

BEFORE THE
POSTAL RATE COMMISSION

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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

COMPLAINT ON POST E.C.S.

DOCKET NO. C99-1

RESPONSE OF UNITED PARCEL SERVICE TO
THE UNITED STATES POSTAL SERVICE'S
PRIVILEGE LOG
(September 9, 1999)

Pursuant to Presiding Officer's Ruling No. C99-1/9 (August 9, 1999) ("Ruling No. 9"), United Parcel Service hereby responds to the United States Postal Service Provision of Descriptive List of Responsive Documents and Associated Privileges (August 30, 1999) ("Descriptive List"). See Ruling No. 9 at 4-5.

BACKGROUND

In Ruling No. 9, the Presiding Officer stated that "A review of the categories of documents requested in [UPS interrogatories 5, 6, 10-14] suggests that at least some responsive documents are likely to contain material relevant to establishing the status of Post E.C.S." Ruling No. 9 at 4. As a result, the Presiding Officer directed the Postal Service to file a privilege log and indicated that he would rule on UPS's motions to compel answers to these interrogatories following receipt of the privilege log "and any accompanying argument of the Postal Service, and an opportunity for response by" UPS. *Id.* UPS hereby responds to the Postal Service's filing, which was made on August 30.

ARGUMENT

Interrogatory 5 (introductory subpart). This portion of interrogatory UPS/USPS-5 requests all documents which refer or relate to PostECS. The Postal Service has identified 28 separate categories of documents responsive to this request. We have reproduced those categories in Exhibit A hereto together with corresponding category numbers, and we respond in terms of those category numbers as follows:

1. UPS is willing at the present time to withdraw, without prejudice, its request to the extent that it asks the Postal Service to produce documents in Categories 1, 2, 3, 4, 5, 11, 13, 14, 15, 16, 17, 19, 22, 23, and 24.

2. Category 6 (email messages concerning customer relations and sales issues) -- Unfortunately, the Postal Service's description is not very revealing. However, as described, these messages could very well contain information concerning the substitution of PostECS for services such as overnight mail, certified mail, or other services that are admittedly postal in nature. Thus, these documents should be produced. Given that UPS agrees to accept these documents with customer names redacted, there should be no need for a protective order.

3. Category 7 (status reports on customer activity, service usage, and telemarketing results) -- Reports on customer activity, service usage, and telemarketing results are very likely to contain information relevant to the question of substitution. They are also likely to reveal information about the nature of the service, how it is perceived by users, and the functions which users see the service as performing. These documents should be produced. Again, since customer names may be redacted, there is no need for a protective order.

4. Category 8 (internal presentations on project status and service features) -- Even the Postal Service has admitted on numerous occasions that the service features of PostECS go to whether that service is postal in nature. These presentations should therefore be produced. UPS sees no reason why these documents should not be publicly available.

5. Category 9 (presentations to postal conference attendees) -- Since these presentations were made to third parties ("postal conference attendees"), the Postal Service's claim of confidentiality is frivolous. Moreover, what is said in these presentations is likely to contain information that is highly relevant to the nature and features of the service, to the needs it meets, and also to the question of substitutability. These documents should be produced.

6. Category 10 (communications and drafts on internal and external public relations activity) -- Public relations activities by their nature are not confidential. Moreover, information concerning the nature of proposed and actual public relations activities almost certainly will contain insights on the nature and features of the service and may also contain information on whether it can be used in place of existing postal services.

7. Category 12 (client notes, research, and communications on product development) -- These documents are highly likely to contain insights concerning how the Postal Service and its customers perceive the product and whether the product may be used as a substitute for other postal products. Since they appear to be communications between the Postal Service and third parties (its customers), they are not confidential. Given that customer names may be redacted, they should be

produced without a protective order. Even if the documents are internal documents, product development information is no longer confidential.

8. Category 18 (superseded sales and marketing plans) -- How the Postal Service at one time planned to market the service is highly probative of its nature, and could very well shed light on the question of substitutability. Since the plans have been superseded, there is no longer any question of confidentiality. These documents should be produced and made publicly available.

