for this product, but also invites competitors to adopt such strategies for their own use. Thus, the requested information is unquestionably sensitive, and disclosure would be harmful to the Postal Service's test of this product.

Interrogatories UPS/USPS-26, 29. Interrogatories UPS/USPS-26 and 29 both request information concerning foreign users of Post E.C.S. licensed by the Postal Service. Question 26 requests not only the number of such licensees, but also their names and addresses. The Postal Service objected to the production of names and addresses of foreign users on grounds of relevance and commercial sensitivity. UPS's Motion to Compel offers absolutely no explanation how the identities and addresses of Post E.C.S. customers could possibly inform the issues at stake in this controversy. Such disclosure would work a clearly "unwarranted invasion of personal privacy." *National Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 874, 879 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1078 (1990) (*NARFE*). In light of (1) the complete irrelevance of this information to this proceeding, (2) the express prohibition in 39

U.S.C. § 412 on disclosure “by any means and for any purpose” of names or addresses of persons or patrons, (3) UPS’s silence on this specific matter in its Motion to Compel, and (4) judicial and Commission precedent protecting personal and customer-specific information,⁴ UPS’s Motion to Compel should be denied to the extent interrogatory 26 requests the production of customer names and addresses.

UPS also contends that it is not proper for the Postal Service to object to interrogatory 29 on grounds that it is cumulative and burdensome. UPS Motion to Compel at 3 n.3. UPS, however, offers no underlying explanation in support of this allegation. The Postal Service submits that interrogatory 29 is essentially repetitious of interrogatory 26. As a practical matter, both request the number of foreign users.⁵ Admittedly, interrogatory 26 asks for the number of such users located outside the United States, yet UPS offers no explanation as to why the *location* of a foreign user is material, at least in the abstract. A test participant’s “location” or domicile in the context of an internet-based service such as Post E.C.S. is of attenuated relevance, as the concept of location varies. This is because Post E.C.S. messages can be sent and retrieved by any person of any nationality anywhere in the world having internet access. In short, UPS has failed to satisfy its burden of establishing that the two requests are significantly different. To the extent UPS’s alleges that the cumulative or repetitious nature of an interrogatory is an improper basis for an objection, any belief to this effect is contrary to law and Commission precedent.⁶

⁴ See *NARFE*, 879 F.2d at 879; P.O. Ruling Nos. R83-1/16, 1/32, 1/38.

⁵ Customers are not asked to identify their nationality, so even if the Postal Service were compelled to respond to interrogatory 29, it would not have responsive information on the “number of non-U.S. companies/citizens” that are test participants.

⁶ See, e.g., 5 U.S.C. § 554(d); P.O. Ruling No. MC96-3/22 at 3 (denying motion to

Interrogatories UPS/USPS-27, 28. Interrogatories 27 and 28 request that the Postal Service provide technical details on Post E.C.S. for documents sent by Postal Service test participants to foreign recipients. The Postal Service objected to these interrogatories on grounds that the requested information is irrelevant and the interrogatory constitutes a fishing expedition. In its Motion to Compel, UPS states that these interrogatories do not request "*technical* information" on how the transmission and delivery is accomplished, but rather request a "general description of the path the message follows to its destination." UPS Motion to Compel at 3. Notwithstanding UPS's attempt to narrow the questions, its Motion to Compel fails to address specifically the Postal Service's relevance objection beyond the broad generalizations UPS mentions on page 2 of its Motion to Compel. Even for licensed Postal Service users, Post E.C.S. messages from a sender to a recipient who both happen to be in the United States can still travel through foreign or domestic paths because the user could be accessing the internet through a service provider located abroad. For this reason, the path traveled and servers used in Post E.C.S. do not, in and of themselves, establish that a particular transaction constitutes a cross-border communication.

Interrogatory UPS/USPS-30. Interrogatory 30 requests the Postal Service to provide an answer indicating its views as to when, among a variety of proffered alternatives, "delivery" of a Post E.C.S. message has been achieved. The Postal Service objected to this question on grounds that it was essentially irrelevant and

compel answers to written discovery on "ground that [the witness'] oral responses were adequate, and written responses would be unduly repetitious."); P.O. Ruling No. R97-1/62 at 6 ("In proceedings conducted under these provisions, parties are entitled 'to conduct such cross-examination as may be required for a full and true disclosure of the facts[.]' and in general '[a]ny oral or documentary evidence may be received,' with the exception of irrelevant, immaterial, or unduly repetitious evidence." (citation omitted)).

reached into matters that were the subject of ongoing negotiations with the software supplier. Since the filing of the objection, the parties have reached an agreement on the definition of "delivery" for purposes of the software license.⁷ This, in turn, has transformed the principal basis for the objection from one of interference with ongoing negotiations to one of commercial sensitivity. In particular, the definition of "delivery" in the context of Post E.C.S. is incorporated in a provision of the software license.⁸ The response to this interrogatory would accordingly reveal to competitors the basis upon which the software supplier is compensated, and this, in turn, would give competitors such as UPS, which have integrated the very same supplier's software in competing products,⁹ leverage in further contractual negotiations. Thus, the Postal Service, IPC, the foreign posts, and the software supplier would not only be harmed by disclosure of the requested information, but competitors stand to gain negotiating strength through the compelled production of an answer to this interrogatory.

