

BEFORE THE
POSTAL RATE COMMISSION

RECEIVED
Jul 20 11 47 AM '99

POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

COMPLAINT ON POST E.C.S.

DOCKET NO. C99-1

MOTION OF UNITED PARCEL SERVICE TO
COMPEL ANSWERS TO INTERROGATORIES
UPS/USPS-34 AND 36 THROUGH 43
(July 20, 1999)

Pursuant to Section 25(d) of the Commission's Rules of Practice, 39 C.F.R. § 3001.25(d), United Parcel Service hereby moves that the United States Postal Service be ordered to answer interrogatories UPS/USPS-34 and UPS/USPS-36 through UPS/USPS-43 within seven days of the Presiding Officer's ruling, on the grounds set forth below.¹

ARGUMENT

A. The Postal Service Has Agreed to Withdraw Its General Objection.

In discussions held pursuant to Presiding Officer's Ruling No. C99-1/3 (July 7, 1999) in an effort to resolve outstanding discovery issues, the Postal Service has agreed to withdraw its "General Objection." See Report on Discussions Between the United States Postal Service and United Parcel Service in Response to Presiding Officer's Ruling No. C99-1/3 (July 14, 1999) at 1, ¶ 1 ("Discovery Report").

1. Copies of these interrogatories are attached hereto as Exhibit "A."

B. The Postal Service Should Be Ordered to Answer Fully Interrogatories UPS/USPS-34 Through UPS/USPS-43.

Interrogatory UPS/USPS-34. This interrogatory asks whether the Postal Service's Electronic Postmark is available, or will be available, in conjunction with services other than PostECS. The Postal Service claims this information is irrelevant, commercially sensitive, and privileged. It also objects "on grounds of . . . jurisdiction (in part)." Postal Service Objection at 2.

The requested information is relevant to compare the nature of PostECS, for which the Electronic Postmark is available, with other services which are admittedly postal in nature, such as Mailing Online or Post Office Online, for example. A similarity between the features of service offered by PostECS and those offered by admittedly postal services tends to show that PostECS serves the same or similar functions as do other mail services, and therefore is postal in nature. It also goes to the question of substitutability. And the use of the Electronic Postmark feature for PostECS and for admittedly postal services is relevant to the extent to which PostECS shares common inputs with admittedly postal services.

The Postal Service asserts its commercial sensitivity and jurisdiction objections to the extent that the interrogatory seeks information concerning whether foreign posts have made available or will make available an electronic postmark in their electronic services. As we have made clear before, UPS is not seeking any information about the services foreign posts offer; we seek only information relating to the Postal Service's offering of PostECS.

The Postal Service's objection is also based on the claim that its future plans are protected from discovery on the grounds of commercial sensitivity and the deliberative

process privilege. *Id.*² Whether there are any such plans is a **fact**. A response would not reveal the nature of any recommendations or deliberative processes that led to any such plans. And there is no basis for the Postal Service's contention that the mere fact that the Postal Service may plan to offer the Electronic Postmark in conjunction with some other service such as Mailing Online could somehow enable competitors to do something they otherwise could not do, e.g., "copy ideas for use in their new product offerings and accelerate experimentation with, and introduction of, new, competing services." Postal Service Objection at 3.

Postal Service plans for the future, including plans for the provision of add-on services as a complement to competitive products (such as in the case of delivery confirmation, for example) are routinely revealed in Commission proceedings. The Postal Service itself has repeatedly trumpeted its plans to make an electronic postmark available well before it actually did so. Thus, it has waived as to that feature of service any privilege from disclosure it may otherwise have had.

Accordingly, the Postal Service should be ordered to answer UPS/USPS-34.

