



BEFORE THE
POSTAL RATE COMMISSION

- - - - - X
In the Matter of: :
COMPLAINT OF UNITED PARCEL : Docket No. C99-1
SERVICE RE: POST E.C.S. :
- - - - - X

Third Floor Hearing Room
Postal Rate Commission
1333 H Street, N.W.
Washington, D.C. 20268

Volume 1
Tuesday, August 10, 1999

The above-entitled matter came on for prehearing
conference, pursuant to notice, at 9:30 a.m.

BEFORE:

HON. DANA B. COVINGTON, COMMISSIONER, PRESIDING
HON. EDWARD J. GLEIMAN, CHAIRMAN
HON. W.H. "TREY" LeBLANC, III, VICE CHAIRMAN
HON. GEORGE OMAS, COMMISSIONER
HON. RUTH GOLDWAY, COMMISSIONER

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P R O C E E D I N G S

[9:30 a.m.]

COMMISSIONER COVINGTON: Good morning to everyone.

This is a prehearing conference in Docket Number C99-1. This docket was established to consider the complaint of United Parcel Service concerning POST E.C.S., a Postal Service Electronic Communications Service offered in conjunction with several foreign postal authorities.

My name is Danny Covington, and although I have only been a Postal Rate Commissioner for a few months, Chairman Gleiman, who is seated to my immediate left, assigned me the task of presiding in this case. Believe it or not, I was happy to get this assignment and I am enjoying being so closely involved in this important but somewhat controversial case.

With me on the bench this morning in addition to Chairman Gleiman is, to my right, Vice Chairman LeBlanc; to my far right, Commissioner Goldway; and to my far left, Commissioner George Omas.

As some of you may know, I am not a lawyer. However, I have been working with my colleagues and with the Commission Staff to get through the issues that have been raised in these pleadings. We will try, particularly myself, I am going to try to be careful and systematic. My reaction at this point is that counsel have all been

1 thorough and persuasive, and I want to thank each of you for
2 presenting your arguments in sufficient detail so that a
3 first-timer such as myself can fully grasp the points that
4 you are making in this particular case.

5 The full Commission agreed to consider this
6 complaint in phases, the first phase being for the purpose
7 of determining whether POST E.C.S. is a postal service for
8 the purpose of the Commission's jurisdiction under Title 39,
9 Chapter 36, of the United States Code.

10 Up to this point discovery has been taking place
11 and the next major procedural stage in this case will start
12 when Complainant United Parcel Service files its direct
13 testimony. Now a date for receiving that testimony had been
14 established but was deferred pending resolution of the
15 numerous controversies arising out of discovery, and the
16 receipt of answers to permissible discovery requests.

17 Before turning to pending substantive issues, I
18 want to take a minute to get introduced to counsel who are
19 appearing here in the PRC hearing room today.

20 Will counsel for United Parcel Service please
21 introduce yourself for the record.

22 MR. McKEEVER: Good morning, Mr. Commissioner. My
23 name is John McKeever, and I represent United Parcel
24 Service. With me is my partner, Kenneth Starling, who has
25 appeared on the pleadings in the case.

1 COMMISSIONER COVINGTON: Thank you Mr. John
2 McKeever, and Mr. Starling.

3 Next will counsel for the Postal Service introduce
4 themselves?

5 MR. ALVERNO: Good morning, Mr. Presiding Officer.
6 I am Anthony Alverno and I am appearing on behalf of the
7 Postal Service, and with me to my right is Mr. Eric
8 Koetting, also of the Postal Service.

9 COMMISSIONER COVINGTON: Welcome, Mr. Alverno and
10 Mr. Koetting.

11 I have been advised that there are four other
12 participants. Is Mr. Douglas Carlson present in the hearing
13 room?

14 [No response.]

15 COMMISSIONER COVINGTON: I don't see Mr. Carlson.

16 Do we have a representative of the Coalition
17 Against Unfair UPS Practices present this morning? -- USPS
18 Practices, excuse me.

19 MR. MCKEEVER: Thank you, Mr. Commissioner.

20 [Laughter.]

21 COMMISSIONER COVINGTON: Forgot about that other
22 "S." Is there a representative for CAUUC?

23 [No response.]

24 COMMISSIONER COVINGTON: Will counsel for the
25 Office of Consumer Advocate introduce themselves for the

1 record?

2 MS. DREIFUSS: Good morning. I am Shelley
3 Dreifuss. I am making an appearance today on behalf of the
4 Office of the Consumer Advocate, OCA.

5 COMMISSIONER COVINGTON: Thank you, Ms. Dreifuss.
6 Is Mr. David Popkin present in the PRC hearing
7 room this morning?

8 [No response.]

9 COMMISSIONER COVINGTON: All right.
10 Is there any other interested person who would
11 like to participate in these proceedings?

12 [No response.]

13 COMMISSIONER COVINGTON: There being none, I would
14 like to thank you all for acknowledging your presence here
15 with us today.

16 For those of you who have not already done so, we
17 would like to ask that you please fill out an appearance
18 form and hand it to the reporter before you leave the
19 hearing room today. They have been made available on the
20 side table here in the room.

21 Further, anyone interested in obtaining a
22 transcript of today's prehearing conference or any other
23 official Commission proceeding in this case should make
24 arrangements directly by contacting the reporting company,
25 Ann Riley & Associates, Limited. An order form is available

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1 on the bottom half of the appearance form, and transcripts,
2 I am pleased to say, are also available on computer
3 diskette. Please fill out an order form if you wish
4 transcripts either in hard copy or in diskette form.

5 Anyone present needing to make additional
6 arrangements that cannot be dealt with today through the
7 reporter who is here, you can feel free to contact the
8 company at (202) 842-0034.

