

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-34, 36-43
(July 27, 1999)**

On June 23, 1999, UPS filed interrogatories and requests for production of documents UPS/USPS-34-43. On July 6, the Postal Service filed general and specific objections to UPS's discovery request¹ (hereinafter "Objection"). On July 20, UPS filed its Motion to Compel Answers to Interrogatories UPS/USPS-34 and 36-43 (hereinafter "UPS Motion to Compel"). As stated in the Report on Discussions between the United States Postal Service and United Parcel Service filed on July 14, the Postal Service is no longer pursuing the general objection raised in its objection. The Postal Service accordingly filed a response to interrogatory UPS/USPS-35 on July 20. The Postal Service hereby responds to UPS's Motion to Compel answers to UPS/USPS-34 and 36-43.²

Interrogatory UPS/USPS-34. Interrogatory 34 asks whether the Electronic Postmark™ system is, or will be, available with services other than Post E.C.S. The

¹ Objection of the United States Postal Service to United Parcel Service Interrogatories UPS/USPS-34-43 (filed July 6, 1999) (hereinafter "Objection").

² Under 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. C99-1/3, Attachment A. Consistent with Special Rule 2B, the Postal Service will not endeavor to repeat the arguments

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Postal Service objected to this interrogatory on grounds of relevance, commercial sensitivity, jurisdiction (in part), and privilege (in part). In its Motion to Compel, UPS claims that the requested information is necessary to compare Post E.C.S. with other services such as "Mailing Online or Post Office Online."³ UPS also challenges the Postal Service's deliberative process and commercial sensitivity objections.

UPS's first argument suffers from faulty logic. The gist of UPS's argument is that the status of Post E.C.S. is somehow converted when it is combined with Electronic Postmark™, another clearly nonpostal service,⁴ simply because the latter may be combined with other services. This is not the case. The combination of two nonpostal services, or a nonpostal service and a postal service, does not change the fundamental characteristics of a nonpostal service. Post E.C.S. should be judged on the basis of the legal standard, *i.e.*, its relation to the posting, handling, and delivery of mail matter.⁵ Hence, there is no reason to engage in inquiries on whether Electronic Postmark™ is combined with other services.

UPS's attempt to narrow the interrogatory to include only the Postal Service's

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presented in its objection, but rather will supplement those arguments in order to respond to arguments raised in UPS's Motion to Compel.

³ UPS's Motion claims that "PostOffice Online" is a "postal" service. The Postal Service does not agree.

⁴ See Response of United States Postal Service to Interrogatory OCA/USPS-16 (filed July 20, 1999); Response of United States Postal Service to Interrogatory UPS/USPS-35 (filed July 20, 1999).

⁵ *National Assoc. of Greeting Card Publishers v. US Postal Service*, 569 F.2d 570, 595-598 (D.C. Cir. 1976) (*NAGCP*), *vacated on other grounds, US Postal Service v.*

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products, and not those of the foreign posts, does not overcome the Postal Service's deliberative process and commercial sensitivity objections. UPS asserts that "Postal Service plans for the future" are "routinely revealed in Commission proceedings." UPS's argument presupposes, however, that a complaint proceeding is analogous to an ordinary rate and classification case. To the contrary, a complaint docket is not a "routine" Commission proceeding. This proceeding began with the filing of a complaint, not the filing of a request by the Postal Service to introduce new product offerings. The Postal Service has not come forward with proposals to offer new products combined with Electronic Postmark™. Thus, it is no more "routine" for the Postal Service to discuss its plans for Electronic Postmark™, let alone Post E.C.S., than for UPS to discuss its future plans for its services.

Furthermore, UPS trivializes the Postal Service's future plans to offer Electronic Postmark™ by suggesting that they are simple "facts." To the contrary, disclosure of future product plans for Electronic Postmark™ would not simply reveal "facts" in the public domain; rather, it would reveal postal policy and marketing initiatives that are under consideration and have *not* been publicly disclosed. Such information is not exclusively and independently factual, but rather is inextricably associated with commercially sensitive and predecisional information. The Commission has shielded similar information from any form of disclosure, despite protective conditions, and

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Associated Third Class Mail Users, 434 U.S. 884 (1977).

should do so here. See, e.g., P.O. Ruling No. R97-1/60 (upholding redaction of researchers' analysis and interpretation of underlying facts, conclusions and recommendations).

Finally, UPS claims that the Postal Service has somehow waived its commercial sensitivity objection by "repeatedly trumpet[ing] its plans to make an electronic postmark available well before it actually did so." UPS provides no citation for this allegation. Furthermore, UPS does not state that any such alleged public pronouncements discuss in any detail precisely what the interrogatory requests, *i.e.*, the Postal Service's future plans for offering Electronic Postmark™ in combination with other services. Simply put, UPS's argument relies on unexplained and unsupported speculation. The Postal Service has not waived any objection to its future integration plans for Electronic Postmark™.