Interrogatories UPS/USPS-36 through UPS/USPS-40.³ These interrogatories seek to determine the extent to which certain specific resources used by the Postal Service to provide PostECS service are also used as common inputs to produce other services that are clearly postal in nature. The Postal Service objects to providing this

-
2. This particular objection is directed solely at the aspect of the interrogatory which asks about whether the Electronic Postmark "will" be available in the future in conjunction with other products, and does not shield from discovery whether the Electronic Postmark is now available in the case of other products.
 3. The Postal Service has indicated that it now intends to answer interrogatory UPS/USPS-35. Discovery Report at 1, ¶ 2.

information on the grounds of lack of relevance, undue burden, and commercial sensitivity. Postal Service Objection at 3.

The Postal Service states that “the sharing of internal resources . . . does not elucidate the question of whether PostECS is a ‘postal’ service.” Postal Service Objection at 3. That is not so. If common inputs are used to provide two services, there is at least some degree of similarity between the services. That similarity suggests that they may be of the same basic nature. Either alone or when taken together with other similarities, the use of common inputs may very well demonstrate that two services have the same basic “postal” nature. Indeed, commonality of inputs can indicate functional equivalence. In short, the use of common inputs says a great deal about the relationship between two products.

Discovery is permissible whenever the information sought “appears reasonably calculated to lead to the discovery of admissible evidence.” 39 C.F.R. § 3001.25(a). This interrogatory falls well within proper discovery here.

Moreover, the extent to which common inputs are used to provide a service indicates the extent to which cross-subsidy of one service by the other may result. This is relevant not only to the policy issue that may ultimately be before the Commission in this case, but also goes to the Commission’s jurisdiction under 39 U.S.C. § 3661.

The Postal Service claims that these interrogatories are “geared toward uncovering the internal operating procedures of the Postal Service.” Postal Service Objection at 3-4. First, these interrogatories do not delve into “internal operating procedures” to any great extent. Second, even if they did, that is no basis for objecting to them. On the contrary, the Special Rules of Practice for this very proceeding contemplate that during discovery parties will seek, and are entitled to, information on

the Postal Service's operating procedures. See Special Rule of Practice 2(E), referring to the need for participants to "obtain information (such as operating procedures or data) available only from the Postal Service"

The extent to which the Postal Service makes actual use of certain resources to provide two or more different products has absolutely nothing to do with the deliberative process privilege. Otherwise, the fact that the Postal Service uses flat sorting machines to process different classes or subclasses of mail, for example, would be protected by the deliberative process privilege. That is clearly nonsense. These interrogatories call for the disclosure of facts, and those facts should be provided.

The Postal Service's undue burden argument suggests that common inputs are in fact used to produce both PostECS and other products. As a result, the undue burden objection merely highlights the relevance of the requested information. The Postal Service has not supported its undue burden objection by any specific information on the burden of responding to these interrogatories, as required by Section 25(c) of the Rules of Practice, 39 C.F.R. § 3001.25(c). In any event, the interrogatories themselves require only the identification of common inputs and the services they are used to provide -- hardly a burdensome request.

Again, the Postal Service should be ordered to answer fully these interrogatories.

Interrogatory UPS/USPS-41. Interrogatory 41 asks whether the interception of a PostECS transmission would constitute a federal crime, and, if so, what federal crime would be committed. The interrogatory is based on statements by Postal Service representatives which suggest that interfering with a PostECS transmission would violate criminal statutes which prohibit interfering with the mails.

The relevance of this inquiry is obvious. If intercepting a PostECS message violates a statute relating to the integrity or interception of the mails, then PostECS must be "mail" and therefore is subject to the Commission's jurisdiction.⁴

The Postal Service also objects that the interrogatory asks for a legal opinion. Postal Service Objection at 4. Such discovery often takes place in Commission proceedings. The Commission's rules specifically state, "An interrogatory otherwise proper is not necessarily objectionable because an answer would involve an opinion or contention that relates to fact or the application of law to fact" 39 C.F.R. § 3001.25(c).⁵ Here too, the public statements of Postal Service representatives suggesting that intercepting a PostECS transmission is a crime against the mails is a waiver of any objection to this interrogatory that the Postal Service might otherwise have had; if the Postal Service feels free to broadcast to the public that such activity would violate federal laws relating to the mails, then it should be required to tell the Commission its view on that matter, including what mail statute is violated.⁶