9 This conference was scheduled at the request of
10 United Parcel Service in order to facilitate the resolution
11 of outstanding discovery-related issues. I will give
12 counsel for United Parcel Service an opportunity to raise
13 relevant issues, but I think a good way to proceed would be
14 to go over some of the issues that were not completely
15 resolved by the Presiding Officer's Ruling Number 9. Ruling
16 9 was issued yesterday morning and we have notified counsel
17 for United Parcel Service and the Postal Service as soon as
18 it was issued, as soon as it went out.

19 That particular ruling dealt with four separate
20 motions to compel responses to discovery filed by United
21 Parcel Service.

22 I hope that counsel have had sufficient
23 opportunity to review that ruling and are prepared to
24 discuss matters still left pending.

25 First, I would like to acknowledge that there is a

1 pending motion to compel that was filed by the Office of
2 Consumer Advocate. The Postal Service has answered that
3 motion and I expect to issue a ruling shortly.

4 Also United Parcel Service filed another motion to
5 compel yesterday, August the 9th.

6 Now I would like to turn specifically to Ruling
7 Number 9, and for anyone in the hearing room who does not
8 have a copy of that ruling, we have placed extra copies on
9 the table behind Postal Service counsel, at the door
10 entering to the hearing room. That ruling granted UPS
11 motions to compel outright as to seven interrogatories.
12 Under the special rules of practice of this case, answers to
13 those interrogatories should be filed by next Monday.

14 Mr. Alverno, I would like to ask you is there any
15 reason why the Postal Service would be unable to file
16 responses by that date?

17 MR. ALVERNO: This is currently for the
18 interrogatories for which the motion to compel has been
19 granted?

20 COMMISSIONER COVINGTON: Yes.

21 MR. ALVERNO: Mr. Presiding Officer, with all due
22 respect, if I could have some more time to respond, our
23 clients here who are working on this particular case do not
24 do this proceeding or do not work in this proceeding as a
25 matter of course. This is something that they do in

1 addition to other things that they have on their plate.

2 I would accordingly ask for four extra days so
3 that we would be at Friday of next week.

4 COMMISSIONER COVINGTON: Okay.

5 MR. McKEEVER: Mr. Commissioner, United Parcel
6 Service -- if I understand counsel, he is indicating that
7 the Postal Service would be prepared to file answers with
8 respect to the interrogatories where they have been ordered
9 to respond by Friday of next week instead of Monday, and if
10 that is the case, United Parcel Service has no objection to
11 that request.

12 COMMISSIONER COVINGTON: Okay, Mr. Alverno. In
13 response to what Mr. McKeever just stated from United Parcel
14 Service, we are to understand that August the 20th would be
15 the date when you would have everything in to us as far as
16 responses?

17 MR. ALVERNO: For those interrogatories for which
18 the motion to compel has been granted, yes.

19 COMMISSIONER COVINGTON: OCA?

20 MS. DREIFUSS: That is satisfactory for OCA too,
21 Mr. Presiding Officer.

22 COMMISSIONER COVINGTON: Thank you. In several
23 areas Ruling 9 granted motions to compel in principle but
24 did not establish dates for providing answers pending
25 discussions at today's conference.

1 In that ruling, in Ruling Number 9, on page 4 I
2 discussed a series of interrogatories that requested
3 documents on a variety of topics. Now the Postal Service
4 has indicated that some documents that would be responsive
5 to these interrogatories were privileged, but it did not
6 identify specific documents and explain what privileges
7 might apply to those documents and why.

8 United Parcel Service has argued that the United
9 States Postal Service should substantiate each individual
10 claim of privilege. On that point I agree. Ruling 9
11 indicated that the Postal Service should be prepared to
12 inform us of how long it will take to prepare a list
13 identifying each respective -- I beg your pardon -- each
14 responsive document for which the Service believes a legal
15 privilege is applicable including a description of why the
16 privilege applies in each specific instance.

17 Now Mr. Alverno, can you give us or can you
18 provide us with an estimate of when such a list could be
19 filed?

20 MR. ALVERNO: Mr. Presiding Officer, I would like
21 to ask your indulgence to discuss interrogatory 5. In
22 particular the introductory subpart to that interrogatory
23 states that the Postal Service is to provide all documents
24 referring or relating to post-E.C.S., including but not
25 limited to. And it lists then specific categories of

1 documents in various subparts.

2 If I'm to understand the ruling to require the
3 Postal Service to provide a listing of every document
4 referring or relating to post-E.C.S., it is my opinion that
5 that would take months.

6 COMMISSIONER COVINGTON: Okay. If I understand
7 it, that particular interrogatory requested the production
8 of a wide variety of documents, including planning,
9 development, instructional training, surveying, marketing
10 materials.

11 MR. ALVERNO: Indeed, for the specific subparts a
12 through f, we are able to produce such a list, and I would
13 estimate that that would take approximately one week.

14 COMMISSIONER COVINGTON: Okay.

15 Mr. McKeever.

16 MR. MCKEEVER: Mr. Commissioner, if I may, that is
17 acceptable to us. That of course does not, as Mr. Alverno
18 points out, take care of all the documents requested in that
19 interrogatory, although our thought when we put together the
20 subcategories was that it would embrace most of the
21 documents that refer or relate to post-E.C.S. other than
22 technical materials, which of course we excluded from the
23 request.

24 We may be willing to accept as a sufficient
25 response to the interrogatory documents responsive to a

1 through f. The only reason I hesitate is that I don't have
2 an idea of what other documents fall outside of a through f
3 which Mr. Alverno believes may exist. If the Postal Service
4 would also commit to provide at the same time it produces
5 its privilege log a description of other documents that
6 would be responsive to 5 but that fall outside of a through
7 f, then we may, as I say, be willing to accept responses to
8 a through f as a sufficient response to the interrogatory.
9 But it's difficult for me to give up my client's right to
10 relevant documents without knowing the nature of those
11 documents.

