

PRESIDING OFFICER'S
RULING NO. C99-1/3

UNITED STATES OF AMERICA
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

Complaint on Post E.C.S.

Docket No C99-1

PRESIDING OFFICER'S RULING GRANTING IN PART
MOTION OF UNITED STATES POSTAL SERVICE
FOR PARTIAL RECONSIDERATION
OF PRESIDING OFFICER'S RULING NO. C99-1/2
AND ESTABLISHING SPECIAL RULES OF PRACTICE

(July 7, 1999)

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Presiding Officer's Ruling C99-1/2 established initial procedural dates for this docket, and solicited comments on Special Rules of Practice and protective conditions for discovery responses. On June 8, the Postal Service submitted a Motion for Partial Reconsideration of P.O. Ruling No. C99-1/2 (Motion), which requests: (1) a ruling limiting the scope of this proceeding "to the issue of whether Post E.C.S. is a 'postal' service for purposes of chapter 36 of Title 39" (Motion at 5); (2) issuance of a procedural schedule identifying the steps and stages in the proceeding, preferably including only two stages; (3) inclusion in the procedural schedule of an indication that the proceeding will culminate in the issuance of a recommended decision if the Commission finds Post E.C.S. to be a postal service subject to the rate and classification procedures of chapter 36. These requests bear on both the conduct and the outcome of this proceeding, and are opposed to varying degrees by Complainant United Parcel Service (UPS), intervenor Coalition Against Unfair USPS Competition (CAUUC) and the Office of the Consumer Advocate (OCA).¹

¹ Response of United Parcel Service to United States Postal Service Motion for Partial Reconsideration of P.O. Ruling No. C99-1/2 (UPS Response), June 18, 1999; Coalition Against Unfair USPS Competition Opposition to Postal Service Motion for Partial Reconsideration (CAUUC Response),

Limiting scope of proceeding. The Postal Service urges adoption of limits on the scope of this proceeding "so as to balance any rights to which complainant and other participants may be entitled with the Postal Service's legitimate commercial interests and public service objectives." Motion at 2. Specifically, the Service requests that the focus of this docket be narrowed to the single issue of whether Post E.C.S. is "postal" or "nonpostal" in character, in the same fashion as the Commission's deliberations were confined to this issue in its consideration of the "Pack and Send" service in Docket No. C96-1.

UPS responds that the three counts in its Complaint establish the range of issues to be considered by the Commission in this case, and that Order No. 1239, issued May 3, 1999, has already found these issues appropriate for further evaluation. UPS Response at 2. UPS is correct on this point. However, UPS also states it does not oppose phasing this proceeding, with the first phase limited to the question of whether Post E.C.S. is a "postal" service. Under this scenario, discovery and the evidentiary presentations of the participants initially would be limited to that single topic, although subsequent phases, should they be necessary, would address a variety of issues relevant to rate and classification criteria. *Ibid.*

OCA opposes the Postal Service's request for reconsideration of P.O. Ruling C99-1/2, and suggests that the Presiding Officer take the opportunity to emphasize the broad scope of discovery appropriate in a complaint case such as the one before the Commission in this docket. OCA contends that the Postal Service motion is in reality a "collateral attack" on Order No. 1239, in which the Commission determined to consider the UPS complaint. OCA Response at 1-2. It urges that all aspects of the complaint be considered, and suggests that whether Post E.C.S. is a "postal" service or not, questions concerning the attributable costs and revenue impact of that service are

within the Commission's jurisdiction and are relevant to the issues raised by UPS in its complaint. *Id.* at 4.

There is no legal principle that would require the scope of this complaint to be restricted to limited issues as requested by the Postal Service. The grounds for relief presented by the Postal Service relate only to the potential business harm it might suffer unnecessarily if the range of discovery is broader than needed for the Commission to resolve the essential issues before it. However, the Postal Service's concerns are reasonable, and inasmuch as UPS has expressed willingness to pursue only the "postal versus nonpostal" issue at this time, UPS will be allowed to prosecute its case in this fashion. Essentially, UPS is recognizing that several of the lines of inquiry that it has attempted to open in discovery may become moot if the Commission rules against it on the threshold jurisdictional issue. Its willingness to proceed in this fashion is welcome, and helps refute any implication that it is using the Commission's processes are being used for inappropriate, competitive purposes.