-
4. If the interception of a PostECS transaction does not fall within any statutes relating to the mail, then the Postal Service's statements touting PostECS in this regard would appear to be misleading, at best.
 5. Section 25(c) goes on to state that the Presiding Officer may order that an answer to such an interrogatory need not be provided until a prehearing conference or other later time. There is no reason why an answer to Interrogatory 41 should not be given now. On the contrary, given the Postal Service's contention that PostECS is not "mail," an answer should be given before UPS files its case-in-chief.
 6. The cases and rulings cited by the Postal Service (Postal Service Objection at 4), are inapposite. Not only do they deal with the admissibility of testimony at trial rather than discovery, but they also involve instances in which counsel asked questions for the sole purpose of obtaining a legal conclusion, not for the purpose of obtaining what amounts to an admission, based on the mind set of the party making the legal claim concerning the nature of a service, as UPS is seeking to do in Interrogatory 41. Similarly, Special Rule of Practice 5 regarding

(Footnote continued on next page)

Interrogatory UPS/USPS-42. This question points out that a recent General Accounting Office report indicates that the Postal Service's electronic services -- which include PostECS -- are being operated at a loss, and then asks for the source of the revenues used to fund this loss. If those revenues are coming from postal services, then PostECS is having an impact on (other) postal services. Not only is this contrary to sound public policy which the Commission was created to uphold, but it also suggests that, at the very least, the Postal Service should have asked the Commission for an advisory opinion under 39 U.S.C. § 3661. The Postal Service should be required to answer this relevant question.⁷

Interrogatory UPS/USPS-43. Interrogatory 43 asks when the sender of a PostECS message becomes obligated to pay the Postal Service for PostECS service. The Postal Service objects on grounds of relevance, but does not elaborate. Postal Service Objection at 6.

This information is relevant to the Postal Service's defense that PostECS is an international service. If the Postal Service's delivery obligations are complete so that it has earned the right to payment when a message or document resides on the destination server and is awaiting pickup by the recipient, then that particular message or document does not constitute "mail matter conveyed between the United States and

(Footnote continued from previous page)

argument not constituting evidence (Postal Service Objection at 5) does not apply here, since the interrogatory does not constitute argument, nor is UPS currently asking for anything to be received in evidence.

7. UPS is unaware of any principle which invalidates discovery on the ground that a discovery request "assumes facts not in evidence." Postal Service Objection at 5. The very purpose of discovery is to elicit facts that are not (yet) in evidence.

other countries," 39 U.S.C. § 407(a), and the transaction is a purely domestic one. In short, when payment is made is relevant to the question when the PostECS message or product is "delivered," and therefore is relevant to whether a message addressed to a foreign addressee is an international delivery or not.

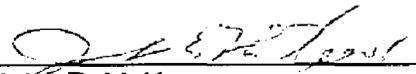
The Postal Service's objection should be overruled.

CONCLUSION

The Postal Service continues to stonewall. It attempts to draw technical distinctions justifying its refusal to provide information, but those distinctions do not hold up. The Presiding Officer should not countenance these tactics.

WHEREFORE, United Parcel Service respectfully requests that the Presiding Officer order the United States Postal Service to respond in full to interrogatories UPS/USPS-34 and UPS/USPS-36 through UPS/USPS-43 within seven days of the Presiding Officer's ruling.

Respectfully submitted,



John E. McKeever
Kenneth G. Starling
Nicole P. Kangas
Attorneys for United Parcel Service

PIPER & MARBURY L.L.P.
3400 Two Logan Square
18th and Arch Streets
Philadelphia, PA 19103
(215) 656-3300

and

1200 19th Street, N.W.
Washington, DC 20036
(202) 861-3900

Of Counsel.

BEFORE THE
POSTAL RATE COMMISSION

COMPLAINT ON POST E.C.S.

