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POSTAL RATE COMMISSION  
OFFICE OF THE SECRETARY

ORDER NO. 1258

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

Before Commissioners: Edward J. Gleiman, Chairman;  
W.H. "Trey" LeBlanc III, Vice Chairman;  
Dana B. Covington, Sr.; Ruth Y. Goldway;  
and George A. Omas

Complaint on Post E.C.S.

Docket No. C99-1

ORDER AFFIRMING DISPOSITION  
OF PROCEDURAL ISSUES IN  
PRESIDING OFFICER'S RULING NO. C99-1/3

(August 6, 1999)

Presiding Officer's Ruling No. C99-1/7 granted a Postal Service request for certification of an appeal of certain aspects of the previous Ruling No. C99-1/3, which granted in part the Service's earlier motion for partial reconsideration of Presiding Officer's Ruling No. C99-1/2. At issue are the Service's claims that, in addition to restricting the first phase of this proceeding to focus on the "postal" or "non-postal" character of the challenged Post E.C.S. service, Ruling No. C99-1/3 should also have: (1) explicitly identified what issues would be addressed in any subsequent phase of this proceeding; and (2) declared that the Commission's determination of the threshold issue would be in the form of a final Opinion and Recommended Decision.

A related issue has been raised by a motion<sup>1</sup> filed by Complainant seeking clarification, or alternatively reconsideration, of another aspect of Presiding Officer's Ruling No. C99-1/3. In that motion, UPS gives notice of the Postal Service's position

that discovery on its jurisdictional claim that Post E.C.S. is not a domestic mail service is improper at this time, in light of the limitation of issues directed by the Presiding Officer in the cited ruling. Complainant asks the Presiding Officer to countermand the Service's interpretation, and allow such discovery to be conducted during the initial phase of the case. The Postal Service has filed an answer<sup>2</sup> opposing the relief requested by UPS.

In order to forestall additional motions practice and expedite the receipt of evidence in this phase of the proceeding, the Commission will address all of these controversies in this Order.

A. Scope of Initial Phase of the Proceeding

Complainant's Argument. UPS argues that the Postal Service's construction of Presiding Officer's Ruling No. C99-1/3 should be rejected because it would defeat the ruling's purpose—*i. e.*, to adopt procedures that avoid unnecessary steps in the case, including discovery that would be rendered moot if the Commission were to find that it lacks jurisdiction over the Post E.C.S. service. Under the Service's reading, UPS observes, the first phase of the proceeding would only address the "postal" versus "non-postal" question, leaving the other, "domestic" versus "international" issue to be decided in a subsequent phase, if necessary. UPS asks the Presiding Officer to confirm that this was not the ruling's intent, or to reconsider that aspect of the ruling if it was its intent. Alternatively, UPS suggests that the Presiding Officer could rule that the domestic character of Post E.C.S. has not been put in issue in the case, as the Postal Service did not raise it in its Answer to the Complaint, but only subsequently in the argument offered in support of its Motion to Dismiss the Complaint.

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<sup>1</sup> 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, July 15, 1999.

<sup>2</sup> United States Postal Service 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, July 26, 1999.

Postal Service Response. In its Answer of July 26, the Postal Service requests the Presiding Officer to clarify the ruling by affirming its own interpretation. The Service opposes the alternative motion for reconsideration on several grounds.

First, the Service claims that the Commission lacks authority to pursue an inquiry into whether Post E.C.S. is an "international" service because, in its view, Congress has conferred exclusive authority over international mail upon the Postal Service. Citing the decision in *Air Courier Conference of America/International Committee v. U.S. Postal Service*,<sup>3</sup> the Service argues that its authority over international mail is exercised independently of any provision in Chapter 36 of Title 39, and that the Commission's responsibility in the international area is limited to preparing the annual report on costs, revenues, and volumes for Congress pursuant to 39 U.S.C. § 3663. Furthermore, the Service claims that the Commission's authority over domestic rates is circumscribed by the Service's unilateral authority to determine the content of rate requests, and that similarly, the Service has authority to classify a service as domestic or international. Postal Service Answer at 3-4.

Apart from the Commission's authority to consider the issue, the Postal Service argues that doing so in the first phase of the proceeding would impede the Presiding Officer's objectives of achieving efficiency in the proceeding while minimizing the potential for unnecessary commercial harm to participants. According to the Service, broadening the inquiry to include the international character of Post E.C.S. would encumber the proceeding with numerous discovery disputes, and substantially increase the prospect of commercial harm to the Postal Service through the release of sensitive information that will enhance Complainant's competitive position. Finally, the Service urges the Commission to exercise extreme caution in this area "by limiting the scope of this proceeding in order to preserve the integrity of the complaint process and the commercial information of the Postal Service, the International Post Corporation, and the foreign posts, as well as their customers and suppliers." *Id.* at 5.