The procedural schedule for this case will be phased, with its initial focus on the issue "is Post E.C.S. a 'postal' service?" For this reason, discovery and other fact finding will be limited to the "postal" issue at this stage of the proceeding.

OCA has pointed out that the Postal Service has objected to all of the discovery requests initially submitted by complainant. Office of the Consumer Advocate Comments in Response to P.O. Ruling No. C99-1/2, June 8, 1999, at 1. With this fact in mind, it is important to emphasize that this ruling does not accept the Postal Service's premise that the proper scope of inquiry in this case is quite limited. Nonetheless, phasing this case will achieve judicial efficiency while minimizing the potential for unnecessary commercial harm to participants. In the first phase of this case, discovery can be limited to matters bearing on the "postal" aspects of Post E.C.S., with discovery on more commercially sensitive topics deferred until later.

In a separate earlier pleading, UPS has reported that the Postal Service was unwilling to attempt to resolve discovery disputes informally, preferring to present its

views directly to the Presiding Officer in writing. Reply of United Parcel Service to Response of the United States Postal Service to P.O. Ruling No. C99-1/2 with Respect to Protective Conditions, June 18, 1999, at 2. I will direct UPS and the Postal Service to discuss issues related to discovery during the first phase of this case in light of this ruling. They should attempt to identify pending questions, or portions thereof, that are relevant to the question of whether Post E.C.S. is a "postal" service, and report within seven days on the extent to which part or all of the pending motions to compel in this case can be resolved informally.

Procedural schedule for proceeding. The Postal Service requests that the specific procedural steps to be followed in this complaint be established, and further that a commitment be made that the Commission will forward to the Governors a recommended decision on whether Post E.C.S. is a postal service for purposes of Chapter 36 of Title 39. None of the responses to the Postal Service motion oppose the publication of a procedural schedule that identifies the progression of events the Commission expects to occur in the prosecution of this complaint. However, all of the responses contend that the procedural schedule suggested by the Postal Service would unfairly bias the proceeding in the Service's favor.

As just described, consideration of this complaint will be phased, and it would be premature to attempt to develop a schedule of events for phases that may or may not occur, depending on the outcome of the first phase of this case. However, it is reasonable to set out the events that should occur during the initial phase of this case.

The Postal Service has suggested procedural steps building on the sample version of special rules of practice appended to P.O. Ruling C99-1/2. As stated in that ruling, at 2, the sample version of the special rules of practice appended to P.O. Ruling C99-1/2 were the special rules adopted for use in the last omnibus rate case, Docket No. R97-1. Those rules were applicable to a case filed by the Postal Service, in which intervenors submit combined direct and rebuttal evidence, and an opportunity for

surrebuttal is provided. In this case, Complainant UPS will make the initial evidentiary submission, and other participants will then have the opportunity to file rebuttal evidence.

It is conceivable that UPS may wish to tender surrebuttal. It is also possible that one or more participants may seek the opportunity to file testimony in rebuttal to the evidence presented by participants other than Complainant UPS. However, the comparatively narrow scope of the issue before the Commission in phase one of this case, as discussed above, may allow the Commission to forego this procedural step. The procedural schedule for this phase will identify the point when participants must indicate whether this step is necessary. At least up until that point, discovery relevant to the need for, or content of, such rebuttal or surrebuttal evidence will be permissible.

Attachment A to this ruling identifies the likely procedural steps for the first phase of this case. Specific dates are not included. As noted in P.O. Ruling C99-1/2, specific dates can be developed after the breadth of the initial UPS evidentiary presentation is known.

Attachment B to this ruling is Special Rules of Practice for use in this case. The sample version has been modified to reflect the fact that this is a complaint case and evidence will be submitted initially by the Complainant. The Postal Service suggested that adjustments be made to rules extending the periods of time for submitting responses to both discovery requests and various motions. United States Postal Service Comments on the Special Rules of Practice, June 8, 1999, at 2. In contrast, UPS suggests that the period for responding to discovery requests be shortened. Comments of United Parcel Service in Response to Presiding Officer's Ruling C99-1/2, June 8, 1999, at 1. The time periods allotted for submitting pleadings published in the sample rules will be unchanged. These time periods have proved adequate in complex omnibus rate cases, and should be ample in this proceeding.