DOCKET NO. C99-1

THIRD SET OF INTERROGATORIES OF UNITED
PARCEL SERVICE TO UNITED STATES POSTAL SERVICE
(UPS/USPS-34 THROUGH UPS/USPS-42)
(June 23, 1999)

Pursuant to Section 25 of the Commission's Rules of Practice, United Parcel Service hereby serves the following interrogatories on the United States Postal Service.

UPS/USPS-34. Is the Postal Service's electronic postmark available, or will it be available, other than in conjunction with PostE.C.S.? If so, please identify all products for which it is available.

UPS/USPS-35. Is the electronic postmark a service feature available in connection with PostE.C.S., whether as an add-on or as an integral part of the basic service?

UPS/USPS-36. Is any of the computer equipment used in providing PostE.C.S. used for any other service offered by the Postal Service? If so, please identify all services in addition to PostE.C.S. for which such equipment is used.

UPS/USPS-37. Is any of the computer equipment used in connection with PostE.C.S. used to perform any non-PostE.C.S. function for the Postal Service? If so, please identify all such non-PostE.C.S. functions.

UPS/USPS-38. Are any of the servers used in connection with PostE.C.S. used by the Postal Service for any other purposes? If so, please identify all such uses.

UPS/USPS-39. Are any of the computer programmers used in connection with PostE.C.S. also used for any other purposes of the Postal Service? If so, please identify all such other uses.

UPS/USPS-40. Are any of the phone lines used to render PostE.C.S. used by the Postal Service for any other purposes? If so, please identify all such other uses.

UPS/USPS-41. Please refer to Attachment A hereto, which states in connection with the Postal Service's rendition of PostE.C.S. that a Postal Service representative has stated: "The [Postal Service] brand definitely helps. People know that if they intercept someone's mail, it's a federal crime." Regardless of the accuracy or authenticity of the quote, is it the Postal Service's position that if someone intercepts a PostE.C.S. transmission, that interception is a federal crime? If so, what federal crime is committed (please identify any federal statute that is violated)?

UPS/USPS-42. The General Accounting Office's Report on New Postal Products, GAO/GGD-99-15, indicates that the Postal Service's electronic services are

(or at least were, through the third quarter of Fiscal Year 1998) operating at a loss.

Please identify the source of the revenues used to fund this loss.

Respectfully submitted,



John E. McKeever
Kenneth G. Starling
Nicole P. Kangas
Attorneys for United Parcel Service

PIPER & MARBURY L.L.P.
3400 Two Logan Square
18th and Arch Streets
Philadelphia, PA 19103
(215) 656-3300

and

1200 19th Street, N.W.
Washington, DC 20036
(202) 861-3900

Of Counsel



Free membership!

Search

Find It!

Top News

ZDNN home
 Headline scan
 News archive

Sections

Business
 Computing
 Internet
 Law and Politics
 Opinion

Click here! ▼

Advertisement

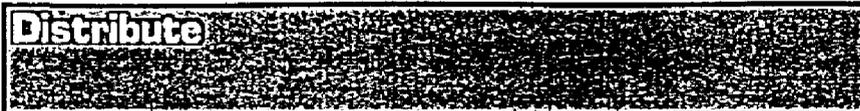
Contact us
 Corrections
 Custom News

Related Sites

AnchorDesk
 CyberCrime
 Inter@ctive
 Week
 Investor
 MSNBC News
 PC Week
 Silicon Spin
 Sm@rt Reseller
 ZDY2K



Pick a site or topic: ▼

[Reviews](#) | [News](#) | [Downloads](#) | [Shop](#) | [Auctions](#)


INTERNET
 ZDNN TECH NEWS NOW

Reporter's notebook from Internet World

By Sean Silverthorne, ZDNN
 October 9, 1998 4:45 PM PT

NEW YORK -- ZDNN's senior news producer Sean Silverthorne spent the better part of this week prowling the caverns of New York's Javits Center as he attended Fall Internet World '98.



▶ [Return to Special Report](#)

Some old familiar faces were making their first visit to Internet World. The U.S. Postal Service was here, showing off several products including Post Electronic Courier Service - which allows any kind of file to be sent over the Internet "at less cost than an overnight service, and with greater reliability than traditional e-mail," says the agency.