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<sup>3</sup> 959 F.2d 1213 (3<sup>rd</sup> Cir. 1992).

Commission Determination. In responding to the Postal Service's request to limit issues in this proceeding, Presiding Officer's Ruling No. C99-1/3 correctly concluded that, "[t]here is no legal principle that would require the scope of this complaint to be restricted to limited issues as requested..." Ruling at 3. In Order No. 1239 in this docket, the Commission explicitly found that three separate claims contained in the UPS Complaint are appropriate for consideration under the Commission's § 3662 complaint authority.<sup>4</sup> It is readily apparent that the second and third of these claims—alleging that Post E.C.S. rates are uncompensatory and that offering Post E.C.S. impacts on mailers' use of hardcopy postal services—present issues that extend beyond the "postal" versus "nonpostal" controversy.

Nonetheless, in view of Complainant's willingness to limit the issues at the outset, the Presiding Officer accommodated the Service's request to the extent of limiting issues to be considered in an initial phase of the case. While the narrative portion of the ruling refers to the central issue in a variety of ways, the ruling itself declares that the first phase of the case shall be "limited to the issue of whether Post E.C.S. is a postal service for purposes of Chapter 36 of Title 39." P. O. Ruling No. C99-1/3 at 7, para. 2.

Notwithstanding the Postal Service's arguments to the contrary, the Commission agrees with Complainant's position that the ruling is sufficiently broad to encompass an inquiry into the factual support for the Service's claim that Post E.C.S. is not a domestic service, and that such an inquiry is appropriate in this stage of the proceeding.

First, the issue raised by the Postal Service's claim is a crucial one on which the outcome of this proceeding may depend. If available facts support the Service's claim, and Post E.C.S. is found to be an entirely international service, it would not be a "postal service" subject to the Commission's mail classification and rate authority under Chapter 36, as the Service has argued. On the other hand, if the record identifies an

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<sup>4</sup> Order Denying Motion of United States Postal Service to Dismiss Complaint and Notice of Formal Proceedings, May 3, 1999, at 13-15.

appreciable segment of Post E.C.S. transactions that are wholly domestic, those transactions arguably may be postal services subject to the requirements of Chapter 36. Indeed, it is these considerations that led the Commission to direct certain questions regarding the international character of Post. E.C.S. to the Service in Order No. 1229.<sup>5</sup>

The Commission addressed these questions to the Service in light of some statements in its Answer to the UPS Complaint<sup>6</sup> and the previously cited allegation in the Service's Motion to Dismiss that Post E.C.S. is not a domestic service. Thus, the Service has itself posed the issue that Complainant wishes to explore in discovery. Furthermore, by asserting this defense, the Service has called upon the Commission to consider the limits of its jurisdiction under the Reorganization Act. There can be no serious dispute regarding the Commission's authority to conduct an inquiry into the limits of its jurisdiction in a proceeding.<sup>7</sup> The decision in *Air Courier Conference v. U.S. Postal Service*, which recognized not only the Postal Service's primary authority to set international mail rates but also the exclusive application of Chapter 36 procedures to domestic rates,<sup>8</sup> does not overrule or even conflict with this basic precept. For these reasons, the Commission is not dissuaded from this line of inquiry by the Postal Service's argument that the Commission's authority to conduct it is lacking.

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<sup>5</sup> Portions of Questions 1, 2 and 4 in Order No. 1229 bear on the putative international character of the Post E.C.S. service. The Postal Service submitted answers to most of the questions posed in its Partial Response to Commission Order No. 1229, filed March 3, 1999.

<sup>6</sup> In its Answer of November 5, 1998, the Service affirmatively alleged that Post E.C.S. service is being provided "under the auspices of the International Post Corporation, in conjunction with the Canada Post Corporation and France's La Poste[.]" Answer at 6, para. a, and that a recipient "may reside abroad or in the United States," *id.*, para. b.

<sup>7</sup> "The need to protect the primary authority of an agency to determine its own jurisdiction 'is obviously greatest when the precise issue brought before a court is in the process of litigation through procedures originating in the [agency]. While the [agency's] decision is not the last word, it must assuredly be the first.' *Federal Power Commission v. Louisiana Power and Light Co.*, 406 U.S. 621, 647 (1972), quoting *Marine Engineers Beneficial Assn. v. Interlake S. S. Co.*, 370 U.S. 173, 185 (1962).