The Postal Service also suggests a minor change to rule 3.D. The Service suggests that the rules should require that the date of filing be included in the title of

documents. That practice has caused confusion in the past, because document titles included dates that were on occasion different from the official filing date, that is, the date the document was actually received at the Commission's docket room. For this reason, the Postal Service suggestion will not be accepted.

The form of Commission action. The Postal Service suggests that any decision that the Commission might make on the question of whether Post E.C.S. is a postal service should be made as a recommendation to the Governors. The Service explains that such a procedure would be consistent with the expectation of Congress that the Commission and the Governors work cooperatively. The Postal Service also contends that the determination of whether a service is "postal" or not is properly within the responsibilities of the Governors.

CAAUC characterizes this aspect of the Postal Service Motion as an indirect attack on the Commission's authority to provide meaningful relief under 39 U.S.C. § 3662 and urges the Commission to deny the Postal Service request and affirm its ability to take appropriate action in complaint cases. CAAUC Response at 1-3. UPS also opposes this Postal Service suggestion. It contends that the Commission has correctly determined that such an approach would be inappropriate because the Commission would not be making a "substantive recommendation" of the type contemplated by the Postal Reorganization Act. UPS Response at 2, citing PRC Order No. 1145, December 16, 1996.

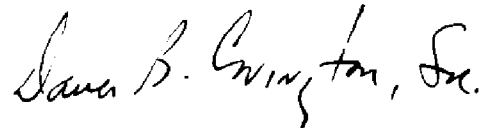
The Postal Service request that any Commission action be in the form of a recommended decision will not be granted at this time. It would be premature to make any such declaration, as well as inconsistent with the role assigned to presiding officers in the Commission's rules. Section 23(a)(7) allows presiding officers to dispose of procedural requests, but not to rule on "motions which involve a final determination of the proceeding."

The nature and content of final Commission decisions are generally the subject of legal briefs and reply briefs from the participants, and there is no purpose in foreclosing participants from advising the Commission on appropriate procedural steps after the evidentiary record has been developed further. Beyond that, the form of Commission action should be suited to the substance of that action, and as this case will proceed in phases, the Commission may or may not find it necessary to take action on items that are not within the areas of responsibility of the Governors. Notwithstanding the rejection of this Postal Service request, the fact that the Postal Service has raised this issue at an early stage of this case has been helpful as it has focused attention on the complementary roles of the Commission and the Governors in developing and taking remedial action on complaints found to be valid.

RULING

1. The Motion of the United States Postal Service for Partial Reconsideration of P.O. Ruling C99-1/2, filed June 8, 1999, is granted in part.
2. This proceeding shall be considered in phases, with the first phase limited to the issue of whether Post E.C.S. is a postal service for purposes of Chapter 36 of Title 39.
3. Procedural steps during the first phase of this case are set forth in Attachment A.
4. The special rules of practice for use in this case are set forth in Attachment B.
5. United Parcel Service and the United States Postal Service shall meet and discuss issues related to discovery during the first phase of this case, and shall report

on or before July 14, 1999, on the extent to which all or part of pending motions to compel have been resolved.

A handwritten signature in black ink, reading "Dana B. Covington, Sr." in a cursive script.

Dana B. Covington, Sr.
Presiding Officer

PROCEDURAL STEPS
DOCKET NO. C99-1
FIRST PHASE

July 27, 1999

Case-in-chief of Complainant

August 3, 1999

Identification of time needed to prepare for cross-examination of Complainant

Completion of discovery on Complainant

Hearings on case-in-chief of Complainant

Direct and rebuttal presentations of other participants

Completion of discovery on direct and rebuttal presentations of other participants

Hearings on direct and rebuttal presentations of other participants

Notification of intent to file rebuttal to direct presentation of other participants or surrebuttal evidence

Hearings on rebuttal to direct presentations of other participants and surrebuttal evidence

Initial briefs

Reply briefs

SPECIAL RULES OF PRACTICE
Docket No. C99-1 – First Phase

1. Evidence

A. Case-in-chief. A participant's case-in-chief shall be in writing and shall include the participant's direct case and rebuttal, if any, to the case-in-chief of Complainant United Parcel Service. It may be accompanied by a trial brief or legal memoranda. There will be a stage providing an opportunity to rebut presentations of other participants and for United Parcel Service to present surrebuttal evidence.