Power of the Post Office

I asked one of the booth managers how the Post Office will use its well-known brand against upstarts like PostX. "The brand definitely helps," he said. "People know that if they intercept someone's mail, it's a federal crime."

Other first-timers from the brick-and-mortar world included Barnes & Noble, the technology law firm of Brobeck Phleger, and financial powerhouses Visa and Citibank.

One noticeable trend is that more applications are being targeted at consumers -- a sure sign that people believe this mother lode market

NEWS BURSTS

June 21, 1999 AM

11:07a
[Final MS-DOS testimony begins](#)
 10:50a
[AOL takes \\$1.5B stake in Hughes](#)
 10:12a
[Qwest's Nacchio is on a roll](#)
 08:55a
[InfoGear gets \\$12M infusion; Inks eToy deal](#)
 08:52a
[News Corp. invests in networking](#)

TOP STORIES

- ▶ [High tech/high entertainment: 'Bonfire of the Techno-Vanities'?](#)
- ▶ [Turn on your PC, turn on an ad](#)
- ▶ [New Notes will include Lycos](#)
- ▶ [EMI takes big step toward Net music](#)
- ▶ [Apple's PowerBook chief is out](#)
- ▶ [Investor Midday: Inching higher](#)

[E-mail this!](#)

[Print this!](#)

[Get Personal News Alert](#)

ATTACHMENT A

that people believe this mother lode market opportunity is about to pop.

Consumer's delight

Ancestry.com, for example was displaying its online research capabilities. Centraal's RealNames product was picking up some buzz, too. Targeted at the Web novice, RealNames allows users to type in a search using common terms, such as Sony HandyCam, and not have to sift through 123,987 hits.

The phone seems to be becoming more of an Internet force. Motorola unveiled its Voice Markup Language, or VoxML, a technology that will allow users to give Internet commands with voice. And General Magic displayed Portico, a dazzling smart phone network that helps you do everything from scheduling appointments to reading you your e-mail. (Hmmm - do I really want to *hear* those 100 messages piling up in my inbox?)

Where did they go?

But for all the recent talk about Internet appliances, including a huge spread in USA Today this week, there were very few of them to be seen on the show floor. Aplio showed its Internet phone -- a device that lets you place long-distance calls over the Net without a computer. One snag: both parties must have an Aplio phone. The Java-controlled refrigerators will have to wait for another show, apparently.

I was just as surprised by who wasn't at this show as by who was. Very few PC companies were represented. That's interesting because these folks are all trying to figure out how to make their machines more Web-friendly. Seems like Internet World would be a good place to find out. Even Apple, which controls the hot QuickTime technology and sells a product called the iMac (the "i" is for Internet), was absent.

But even several big-time Web brands were MIA, too, including Yahoo! (Nasdaq:YHOO), Amazon.com (Nasdaq:AMZN) and CDNow. How can you have an "Internet World" without those companies?

See also: [ZDNN's Internet section](#)

SECTIONS

Business

- ▶ [McNealy slams MS, dodges eBay](#)
- ▶ [Compaq crisis: Layoffs, Q2 loss](#)

Commentary

- ▶ [Katt: Big Apple churns CEO rumors](#)
- ▶ [Macko: Welcome to virtual stardom](#)

Computing

- ▶ [Intel raises the chip speed limit](#)
- ▶ [Open-source guru converting MS?](#)

Internet

- ▶ [More women, shoppers on the Net](#)
- ▶ [Net gamblers sue credit card firms](#)

Law and Politics

- ▶ [Greenspan sounds tech warning](#)
- ▶ [MS presses AOL, judge's patience](#)

COMPANYFINDER.COM

News, Financials, Products

[Amazon.com](#)

[Aplio](#)

[Barnes & Noble](#)

[General Magic](#)

[Motorola](#)

Enter a company

▶ GET INFO

Get our **FREE** digest of the day's top headlines by e-mail every morning.