Interrogatories UPS/USPS-36-40. Interrogatories 36-40 request information about the extent to which computer equipment, servers, computer programmers, and phone lines used in connection with Post E.C.S. are used for purposes other than Post E.C.S. The Postal Service objected to these interrogatories on grounds of relevance, undue burden, and commercial sensitivity.

In its Motion, UPS asserts that the information is relevant because the sharing of inputs would tend to show a degree of similarity between the services. Yet UPS's interrogatory is far too broad to achieve this purpose. That a nonpostal service and a postal service share a telephone line, a computer terminal, a server, or a programmer's

time does not convert the status of either service. Rather, each service should be judged on its own merits under the applicable legal standard. *NAGCP*, 569 F.2d at 595-98.

UPS also asserts that sharing of inputs could demonstrate cross-subsidy. This does not serve as a basis for establishing relevance, however, as evidence of cross-subsidy is beyond the scope of the first phase of this proceeding. Allegations of cross-subsidization in connection with Post E.C.S. are well outside the scope of this phase of the proceeding. The Commission should protect the integrity of its complaint process from these sorts of improper fishing expeditions, the fruits of which undoubtedly are intended for other audiences.

In addition, UPS challenges the Postal Service's burden objection on grounds that the Postal Service has not estimated time and effort. That such estimates were not provided simply demonstrates that the questions have not been adequately tailored to elicit relevant information. In particular, UPS instead asks that the Postal Service identify all of the other purposes which telephone lines, computers, servers, and computer programmers are put to use other than Post E.C.S. Cataloging this information could be an enormously time-consuming exercise, depending upon the degree to which resources for Post E.C.S. are used for other purposes. Furthermore, the interrogatory draws no distinction between other purposes that relate to other products, and those which are administrative in nature and do not involve the direct provision of other products and services. In short, the questions are clearly

burdensome, and their broad-based nature makes it difficult to estimate the time needed to prepare a response.

Finally, UPS's Motion to Compel fails to address the Postal Service's commercial sensitivity objection raised in its Objection. In particular, the Postal Service stated that the response to this interrogatory could give competitors indications of the capacity of the Postal Service's equipment used in providing Post E.C.S. On this basis alone, discovery on this topic should be foreclosed. UPS has offered nothing to overcome this ground.

Interrogatory UPS/USPS-41. This interrogatory asks the Postal Service to state whether it believes that it would be a crime to intercept a Post E.C.S. transmission, and if so, to state what crime would be committed. The Postal Service objected to this interrogatory on the grounds that it is irrelevant and seeks a legal conclusion.

In its Motion to Compel, UPS states that its 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." This claim is riddled with multiple misimpressions and misunderstandings. First, the alleged claims to which UPS alludes are published in an article that was lifted off a "zdnet.com" website. The article, which is appended to the interrogatory, quotes an unnamed person at a trade show as stating, "The brand definitely helps" and "People know that if they intercept someone's mail, it's a federal crime." No attribution is provided in the article, and the Postal Service has no basis for determining the

accuracy of the quotation. In addition, because the speaker is not identified, it is unknown whether he or she was both authorized and competent to offer such an opinion, or even whether such person was in fact a Postal Service representative. Even if the statement were made, it proves nothing. The article provides virtually no context of the conversation, and the quotation could simply be the product of two unrelated thoughts. Furthermore, UPS's interpretation of the statement is based on speculation and conjecture. A fair reading of the passage does *not*, as UPS claims, suggest that the Post E.C.S. transactions are subject to criminal mail statutes, or that the Postal Service believes statements to that effect. Rather, a fair interpretation of the statement is simply that mail security statutes, as applied to existing mail services, have enhanced the Postal Service's public image and identity.

UPS also fails to distinguish the judicial precedents⁶ and other legal authority cited by the Postal Service. UPS claims that the authorities cited by the Postal Service dealt with attempts to obtain testimony for the purpose of obtaining a legal conclusion, rather than "obtaining what amounts to an admission." This characterization of the question is misleading. Interrogatory 41 does not ask for an admission. Indeed, the interrogatory explicitly directs the Postal Service to ignore "the accuracy or authenticity of the quote." The interrogatory instead asks for a legal conclusion as to whether the Postal Service believes that interception of an e-mail is a "federal crime." This is plainly not a request

⁶ *F.A.A. v. Landy*, 705 F.2d 624, 632 (2nd Cir. 1983), *cert. denied*, 464 U.S. 895 (1983); *Marx & Co. v. Diners Club, Inc.*, 550 F.2d 505, 511 (2d Cir.), *cert. denied*, 434 U.S. 861
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for admission, but rather a back-handed attempt to force the Postal Service to offer a legal opinion. If UPS wishes to argue that mail tampering laws apply to Post E.C.S. matter, and therefore Post E.C.S. is a postal service, it may do so without discovery.