<sup>8</sup> "In giving the Postal Service the authority to 'establish' international mail rates, section 407(a) is just as specific about international rates as chapter thirty-six is about domestic rates. Section 407(a) tells us how international postage rates are to be set and who sets them. Chapter thirty-six tell us how domestic postage rates are to be set and who sets them." 959 F.2d at 1221.

In the Commission's opinion, allowing the domestic-versus-international inquiry to go forward now is in the best interests of the parties and of the Commission's expeditious resolution of the case. As Complainant has argued, in the event of an affirmative finding that Post E.C.S. is a "postal" service in all other respects, deferring inquiry into the domestic-versus-international issue would result in the necessity of adding a second phase to consider this additional jurisdictional issue. There is no justification for potentially prolonging this proceeding and imposing the burden of additional litigation on the parties in this way.

The Commission remains aware of the potential commercial sensitivity of some of the materials that might be sought in this inquiry, and is committed to employing all available means to prevent commercial harm to the Postal Service through the release of sensitive information. The Commission will rely on the Presiding Officer's discretion to consider the sensitivity of materials sought in discovery, and to direct the use of protective conditions and any other appropriate means to avoid compromising such information.

#### B. Form of Commission Action at Conclusion of Initial Phase

In its Request for Certification, the Postal Service challenges the Presiding Officer's Ruling for declining to commit the Commission to issuance of a recommended decision at the conclusion of the first phase of the case, and for alluding to the possibility that the Commission might present its determination of the "postal" versus "non-postal" issue in some other form. The Service claims that the use of any vehicle other than a recommended decision at the conclusion of the first phase would violate the Commission's rules and generally-applicable precepts of administrative decisionmaking; would be inconsistent with the respective roles of the Commission and the Governors assigned by the Reorganization Act's statutory scheme; and would subject the Service to further costly and time-consuming proceedings without opportunity to seek relief until the conclusion of subsequent phases of the proceeding. Request for Certification at 4-5. Additionally, the Service argues that the Commission's

disposition in the first phase must be in a form that facilitates subsequent review by the Governors because the Commission's disposition of the postal/non-postal issue could place the Service in a defensive posture in a lawsuit for equitable relief. *Id.* at 6-7.

The Commission affirms the Presiding Officer's disposition of the Service's request in the ruling. First, the Presiding Officer was correct in declining to make the requested commitment on the Commission's behalf on the ground that the request "involve[d] a final determination of the proceeding[.]" which section 23(a)(7) of the rules of practice [39 C.F.R. § 3001.23(a)(7)] reserves for the full Commission. In addition to this prohibition, granting the relief requested by the Postal Service at the outset of this phase would be premature. The Postal Service and all other parties will be afforded opportunities to argue the appropriateness of different Commission actions on the basis of the evidentiary record that has yet to be made.

#### C. Issues for Consideration in Any Subsequent Phases

In the ruling challenged by the Postal Service, the Presiding Officer found that, "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 the case." Presiding Officer's Ruling No. C99-1/3 at 4. The Service's Request for Certification challenges this aspect of the ruling, arguing that, "[t]he Postal Service and other participants should not be left to guess what the subsequent phases of the proceeding will entail...." Request at 4.

The Commission affirms the Presiding Officer's decision to defer the specification of additional issues and potential future procedural steps in the proceeding. The Postal Service and other parties are on general notice of the issues that might be litigated in any subsequent phases of the case, inasmuch as the three claims set out in the Complaint establish the boundaries of such issues. However, depending on information contained in the evidentiary record to be made in this phase, and the Commission's disposition of the issues presented, it may or may not be appropriate to consider any given issue in a subsequent procedural stage.

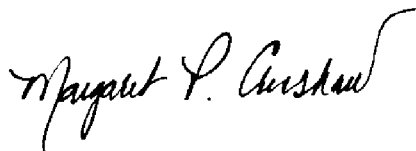
Consequently, the Commission affirms the Presiding Officer's earlier ruling that it is reasonable and sufficient at this time to limit the procedural schedule to issues and events in the first phase of this proceeding.

It is ordered:

1. The Motion of United Parcel Service for Clarification of P. O. Ruling No. C99-1/3 Concerning the Scope of the First Phase of This Proceeding, filed July 15, 1999, is granted.
2. Presiding Officer's Ruling No. C99-1/3, issued July 7, 1999, is affirmed in all respects.

By the Commission.

(S E A L)



Margaret P. Crenshaw  
Secretary