Text HTML

enter your em

SUBSCRIBE

Sponsored Links

- Beyond.com [Pre-order Office 2000 today. No waiting in line!](#)
- Careers [Check out hundreds of job openings at top companies](#)
- Free Issue [Get a risk-free issue of RED HERRING magazine today!](#)
- Very Cool [Wired Home Intro Kit - X10.com](#)
- Books [All New York Times Bestsellers now 50% off!](#)
- Score It [550 MHz, PC Magazine Editor's Choice. Click here!](#)

ZDNet Featured Links

- Freebies [50 FREE downloads - utilities, screen savers and more!](#)
- Shop & Save [How-To-Buy Guides: Find the best deals online](#)
- Bid Now [Get super bargains every day on ZDNet Auctions!](#)

Magazine Offers

- Software [Get a FREE CD-ROM from FamilyPC magazine](#)



[Reviews](#) | [News](#) | [Downloads](#) | [Shop](#) | [MyZDNet](#) | [Games](#) | [ZDTV](#) | [Forums](#)
[AnchorDesk](#) | [PC Magazine](#) | [PC Week](#) | [Help!](#) | [Yahoo! Internet Life](#)

[HOME](#) | [FREE MEMBERSHIP](#) | [CONTACT ZD](#) | [AD INFO](#) | [ZIFF-DAVIS](#)

Use of ZDNet is subject to certain [Terms & Conditions](#).
Please read ZDNet's [Privacy Statement](#) (reviewed by TRUSTe).

Copyright (c) 1999 ZDNet. All rights reserved. Reproduction in whole or in part in any form or medium without express written permission of ZDNet is prohibited. ZDNet and the ZDNet logo are trademarks of Ziff-Davis Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this date I have caused to be served the foregoing document on all parties to this proceeding by first class mail, postage prepaid, in accordance with Section 12 of the Rules of Practice.

Nicole P. Kangas

Nicole P. Kangas

Dated: June 23, 1999
Philadelphia, PA

BEFORE THE
POSTAL RATE COMMISSION

COMPLAINT ON POST E.C.S.

DOCKET NO. C99-1

INTERROGATORY UPS/USPS-43 FROM
UNITED PARCEL SERVICE TO
UNITED STATES POSTAL SERVICE
(June 25, 1999)

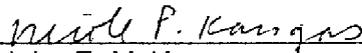
Pursuant to Section 25 of the Commission's Rules of Practice, United Parcel Service hereby serves the following interrogatory on the United States Postal Service.

UPS/USPS-43. (a) When does the sender of a PostECS message or document become obligated to make payment to the Postal Service in the case of a PostECS transaction?

(b) Is the sender of a PostECS message or document obligated to make payment to the Postal Service for a PostECS transaction when the message or

document is lodged on the server from which the recipient picks up the message,
whether or not the recipient picks up the message?

Respectfully submitted,



John E. McKeever
Kenneth G. Starling
Nicole P. Kangas
Attorneys for United Parcel Service

PIPER & MARBURY L.L.P.
3400 Two Logan Square
18th and Arch Streets
Philadelphia, PA 19103
(215) 656-3300

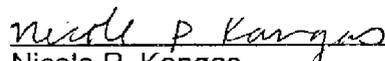
and

1200 19th Street, N.W.
Washington, DC 20036
(202) 861-3900

Of Counsel

CERTIFICATE OF SERVICE

I hereby certify that on this date I have caused to be served the foregoing
document on all parties to this proceeding by first class mail, postage prepaid, in
accordance with Section 12 of the Rules of Practice.

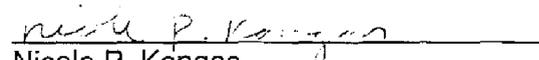


Nicole P. Kangas

Dated: June 25, 1999
Philadelphia, PA

CERTIFICATE OF SERVICE

I hereby certify that on this date I have caused to be served the foregoing document on all parties to this proceeding by first class mail, postage prepaid, in accordance with Section 12 of the Rules of Practice.


Nicole P. Kangas

Dated: July 20, 1999
Philadelphia, PA