12 So if I can sum it up in a sentence or two, I
13 would request that the Postal Service, in addition to
14 providing a privilege log, also provide at the same time a
15 description of the types of documents that it has which are
16 responsive to number 5 but do not fall within subparagraphs
17 a through f.

18 COMMISSIONER COVINGTON: Mr. Alverno.

19 MR. ALVERNO: If I may, Mr. Presiding Officer, may
20 I consult with my client to see precisely how much time it
21 would take to do that sort of exercise?

22 COMMISSIONER COVINGTON: Yes, you may.

23 MR. ALVERNO: Thank you. Can we have two minutes.

24 COMMISSIONER COVINGTON: Yes.

25 MR. ALVERNO: Thank you.

1 [Brief recess.]

2 COMMISSIONER COVINGTON: Mr. Alverno, are we ready
3 to proceed?

4 MR. ALVERNO: Yes, Mr. Presiding Officer. Thank
5 you.

6 We believe we would be able to identify types or
7 categories of documents responsive to the introductory
8 subpart to interrogatory 5 with an additional two or three
9 days.

10 COMMISSIONER COVINGTON: And this would be in
11 addition to the --

12 MR. ALVERNO: To the one week we --

13 COMMISSIONER COVINGTON: To the one week --

14 MR. ALVERNO: Yes.

15 COMMISSIONER COVINGTON: You've already requested.
16 Mr. McKeever.

17 MR. McKEEVER: That is acceptable, Mr.
18 Commissioner.

19 COMMISSIONER COVINGTON: I'd like to now --

20 MR. McKEEVER: Mr. Commissioner --

21 COMMISSIONER COVINGTON: Um-hum.

22 MR. McKEEVER: If I may, I apologize. There is
23 one other point of clarification I'd like to request.
24 Ruling 9 directs the Postal Service on page 4 to prepare and
25 file a list specifying the particular privilege claimed for

1 each category of document requested. This morning in your
2 remarks you refer to a list identifying the privilege with
3 respect to each document requested. That latter approach,
4 indicating the privilege claimed for each document, is the
5 approach typically used in the courts, often referred to as
6 a Vaughn Index, so that it's clear what documents are at
7 issue and what the privilege is with respect to each
8 document.

9 Mr. Alverno agreed with your remarks today. I
10 just want to make sure that there is no confusion and we
11 don't find ourselves a week from now having a list that
12 addresses categories of documents rather than individual
13 documents so that we have a need to come back to resolve
14 that situation. So I thought if you are prepared today, and
15 if not obviously we will wait when you are ready to rule on
16 that, but I would ask clarification as to whether the
17 privilege log to be produced will address each document and
18 the privilege claimed with respect to it or categories of
19 documents.

20 COMMISSIONER COVINGTON: Yes. With respect to
21 each document, Mr. McKeever, I would let the record show
22 that we agree and that that should be so ordered.

23 MR. McKEEVER: Thank you, Mr. Commissioner.

24 COMMISSIONER COVINGTON: The Office of Consumer
25 Advocate.

1 MR. ALVERNO: I'm sorry, Mr. Presiding Officer.
2 If that's the interpretation then that you're applying to
3 that particular portion of the ruling, then I would also ask
4 that the additional two or three days be applied to the
5 listing for documents a through f as well.

6 MR. MCKEEVER: We have no objection to that, Mr.
7 Commissioner. May I suggest that the same date of August
8 20, just for purposes of uniformity, be used for that as
9 well. It'll make it easier for us to keep the deadline
10 straight, I think.

11 COMMISSIONER COVINGTON: Okay. Mr. Alverno, if I
12 understand it -- I mean, Mr. McKeever, if I understand it,
13 you want to accept the United States Postal Service offer as
14 it pertains to sections a through f with the same August 20
15 date.

16 MR. MCKEEVER: Yes, Mr. Chairman. I think we're
17 only talking about a day or two, and I think it'll make it
18 easier for all of us if we have August 20 as the magic date.

19 COMMISSIONER COVINGTON: Mr. Alverno.

20 MR. ALVERNO: That's agreed. Yes.

21 COMMISSIONER COVINGTON: Ms. Dreifuss.

22 MS. DREIFUSS: Yes, we're very much in favor of
23 what's taken place.

24 COMMISSIONER COVINGTON: Okay. All right, Mr.
25 Alverno, we are hopeful that you will file the documents

1 that we've just discussed by the August 20 date, and it
2 seems to me that the Postal Service should have a
3 familiarity with the specific documents at issue that's
4 before us at this time, and we would be hopeful that it's
5 understood by all parties that the August 20 date is the
6 date that we expect the actual filing.

7 Another area where additional information is
8 necessary and where concerns have been raised as far as
9 interrogatories is the request for data on the
10 post-Electronic Courier Service transactions. Because of
11 the potential commercial sensitivity of this information, I
12 also announced in Ruling Number 9 that I would ask counsel
13 to further clarify the nature of existing responsive
14 information and specify the degree to which protective
15 conditions could be applied effectively. If you will refer
16 to page 8 of Ruling Number 9 you will see where that
17 discussion takes place.

18 Mr. Alverno, will you please describe for us the
19 form of available responsive information and whether it
20 could be presented in a way that would make protective
21 conditions unnecessary.

22 MR. ALVERNO: I can go through each interrogatory
23 just briefly. Interrogatory number 2 requests the total
24 number of post-E.C.S. transactions, and to the extent that a
25 response is required, the Postal Service would ask that

1 responsive information be filed under the protective
2 conditions proposed by the Postal Service.

3 For interrogatory 3, this interrogatory asks for
4 the percentage of transactions sent by senders or recipients
5 inside or outside the United States. The Postal Service, as
6 it stated in its answer in opposition to UPS's motion to
7 compel, does not have responsive information to this
8 interrogatory, and can file a response to that effect.