UPS, moreover, fails to distinguish P.O. Ruling No. R97-1/39. In that ruling, the Presiding Officer denied a motion to compel the Postal Service to provide legal opinions on insured services. The Presiding Officer explained:

[The] [i]nterrogatories . . . ask whether, as to insured and uninsured mailers, the Postal Service has the status of a common carrier or bailee. These are essentially legal questions, rather than questions of fact. While a response might indicate the legal position of the Postal Service, that position would not be controlling on the Office of the Consumer Advocate nor on the Commission. The Postal Service Opposition is correct that OCA can develop this information through normal legal research.

P.O. Ruling No. R97-1/39 at 2. Similarly, here, UPS is asking the Postal Service to offer its opinion about the applicability of federal law to interception of Post E.C.S. messages. This is improper discovery and UPS's Motion must therefore be denied.

Finally, UPS does not address the Postal Service's objection to this interrogatory on grounds of relevance. The interrogatory is broadly worded, as it does not ask whether the Postal Service believes mail tampering and obstruction statutes apply to Post E.C.S.; rather, it asks whether any "federal crime" is violated in the event of interception. A response would not necessarily reveal any relationship between Post E.C.S. and mail tampering and obstruction statutes. Rather, there could be electronic

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(1977); *U.S. v. Phillips*, 478 F.2d 743, 746 n.6 (5th Cir. 1973).

transmission crimes that may be responsive to this interrogatory. This would do nothing to prove that Post E.C.S. is any less nonpostal than it already is.

Interrogatory UPS/USPS-42. Interrogatory 42 requests that the Postal Service identify the source of UPS's characterization of the GENERAL ACCOUNTING OFFICE, US POSTAL SERVICE DEVELOPMENT AND INVENTORY OF NEW PRODUCTS, GAO/GGD-99-15 (November 1998). The interrogatory states that the report "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." The Postal Service objected to this interrogatory on grounds that the interrogatory is vague, assumes facts not in evidence, and requests irrelevant information.

In its Motion to Compel, UPS asserts that the information is relevant because it may show that Post E.C.S. is "having an impact on (other) postal services" by virtue of alleged revenues "coming from postal services." Putting aside for purposes of argument the many unproven assumptions in UPS's argument, its contention is contrary to P.O. Ruling No. C99-1/3. The sole issue before the Commission is whether Post E.C.S. is a "postal" service. Inquiries into the finances of electronic products have nothing to do with the scope of the first phase of this proceeding.

In addition, UPS's Motion does nothing to overcome the additional grounds for objection raised by the Postal Service. In particular, UPS does not provide a citation for its claim that the GAO report stands for the proposition that electronic services are operating at a loss; hence, the interrogatory suffers from vagueness. Furthermore,

UPS fails to overcome the objection that the interrogatory assumes facts not in evidence, *i.e.*, that the Postal Service's electronic services are (or at least were, through the third quarter of Fiscal Year 1998), operating at a loss." UPS claims that it is "unaware of any principle which invalidates discovery on the ground that a discovery request 'assumes facts not in evidence.'" Especially given the dual status of discovery in postal rate cases as embodying written cross-examination, this is erroneous. It is hornbook law such questions are objectionable on grounds that they are misleading:

A question which *assumes a fact* that may be in controversy is leading, when put on direct examination . . . because it affords the willing witness a suggestion of fact which he might otherwise not have stated to the same effect. Conversely, such a question may become improper *on cross-examination*, because it may by implication put in to the mouth of an unwilling witness, a statement which he never intended to make, and thus incorrectly attribute to him testimony which is not his.

3 J. WIGMORE, EVIDENCE § 780 p. 171 (J. Chadbourn revision 1970) (emphasis in original).

Interrogatory UPS/USPS-43. This question asks when Post E.C.S. test participants become obligated to make payment for Post E.C.S. transactions. The Postal Service objected to this interrogatory on grounds of relevance. In its Motion to Compel, UPS concocts a convoluted theory as to how the interrogatory relates to the *international nature of Post E.C.S.* This argument simply demonstrates why Post E.C.S. does not fit within the hardcopy mail paradigm, and therefore why this proceeding should never have gone forward. In any event, UPS readily admits that these questions are intended to provide information on the international nature of Post

E.C.S. In this regard, they extend beyond the scope of the first phase of this proceeding, which is limited to the postal/nonpostal question.⁷

CONCLUSION

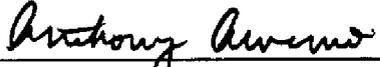
WHEREFORE, the Postal Service requests that UPS's Motion to Compel responses to interrogatories UPS/USPS-34 and 36-43 be denied. The undersigned counsel has sent a copy of this document to counsel for UPS via facsimile transmission.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

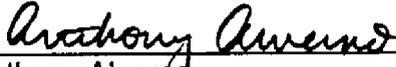
Daniel J. Foucheaux, Jr.
Chief Counsel, Ratemaking



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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July 27, 1999

⁷ See United States Postal Service's Answer in Opposition to Motion of United Parcel Service for Clarification, or, in the Alternative, for Reconsideration and Modification of P.O. Ruling No. C99-1/3 Concerning the Scope of the First Phase of this Proceeding (filed July 26, 1999).