B. Exhibits. Exhibits should be self-explanatory. They should contain appropriate footnotes or narrative explaining the source of each item of information used and the methods employed in statistical compilations. The principal title of each exhibit should state what it contains or represents. The title may also contain a statement of the purpose for which the exhibit is offered; however, this statement will not be considered part of the evidentiary record. Where one part of a multi-part exhibit is based on another part or on another exhibit, appropriate cross-references should be made. Relevant exposition should be included in the exhibits or provided in accompanying testimony.

C. Motions to Strike. Motions to strike are requests for extraordinary relief and are not substitutes for briefs or rebuttal evidence. All motions to strike testimony or exhibit materials are to be submitted in writing at least 14 days before the scheduled appearance of the witness, unless good cause is shown. Responses to motions to strike are due within seven days.

D. Designation of Evidence from other Commission Dockets. Participants may request that evidence received in other Commission proceedings be entered into the record of this proceeding. These requests should be made by motion, should explain the purpose of the designation, and should identify material by page and line or paragraph number. Absent extraordinary justification, these requests must be made at least 28 days before the date for filing the participant's direct case. Oppositions to motions for designation and/or requests for counter-designations shall be filed within 14 days. Oppositions to requests for counter-designations are due within 7 days. At the time requests for designations and counter-designations are made, the moving participant must submit two copies of the identified material to the Secretary of the Commission.

2. Discovery

A. General. Sections 25, 26 and 27 of the rules of practice apply during the discovery stage of this proceeding except when specifically overtaken by these special rules. Questions from each participant should be numbered sequentially, by witness.

The discovery procedures set forth in the rules are not exclusive. Parties are encouraged to engage in informal discovery whenever possible to clarify exhibits and testimony. The results of these efforts may be introduced into the record by stipulation, by supplementary testimony or exhibit, by presenting selected written interrogatories and answers for adoption by a witness at the hearing, or by other appropriate means.

In the interest of reducing motion practice, parties also are encouraged to use informal means to clarify questions and to identify portions of discovery requests considered overbroad or burdensome.

B. Objections and Motions to Compel Responses to Discovery. Upon motion of any participant in the proceeding, the Commission or the presiding officer may

compel a more responsive answer, or an answer to an interrogatory or request for admission to which an objection was interposed, if the objection is overruled. Motions to compel 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 in the text or as an attachment to the motion to compel.

Parties who have objected to interrogatories or requests for production of documents or items which are the subject of a motion to compel shall have seven days to answer. Answers will be considered supplements to the arguments presented in the initial objection.

C. Answers to Interrogatories. Answers to discovery are to be filed within 14 days of the service of the discovery request. Answers to discovery requests shall be prepared so that they can be incorporated as written cross-examination. Each answer shall begin on a separate page, identify the individual responding, the participant who asked the question, and the number and text of the question.

Participants are expected to serve supplemental answers to update or to correct responses whenever necessary, up until the date that answers are accepted into evidence as written cross-examination. Participants filing supplemental answers shall indicate whether the answer merely supplements the previous answer to make it current or whether it is a complete replacement for the previous answer.

Participants may submit responses with a declaration of accuracy from the respondent in lieu of a sworn affidavit.

D. Follow-up Interrogatories. Follow-up interrogatories to clarify or elaborate on the answer to an earlier discovery request may be filed after the initial discovery period ends. They must be served within seven days of receipt of the answer to the previous interrogatory unless extraordinary circumstances are shown.

E. Discovery to Obtain Information Available Only from the Postal Service.

Sections 25 through 27 of the rules of practice allow discovery reasonably calculated to lead to admissible evidence during a noticed proceeding with no time limitations.