9 For interrogatory 4, which requests the percentage
10 of transactions from a sender or server inside or outside
11 the United States for post-E.C.S. transactions, the Postal
12 Service does not have responsive information to this
13 interrogatory and can file a response to that effect.

14 Interrogatory 20(a). This interrogatory requests
15 the total number of licensed users. And the Postal Service
16 certainly does have this information. It would request that
17 such information be filed under protective conditions
18 proposed by the Postal Service.

19 I would respectfully point out, Mr. Presiding
20 Officer, that it seems more consistent with the ruling if
21 this response was not required, in that it only requests the
22 number of licensed users, as opposed to the number of
23 transactions. And I'm referring in particular to I believe
24 it's the rulings handling of interrogatories 25 and 32 to
25 33 -- excuse me, excuse me -- interrogatories 26, 29, and

1 45, which ask questions about the number of licensed users
2 as well.

3 Interrogatory 31 asks for the percentage of
4 transactions sent to servers outside the United States. The
5 Postal Service does not have information responsive to this
6 interrogatory, and will file a response to that effect.

7 Interrogatory 44. This requests the total number
8 of transactions sent to what UPS defines as a foreign
9 top-level domain. The Postal Service affirms that this
10 information is completely irrelevant to this proceeding. It
11 will not yield information about cross-border transactions.
12 It will not yield information that will elucidate the issue
13 as to whether or not a transaction is destined to a foreign
14 recipient, a recipient located in a foreign country, a
15 recipient located in the United States.

16 To the extent a response is required, we will have
17 to undergo considerable effort, and we believe that a
18 response could be filed. We would ask that it be filed
19 under protected conditions, as we believe that any kind of
20 disaggregated information about customer transactions is
21 commercially sensitive.

22 COMMISSIONER COVINGTON: Mr. McKeever.

23 MR. McKEEVER: Mr. Commission, I will address each
24 interrogatory in turn as well.

25 With respect to number 2, the Postal Service

1 indicated I believe that it is prepared to provide the
2 information, but wants it provided pursuant to a protective
3 order. It is our position that volume information, which is
4 routinely provided by the Postal Service on frequent basis
5 including I believe accounting-period basis, is routinely
6 provided publicly, and that therefore there is no need for a
7 protective order.

8 If the Presiding Officer deems that a protective
9 order would be appropriate, we believe that the Postal
10 Service's proposed conditions are too restrictive, as I
11 believe we've indicated in prior filings with the
12 Commission. But bottom line, we don't believe a protective
13 order is needed for volume information which is routinely
14 publicly disclosed, and certainly the terms that they
15 propose are too restrictive in the manner that we've
16 indicated in our prior filings with the Commission.

17 With respect to interrogatory number 3, the Postal
18 Service indicates that it does not have responsive
19 information. Mr. Commissioner, my question is whether that
20 is information that can be compiled by the Postal Service.

21 I'm not sure whether the indication that they do
22 not have responsive information means that it is not
23 currently collected or it is not collectible. And I think
24 there are two different things there, and I believe if the
25 information can be compiled, then as your order indicates,

1 the Postal Service should provide it, should be required to
2 compile it and provide it.

3 I would have the same remarks with respect to
4 interrogatory 4. The Postal Service there indicated that it
5 does not have information responsive to that interrogatory.
6 Mr. Commissioner, I would ask again, is that the type of
7 information that can be compiled from information the Postal
8 Service does have, and if so, I believe they should be --
9 the Postal Service should be ordered to provide it.

10 With respect to Interrogatory Number 20, we are
11 willing at the present time, Mr. Commissioner, without
12 prejudice to withdraw that interrogatory.

13 With respect to Interrogatory 31, again the Postal
14 Service, Mr. Alverno, indicated that the Postal Service does
15 not have that information. I may be mistaken. My
16 recollection is that in their pleadings they raised an undue
17 burden argument here, indicating that the information can be
18 compiled but they believe is it unduly burdensome to compile
19 it.

20 Now as I said, I may be mistaken on that but I
21 believe that this is the interrogatory where they have made
22 that assertion. If that is the case, then I believe it
23 should be provided. I don't believe they have carried their
24 burden of establishing an undue burden.

25 My question would be can that information be

1 compiled and, if so, they ought to be required to provide
2 it.

3 Finally, with respect to Interrogatory 44, I
4 wasn't sure whether Mr. Alverno was saying that the Postal
5 Service would not provide it under any circumstances. That
6 seemed to be the thrust of the early part of his remarks but
7 then at the end of his remarks he indicated that the Postal
8 Service would provide it under the terms of a protective
9 order. He restated the Postal Service's position that
10 information responsive to that interrogatory is irrelevant
11 and if that is just a statement of position and not an
12 indication that they will not provide it, then that is fine.
13 The record will indicate that, so I would ask for a
14 clarification whether the Postal Service is willing or will
15 produce that information as ordered under the terms of a
16 protective order.

17 We don't believe a protective order is needed for
18 that information. It doesn't require them to identify any
19 particular customers. It doesn't require anything about any
20 specific transaction. Instead it merely is an attempt to
21 indicate how many transactions are addressed to a non-U.S.
22 address, which we believe is highly relevant to the Postal
23 Service's defense that POST E.C.S. is a wholly international
24 service.

25 We can certainly rephrase the interrogatory to

1 request the reverse. If their concern is disclosing the
2 number of transactions that were addressed to a foreign
3 top-level domain, we can rephrase the question to ask them
4 for the number of transactions that were addressed to a
5 non-foreign top level domain. I think that would be
6 pointless because it is the other side of the same coin, and
7 I don't think that is the thrust of their objection, but I
8 wasn't sure from Mr. Alverno's remarks.

9 I apologize, Mr. Commissioner. That is an awful
10 lot to throw at you in one gulp, but I am not sure I see a
11 way out of that.