The interrogatory is also irrelevant to the issues in this proceeding. This question asks for an opinion of when a message is considered to be delivered. UPS's interrogatory recognizes that there are multiple interpretations to the concept of delivery for this type of service. UPS, however, fails to meet its burden of demonstrating how

⁷ This occurred after the objection was filed. The Postal Service does not believe that UPS is prejudiced by this change, but if UPS does, the Postal Service would not oppose a request by UPS to supplement its Motion to Compel on this particular question should it believe that is necessary.

⁸ Because the concept of "delivery" has a legal consequence, *i.e.*, it triggers when the software supplier is entitled to compensation, the question arguably calls for a legal conclusion, and is therefore objectionable under proposed Special Rule of Practice 5, which provides that argument will not be received in evidence. See P.O. Ruling No. C99-1/2, Attachment A, Special Rule 5.

⁹ See <<http://www.ups.com/bin/shownews.cgi?19990616docexchg>> (UPS Press Release, June 16, 1999).

these varying interpretations of the concept of delivery inform the fundamental question at issue in this proceeding, *i.e.*, whether Post E.C.S. is a “postal” service. UPS, moreover, fails in its attempt to link the subject matter of this interrogatory to 39 U.S.C. § 407(a). Nowhere in section 407 is there an esoteric distinction drawn between various forms of electronic delivery for purposes of determining whether a service is international.

Interrogatory UPS/USPS-31. Interrogatory 31 requests information on the number of Post E.C.S. messages sent to a server inside the United States, and the number sent to servers outside the United States, by Postal Service test participants.¹⁰ The Postal Service objected to this interrogatory on grounds of relevance.¹¹ UPS’s Motion to Compel offers no explanation demonstrating the relevance of this particular question. UPS Motion to Compel at 3-4. The Postal Service reiterates that the location of a server does nothing to prove the domestic or international nature of Post E.C.S., as this factor does not prove that any particular communication constitutes a cross-border communication.

Interrogatories UPS/USPS-32 and 33. These interrogatories request the production of information regarding payments that might occur when Post E.C.S. messages are transmitted outside of the United States. The Postal Service explained

¹⁰ The question does not distinguish between intermediate servers, which serve as routers, and destination servers.

¹¹ As the Postal Service pointed out in its response to question 2 to Order No. 1229, the Postal Service has “no reliable means of determining where (geographically) Post E.C.S. transactions originate and destinate; once a company is authorized to use Post E.C.S., specific transactions can originate from or be sent to any location that has internet access.” Consequently, even if UPS’s motion to compel is granted, the Postal Service will report having no information responsive to interrogatory 31. The Postal Service nonetheless maintains its objections on principle.

in its Objection that these questions seek to unearth details about the licensing agreement for software integrated into Post E.C.S. The Postal Service accordingly objected to this interrogatory on grounds of relevance, privilege, and commercial sensitivity, consistent with its objection to interrogatory UPS/USPS-14. In its Motion to Compel, UPS attempts to analogize any purported payment exchanges in connection with Post E.C.S. with terminal dues systems. UPS Motion to Compel at 4.

UPS's Motion to Compel does nothing to overcome the Postal Service's commercial sensitivity and privilege objections, which are well explained in prior pleadings and incorporated here by reference.¹² Furthermore, UPS's argument in its Motion to Compel is based on the mistaken impression that financial arrangements with the software supplier are analogous to multilateral terminal dues payments for international mail exchanges among universal service postal service providers. UPS Motion to Compel at 4. They simply are not, and this argument reveals precisely why UPS's contentions in this proceeding must fail. Post E.C.S. is not operated, either functionally or financially, like a traditional hardcopy postal service, for the simple reason that it is not one. In short, UPS errs in attempting to apply the hardcopy international mail paradigm to Post E.C.S. Its Motion to Compel must be denied.

¹² Objection of the United States Postal Service to UPS Interrogatories UPS/USPS-1-24 (May 25, 1999) at pages 1-4; United States Postal Service Answer in Opposition to the Motion of UPS to Compel Answers to Interrogatories UPS/USPS-1-7 (except 5(g)) and 9-20 (June 18, 1999).

CONCLUSION

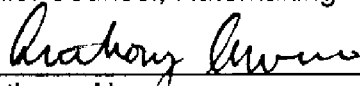
WHEREFORE, the Postal Service requests that the Commission deny UPS's Motion to Compel responses to interrogatories UPS/USPS-25-33.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

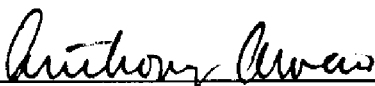
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Anthony Alverno

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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