Generally, discovery against a participant is scheduled to end prior to the receipt into evidence of that participant's direct case. An exception to this procedure shall operate when a participant needs to obtain information (such as operating procedures or data) available only from the Postal Service for use in rebuttal or surrebuttal testimony.

3. Service

A. Receipt of Documents. The Service List shall contain the name and address of up to two individuals entitled to receive copies of documents for each participant. If possible that entry will also include a telephone number and facsimile number.

B. Service of Documents. Documents shall be filed with the Commission and served upon parties in accordance with sections 9 through 12 of the Commission's rules of practice. Participants capable of submitting documents stored on computer diskettes may use an alternative procedure for filing documents with the Commission. Provided that the stored document is a file generated in either Word Perfect 5.1 or any version of Microsoft Word, and is formatted in Arial 12 font, in lieu of the requirements of section 10 of the rules, a participant may submit a diskette containing the text of each filing simultaneously with the filing of 1 (one) printed original and 3 (three) hard copies.

C. Exceptions to general service requirements for certain documents.

Designations of written cross-examination, notices of intent to conduct oral cross-examination, and notices of intent to participate in oral argument need to be served only on the Commission, the OCA, the Postal Service, and the complementary party (as applicable), as well as on participants filing a special request for service.

Discovery requests and pleadings related thereto, such as objections, motions for extensions of time, motions to compel or for more complete answers, and answers to such pleadings, must be served only on the Commission, the OCA, the Postal Service, the complementary party, and on any other participant so requesting, as provided in sections 25-27 of the rules of practice. Special requests relating to discovery must be served individually upon the party conducting discovery and state the witness who is the subject of the special request.

D. Document titles. Parties should include titles that effectively describe the basic content of any filed documents. Where applicable, titles should identify the issue addressed and the relief requested. Transmittal documents should identify the answers or other materials being provided.

4. Cross-examination

A. Written cross-examination. Written cross-examination will be utilized as a substitute for oral cross-examination whenever possible, particularly to introduce factual or statistical evidence.

Designations of written cross-examination should be served no later than three working days before the scheduled appearance of a witness. Designations shall identify every item to be offered as evidence, listing the participant who initially posed the discovery request, the witness and/or party to whom the question was addressed (if different from the witness answering), the number of the request and, if more than one answer is provided, the dates of all answers to be included in the record. (For example, "OCA-T1-17 to USPS witness Jones, answered by USPS witness Smith (March 1, 1997) as updated (March 21, 1997))." When a participant designates written cross-examination, two copies of the documents to be included shall simultaneously be submitted to the Secretary of the Commission.

The Secretary of the Commission shall prepare for the record a packet containing all materials designated for written cross-examination in a format that facilitates review by the witness and counsel. The witness will verify the answers and materials in the packet, and they will be entered into the transcript by the presiding officer. Counsel for a witness may object to written cross-examination at that time, and any designated answers or materials ruled objectionable will be stricken from the record.

B. Oral cross-examination. Oral cross-examination will be permitted for clarifying written cross-examination and for testing assumptions, conclusions or other opinion evidence. Notices of intent to conduct oral cross-examination should be delivered to counsel for the witness and served three or more working days before the announced appearance of the witness, and should include (1) specific references to the subject matter to be examined and (2) page references to the relevant direct testimony and exhibits.

Participants intending to use complex numerical hypotheticals or to question using intricate or extensive cross-references, shall provide adequately documented cross-examination exhibits for the record. Copies of these exhibits should be delivered to counsel for the witness at least two calendar days (including one working day) before the witness's scheduled appearance.

5. General

Argument will not be received in evidence. It is the province of the lawyer, not the witness. It should be presented in brief or memoranda. Legal memoranda on matters at issue will be welcome at any stage of the proceeding.

New affirmative matter (not in reply to another party's direct case) should not be included in rebuttal testimony or exhibits.

Cross-examination will be limited to testimony adverse to the participant conducting the cross-examination.

Library references may be submitted when documentation or materials are too voluminous reasonably to be distributed. Each party should sequentially number items submitted as library references and provide each item with an informative title. Parties are to file and serve a separate Notice of Filing of Library Reference(s). Library material is not evidence unless and until it is designated and sponsored by a witness.