12 COMMISSIONER COVINGTON: Thank you, Mr. McKeever.

13 First of all, Mr. Alverno, can you possibly
14 clarify some of the issues that Mr. McKeever just raised?

15 MR. ALVERNO: Mr. Presiding Officer, to the extent
16 that Mr. McKeever would ask for the responses or for me to
17 identify now whether the responses to Interrogatories 3, 4
18 and 31 can be compiled, it is my belief and understanding
19 that it cannot, and in fact we will supplement our response
20 to that effect. If I am incorrect in that regard, we will
21 state in our responses whether the information can be
22 compiled.

23 COMMISSIONER COVINGTON: Mr. Alverno, I would like
24 to ask at this time what about Number 44?

25 MR. ALVERNO: Mr. Presiding Officer, with all due

1 respect, I have laid out a rather lengthy objection to this
2 interrogatory. I have also responded to a motion to compel
3 to Interrogatory 47, proving that the information requested
4 in this interrogatory is completely irrelevant. It will not
5 yield the information that UPS seeks to elicit.

6 COMMISSIONER COVINGTON: Okay. The question is
7 will the United States Postal Service not yield under any
8 circumstances?

9 MR. ALVERNO: That is our position as well stated
10 on this interrogatory. We have -- I cannot make it clearer
11 that we do not believe the information will yield anything
12 of value to UPS even if one were to assume that we could try
13 to identify cross-border or domestic transactions from that
14 information.

15 COMMISSIONER COVINGTON: Mr. McKeever?

16 MR. MCKEEVER: Mr. Commissioner, I want to be
17 absolutely sure on this and, while I am 99 percent sure,
18 from Mr. Alverno's remarks I am not 100 percent sure and so
19 I would ask Mr. Commissioner if Mr. Alverno was saying that
20 even if ordered by the Presiding Officer to produce this
21 information either under protective conditions or otherwise,
22 the Postal Service will not in fact produce it. Is that
23 what Mr. Alverno is saying?

24 COMMISSIONER COVINGTON: Mr. Alverno?

25 MR. ALVERNO: No.

1 MR. McKEEVER: Then Mr. Commissioner, I am
2 confused. I gather the Postal Service is willing to produce
3 information responsive to Interrogatory 44, and I would ask,
4 Mr. Commissioner, if Mr. Alverno would agree with that
5 statement.

6 MR. ALVERNO: No.

7 MR. McKEEVER: Then Mr. Commissioner, I am at a
8 loss. I think I have heard Mr. Alverno say they will
9 produce but they won't produce. Perhaps if I could ask for
10 a clarification, Mr. Commissioner?

11 COMMISSIONER COVINGTON: Okay, Mr. Alverno, can
12 you possibly, possibly clarify this issue for Mr. McKeever
13 as he so asked?

14 MR. ALVERNO: The way he phrased the question, he
15 said are we willing to provide a response to Interrogatory
16 44 and we have an objection outstanding on that
17 interrogatory.

18 MR. McKEEVER: Well, then, Mr. Commissioner, to my
19 inartful question. Mr. Commissioner, I would ask if Mr.
20 Alverno is stating that the Postal Service will not under
21 any circumstances provide information -- the information
22 requested in Interrogatory 44.

23 COMMISSIONER COVINGTON: How do you respond, Mr.
24 Alverno?

25 MR. ALVERNO: I guess the Postal Service will

1 examine the merits of the ruling and will exercise any
2 rights it may have in regard to that ruling.

3 COMMISSIONER COVINGTON: Mr. McKeever?

4 MR. McKEEVER: I thought, Mr. Commissioner, that
5 that question called for a simple yes or no answer. I tried
6 to make it as direct as I could so it would call for a yes
7 or no answer, and I would ask, Mr. Commissioner, that the
8 Postal Service be directed to provide a yes or no answer.

9 Will they produce the information requested in
10 that interrogatory given that the Presiding Officer has
11 ruled that it is relevant and should be produced?

12 COMMISSIONER COVINGTON: Mr. Alverno?

13 MR. ALVERNO: Well, bearing within his assumption,
14 Mr. Presiding Officer, is the fact that the ruling in fact
15 says that this information is to be produced or that it is
16 relevant. I understood this ruling to say that this
17 information or this question would be discussed at this
18 prehearing conference, and the Postal Service fully expects
19 that the presiding officer will in fact issue a ruling
20 explaining precisely the information is believed to be
21 relevant.

22 I think that that is a fair way of resolving this
23 particular controversy.

24 COMMISSIONER COVINGTON: Mr. McKeever?

25 MR. McKEEVER: Mr. Commissioner, I believe the

1 ruling has been made that it is relevant. What the ruling
2 also states is that the Presiding Officer is reluctant to
3 direct its production, quote, "without further clarification
4 of its potential admissibility as evidence and the possible
5 adoption of appropriate protective conditions" and that is
6 the end of the quote. That is on page 8 of the Presiding
7 Officer's ruling.

8 I am prepared to state that we believe information
9 concerning whether messages have been addressed to non-U.S.
10 addresses is relevant and would be admissible, although that
11 is not the test of discovery, whether it is admissible or
12 not. The test of discovery is whether it is reasonably
13 likely to lead to the discovery of admissible evidence, but
14 it is our position that that information goes directly to
15 their defense that POST E.C.S. has an international
16 component to it that renders the entire service outside the
17 Commission's jurisdiction.

18 COMMISSIONER COVINGTON: Mr. McKeever, Mr.
19 Alverno, as indicative of this exchange I think it is safe
20 to assume that we can probably go back and forth with
21 respect to Interrogatory Number 44 all day. It is this
22 officer's hope and it is my thought that the United States
23 Postal Service would not, should not and will not ignore an
24 order issued in regard to this issue.

25 What I will do, I will provide clarification to

1 the concerns that have been raised after we review the
2 record.

3 Does the Office of Consumer Advocate or any other
4 party have anything to contribute along this line of
5 discussion?

6 MS. DREIFUSS: I do have a couple of supplementary
7 suggestions.

8 One was for information that the Postal Service
9 says it can't produce I think it might be useful for the
10 Postal Service to state precisely why it can't be produced
11 and whether any reasonable steps could be taken to make it
12 possible to produce answers and perhaps go a step further
13 and say whether any extraordinary steps could be taken to
14 provide answers.

15 MR. McKEEVER: Mr. Commissioner, United Parcel
16 Service supports that request.

17 COMMISSIONER COVINGTON: Mr. Alverno?

18 MR. ALVERNO: I believe that that request might be
19 an appropriate follow-up question when the answer is filed
20 but I just -- all of a sudden we are getting into different
21 scenarios here about what the question really asks, and I
22 would like to confine our answers to the question that has
23 been asked, the fact that we don't have responsive
24 information, and the fact that we cannot compile the
25 information as requested.

1 COMMISSIONER COVINGTON: Commissioner Covington,
2 the reason I asked that all these loose ends be tied up now
3 is so as not to needlessly protract the proceeding.

4 It seems silly to go through a kind of a ritual
5 dance where they provide an answer and then we -- or UPS
6 files a follow-up and we wait, we wait 14 days for another
7 answer and so on and eventually we may have more motions
8 practice anyway, so I think it is appropriate to decide
9 right now how to handle that matter.

10 MR. MCKEEVER: Mr. Commissioner?

11 COMMISSIONER COVINGTON: Mr. McKeever.

12 MR. MCKEEVER: Mr. Commissioner, I might add that
13 the purpose of this prehearing conference, I thought, was to
14 air issues such as this so that we could cut short discovery
15 and motion practice and "get to it," so to speak, and so I
16 believe the request is eminently reasonable.

17 If they say they can't compile information they
18 ought to explain why and not just state it and make people
19 serve a follow-up interrogatory which they will take, I
20 think, 20 days, if I remember right, whatever the special
21 rules provide, to answer the interrogatory, and then
22 possibly have a motion to compel after that.

23 COMMISSIONER COVINGTON: Mr. McKeever, first of
24 all, I will take OCA, in particular Mrs. Dreifuss'
25 suggestion under advisement, and I would also like to state,

1 Mr. Alverno, that was exclusively one of the purposes for us
2 convening this prehearing conference.

3 How would you respond to the concerns just stated
4 jointly by the Office of Consumer Advocate and United Parcel
5 Service?

6 MR. ALVERNO: I think, Mr. Presiding Officer, that
7 what they are asking for goes well beyond the scope of the
8 question and we have volunteered in this particular
9 proceeding to state that we cannot compile the information,
10 so we are going above and beyond what has been asked for in
11 the interrogatory to begin with.

12 Now they want to -- if they want to add various
13 types of questions, my view is that they should ask those,
14 that we should have something in writing to respond to
15 rather than these vague questions about extraordinary
16 measures.

17 Perhaps they could specify what measures they are
18 referring to, because I don't know what an extraordinary
19 measure is.

20 COMMISSIONER COVINGTON: Mr. Alverno, I'm sitting
21 here and I believe I'm hearing I would hope basically the
22 same thing that you're hearing. In my mind there's nothing
23 vague about what OCA or what United Parcel Service is
24 asking. The interrogatories have been out there. I issued
25 my ruling, and we specifically stated that these were

1 concerns that we wanted addressed on today.

2 What I need to know from the United States Postal
3 Service is how best can we arrive at resolution as it
4 pertains on this issue that's before us right now. And I go
5 back to what I asked earlier, Mr. Alverno, is it that the
6 United States Postal Service is not willing or will not
7 yield?

8 MR. ALVERNO: I await your ruling. I have nothing
9 further to day.

10 COMMISSIONER COVINGTON: Are there any other
11 comments?

12 CHAIRMAN GLEIMAN: I'm somewhat perplexed. I can
13 understand that you might not want to provide certain data
14 or the Postal Service may not want to provide certain data
15 or may not think certain data is relevant. But I don't
16 understand why the Postal Service is unwilling to respond to
17 a simple question, if indeed the Presiding Officer decides
18 to direct the Postal Service to do that, about why you can't
19 compile data. I mean, it's an easy answer. I can't compile
20 it because it has never been collected. I can't compile it
21 because, you know, there was a fire in the office where it
22 was compiled and the paper -- and the computer burned up.
23 You know, I mean, or I can't -- you know, there's got to be
24 some simple explanation as to why one can't compile certain
25 data. And it may be as simple as we never bothered to

1 collect it.

2 So, you know, I just hope that as we go through
3 this dance that we always go through on procedural issues
4 that we all try to be a little bit reasonable here about
5 what we're willing to do and what we're willing to respond
6 to. It sometimes makes it more difficult not only for us
7 but for the Postal Service when they take a position that's
8 unreasonable, and I just hope that while my able colleague,
9 the Presiding Officer, I'm sure is going to take great pains
10 to understand the discussion today, I hope the Postal
11 Service will go back and rethink a little bit the position
12 it appears to have adopted in this already complicated case
13 that they won't answer simple questions.

14 COMMISSIONER COVINGTON: Mr. Alverno, Mr.
15 McKeever?

16 MR. MCKEEVER: Mr. Commissioner, I really am not
17 sure that I can add to the discussion at this point, other
18 than to say that I think the Commission is always in a
19 position to draw an adverse inference against a party if it
20 refuses to cooperate in discovery on a particular point.
21 But other than that, I'm not sure there's much more I can
22 say that would advance the discussion today.

23 MR. ALVERNO: Mr. Presiding Officer, I would
24 respectfully note that I have not in any way stated that the
25 Postal Service is in any way disobeying any ruling that's

1 been issued by the Presiding Officer. What's happened here
2 is essentially that OCA has requested that we respond to
3 further questions. I have taken a position that the OCA
4 asked those questions in the form of followup discovery.
5 And I am not entertaining these criticisms of the Postal
6 Service that we are somehow not responding to discovery or
7 disobeying a Commission ruling. There is no ruling.

8 COMMISSIONER COVINGTON: However, Mr. Alverno --

9 COMMISSIONER LeBLANC: Mr. Presiding Officer, may
10 I --

11 COMMISSIONER COVINGTON: Yes, Commissioner
12 LeBlanc.

13 COMMISSIONER LeBLANC: Mr. Alverno, the whole
14 purpose as I understood this morning was to ask questions
15 just as were brought out today. Now if I'm wrong -- I could
16 possibly be -- but let me ask you a question as specific as
17 I can make it. Suppose a ruling were to come out, as a
18 hypothetical as you attorneys like to say, and you're
19 required to answer that question, can you answer it in the
20 time frame that we're talking about, by August 20, or are we
21 going to be shuffling papers back and forth for another
22 three months here? I mean, what kind of time frame are we
23 looking at here?

24 It's very specific in my opinion what Mr. McKeever
25 has asked and what Ms. Dreifuss has asked. It refers back

1 to the specific question that was asked in the
2 interrogatory. It is trying to tie it down a little bit
3 tighter. And I'm trying to find out now, since it
4 specifically refers to that question, what kind of time
5 frame are we talking about?

6 MR. ALVERNO: It's not a question of time.

7 COMMISSIONER LeBLANC: Well, it is to us.

8 MR. ALVERNO: Commissioner LeBlanc, a response,
9 given the nature of the questions that the OCA asked, the
10 Postal Service could answer those without any additional
11 time.

12 COMMISSIONER COVINGTON: Ms. Dreifuss.

13 MS. DREIFUSS: OCA also awaits the Presiding
14 Officer's ruling, and we're hopeful that there will be a
15 favorable outcome.

16 I do have one other remark to make. Matters are
17 still a little up in the air, at least in my mind, on UPS
18 interrogatory 44. I'm not sure where it was left, if and
19 when the Postal Service provides an answer, whether they're
20 going to provide the transactions addressed to a foreign
21 top-level domain or domestic. So I wasn't really clear on
22 how that was left.

23 But I did want to add one more thing. However
24 it's left, I believe, based on a Postal Service response to
25 one of UPS's motions to compel, they indicated that there's

1 some top-level domains that are of mixed or uncertain
2 character. It's not clear-cut whether they're foreign or
3 domestic. And I wondered in particular, whatever the Postal
4 Service's response is, if they could indicate whether
5 there's some portion of the top-level-domain answer that
6 they're giving, whether it's foreign or domestic, what
7 portion of that may be mixed.

8 At any rate, I think it ought to be clarified
9 whether the Postal Service is going to give an answer that
10 states strictly these are foreign top-level domains, whether
11 they are strictly domestic top-level domains, or whether
12 they are of mixed character. I know the question isn't
13 phrased in exactly that way, but I think again we'll sort of
14 cut to the chase and get the answers that we need if the
15 information is broken down in that manner.

16 COMMISSIONER COVINGTON: Mr. Alverno.

17 MR. ALVERNO: With response to -- or with respect
18 to Mr. Dreifuss's first comment, my understanding is that
19 you stated that you would take the arguments that were made
20 with regard to interrogatory 44 under advisement and then
21 advise us later as to what ruling you had on that particular
22 interrogatory.

23 With respect to the second part of Ms. Dreifuss'
24 comments on interrogatory 44, yes, she does in fact note
25 that there are mixed top-level domains. Let's start with

1 the most obvious one, Dot Com. Dot com. I have no way of
2 knowing if a Dot Com address is here or France or Germany or
3 Botswana.

4 COMMISSIONER COVINGTON: Mr. McKeever.

5 MR. MCKEEVER: Mr. Chairman, it's our position
6 that a user who wants to use Dot Com has to come to the
7 United States to register, and that's a U.S. address that is
8 administered here, and any message sent there. Now that's
9 not a matter of course for the Presiding Officer to rule on
10 at this point. But we believe that that's a defensible
11 position, that any message addressed to a Dot Com address is
12 addressed to a United States address. And if somebody
13 overseas wants to come here and have a U.S. address to have
14 their mail sent to, they're perfectly capable of doing that,
15 but that's a domestic mail transaction when mail is sent to
16 that address. That is one of our positions. So we believe
17 that at the least those transactions are certainly domestic
18 transactions.

19 I don't want to get into the merits too much, but
20 we believe that there are other reasons why transactions
21 sent to other addresses, including maybe foreign-level top
22 domains, may in fact be domestic transactions, depending on
23 how the message is processed and whether the mailer comes
24 here to the United States to pick up his mail or not. And
25 that's the reason we asked some of the interrogatories about

1 how the system operates.

2 But to get back to my basic point, we don't see
3 Dot Com as a mixed address at all. That's a United States
4 address, and as I said, I don't think the Presiding Officer
5 has to rule on that now. All the Presiding Officer has to
6 rule is that an answer to this question is reasonably
7 calculated to lead to the discovery of admissible evidence.
8 And an evidentiary ruling does not have to be made at this
9 point. That's the purpose of discovery.

10 And it may be that the presiding officer will have
11 to make that ruling at a hearing. I don't know. But we're
12 not there yet. We're only in discovery, and the question is
13 whether there's any set of circumstances under which this
14 information could lead to the discovery of admissible
15 evidence. We think you've already ruled on that, and the
16 concerns you expressed I believe have been addressed to the
17 extent we can address them, and now it's up to the Postal
18 Service to address its concerns about providing an answer.

19 COMMISSIONER COVINGTON: Mr. McKeever, Mr.
20 Alverno, Ms. Dreifuss, I must say that if I was looking to
21 be baptized today as the Presiding Officer, it's more like
22 being drowned while being under fire, so to speak. What I
23 will say is that I will take all of the arguments under
24 advisement. We'll review the transcript, and I'll rule on
25 all outstanding issues that have been raised as soon as

1 possible. But one thing I want to make perfectly clear is
2 that the material that is due on August 20 should be in to
3 the Commission.

4 So I'm assuming that that was the final issue that
5 was left pending by ruling number 9.

6 Mr. McKeever, are there other items that you would
7 like to raise today during this prehearing conference?

8 MR. McKEEVER: The only other potential issue, Mr.
9 Commissioner, and I will be guided by the Presiding Officer
10 in this respect, is one additional interrogatory, the
11 interrogatory in which we asked what the Postal Service's
12 position is with respect to the interception of a
13 post-E.C.S. message. Does that violate a Federal -- any
14 Federal statutes governing the mails, or not? We believe
15 that that is proper discovery.

16 The importance there is not the legal conclusion.
17 They may be right or wrong on the legal conclusion. The
18 importance there is their mind set as to whether they
19 believe this is mail and therefore is treated like other
20 mail or whether they believe otherwise. And we think we're
21 entitled to a statement of their position with respect to
22 that interrogatory. That's what the interrogatory was
23 getting at.

24 We refer to a quote as background material. It's
25 really not essential to the specific question asked. I

1 almost regret that I put it in there, but I thought it might
2 be helpful to explain why we were asking the question. But
3 that's the only matter that I believe your ruling left up in
4 the air, so to speak, and I have nothing further to say on
5 it other than what I've already said. But I didn't want to
6 let that go by without commenting on it, since your ruling
7 did leave that still up for grabs, so to speak.

8 COMMISSIONER COVINGTON: Um-hum. Okay. Mr.
9 Alverno, would you like to address that issue?

10 MR. ALVERNO: First of all, I respectfully point
11 out that Mr. McKeever has changed question in the course of
12 this dialogue right now. The question asks whether or not
13 it is the Postal Service's position that if someone
14 intercepts a post-E.C.S. transmission that interception is a
15 Federal crime. And now he's just changed that to talk about
16 Federal crimes relating to the mails.

17 MR. McKEEVER: Mr. Commissioner, I had hoped that
18 my attempt to narrow the interrogatory was responsive to the
19 Postal Service's stated confusion about it in its responses
20 to discovery. I had thought that the background information
21 we provided made it clear that we were talking about Federal
22 crimes involving the mails. That's why I put the background
23 information in the interrogatory. But I do apologize if the
24 question was inartfully drafted, and I would amend it here.

25 If the Presiding Officer wants me to put that in

1 writing, I'd be happy to do it, although again normal
2 discovery practice and consultation among parties in good
3 faith I think would not require that, but rather that's why
4 counsel discussed interrogatories, what did you mean by
5 this, to see if they can reach an accommodation as to how to
6 respond. But I'm clarifying it here today to the extent it
7 needs clarification.

8 COMMISSIONER COVINGTON: Mr. McKeever, could you
9 put that in writing?

10 MR. McKEEVER: Certainly.

11 COMMISSIONER COVINGTON: Mr. McKeever, also one
12 issue that remains outstanding is a date for submission of a
13 direct case. Obviously United Parcel Service has not yet
14 had access to answers to a number of valid discovery
15 requests, and it looks as though this process will be going
16 on for several weeks more. Now based on discussions here
17 today, do you have a feel for when United Parcel Service may
18 be able to file its direct evidence for phase 1 of this
19 case, or can you give us an estimate as to when you may be
20 able to provide us with a specific date?

21 MR. McKEEVER: Mr. Commissioner, I am not sure I
22 can give you an exact date at this point in time because it
23 does depend on when we get responsive information from the
24 Postal Service. We are prepared to say that we will file
25 our direct case within three weeks of the date that the

1 Postal Service provides information responsive to the
2 interrogatories it has been ordered and will be ordered, we
3 hope, to respond to.

4 Now that unfortunately gives an incentive to the
5 Postal Service to take more time in providing responsive
6 answers, so I would ask that the time within which they have
7 to respond to interrogatories be shortened so that we can
8 move this proceeding along.

9 I think that when we do receive whatever we
10 receive on August 20th, depending on what it is, we may be
11 in a position then to give the Presiding Officer a specific
12 date, but again we are at the mercy of the Postal Service.
13 They are in control of the information so again, if I can
14 sum up some rather long remarks in a sentence or two, we
15 will commit that we can provide our direct case no later
16 than three weeks after the Postal Service responds in full.
17 If we can beat that, when we get the information that is to
18 come in on August 20th, we will so inform the Presiding
19 Officer of that fact.

20 So maybe I can suggest that we provide an answer
21 to your question within a week of August 20th as to whether
22 we believe we can file a direct case by a specific date or
23 whether the information we think that is supplied on August
24 20th is not sufficient, in which case, as I said, our
25 commitment would be to file a direct case within three weeks

1 of the date when responsive information is provided by the
2 Postal Service.

3 I am not sure if that was helpful or not, Mr.
4 Presiding Officer.

5 COMMISSIONER COVINGTON: Well, it is about as
6 helpful as everything else has been.

7 [Laughter.]

8 COMMISSIONER COVINGTON: I would agree with you,
9 Mr. McKeever, it would be our hope that this direct case
10 could be filed within three weeks of your receiving USPS's
11 response.

12 Mr. Alverno, do you have anything to raise along
13 those lines?

14 MR. ALVERNO: Not at this time, Mr. Presiding
15 Officer. Thank you.

16 COMMISSIONER COVINGTON: Does any other
17 participant have anything to discuss with regards to this
18 prehearing conference today?

19 [No response.]

20 COMMISSIONER COVINGTON: Well, with that I would
21 like to thank you all and I now declare this prehearing
22 conference adjourned.

23 [Whereupon, at 10:33 a.m., the hearing was
24 concluded.]

25