9. Category 20 (Postal Service initiatives referring to PostECS) -- The Postal Service's description of this category indicates that these documents refer not only to PostECS, but also to other services provided by the Postal Service. Initiatives which link PostECS with other services provided by the Postal Service are highly relevant to the relationship between PostECS and admittedly postal services. Again, UPS sees no reason why these documents should not be made publicly available.

10. Category 21 (public relations marketing communications) -- As stated above, public relations and marketing materials almost certainly contain information describing the nature of the service and its features, and may very well contain information relevant to substitutability. Since these documents are *public* relations communications, they have undoubtedly already received circulation among at least certain segments of the public. Accordingly, the Postal Service's confidentiality objection has no basis.

11. Category 25 (management briefing papers on PostECS activities and status) -- Such briefings are very likely to contain information on the service's features and on substitutability. UPS sees no reason why they should not be made publicly

available, to the extent they contain facts and analysis other than actual recommendations.

12. Category 26 (documents concerning research of similar services in the marketplace) -- The Postal Service's own description of this category suggests that it may very well contain information relevant to substitutability. Since the documents apparently consist merely of a compilation of other products in the marketplace, there is nothing commercially sensitive about them.

13. Category 27 (draft price lists and sales support information) -- Sales support information could very well contain information describing product features and functions as well as information relevant to substitutability. Moreover, draft prices are relevant to substitutability because the prices proposed to be charged for PostECS service may shed light on the likelihood that a mailer would choose to use PostECS rather than some other postal service, such as overnight mail or certified mail, and on the Postal Service's objectives in providing PostECS. Such drafts are not commercially sensitive.

14. Category 28 (reports on demand for foreign posts' implementation of PostECS) -- UPS has repeatedly stated that we have no interest in information concerning *actual usage* of services provided by foreign posts. However, to the extent that these documents shed light on the nature of and the demand for PostECS generally, whether here or abroad, they contain information that may very well go to the question of substitutability, as well as to the nature and features of the service. They should be produced. UPS is willing to accept these documents pursuant to the terms of an appropriate protective order, as outlined in our prior pleadings on that subject.

Interrogatory 5(a). The Postal Service has apparently located only one document, or one form of document, that is responsive to this request for promotional materials and that was not "widely distributed." Descriptive List at 5. Identified as a "solicitation letter," it apparently was sent to at least some members of the public and therefore is not confidential. A solicitation letter almost certainly indicates the nature and features of the service, and may also contain information relevant to substitutability. All such documents should be produced, with customer names (or potential customer names) redacted.

Interrogatory 5(b). This interrogatory requests instructions to individuals involved in selling, promoting, providing, or answering questions concerning PostECS. All of these documents are of a type which may very well contain information relevant to the nature of the service and its features. They may also contain information relevant to substitutability. With the exception of those documents or portions of documents which merely provide technical details for setting up customer accounts ("PostECS Accounts Creation 5/21/99") and those documents reflecting passwords and log-on information ("Establishing Group Accounts") (see page 7 of the Postal Service's Descriptive List), they should be produced (with customer names redacted).

Interrogatory 5(c). Attached hereto as Exhibit B is a listing of the categories of documents identified by the Postal Service in response to this interrogatory. UPS's comments are made in terms of the category numbers shown on Exhibit B.

1. UPS is willing to withdraw at the present time, without prejudice, its request to the extent that it requests documents in Categories 7, 8, 13, 15, 16, 17, and 20. All other documents responsive to this interrogatory should be provided, as they are

likely to contain information reasonably calculated to lead to the discovery of admissible evidence concerning the nature and features of PostECS and its substitutability with other postal services. As long as customer names and information about foreign posts are redacted, there is no reason why these documents should not be publicly available.

Interrogatory 5(d). UPS is willing to forego at the present time, without prejudice, this request to the extent it encompasses account welcome letters with log-in and password information, email correspondence establishing meeting dates and times, meeting agendas, next steps, etc., and emails from the help desk responding to customer inquiries. However, all other documents should be provided, as they are reasonably likely to lead to the discovery of admissible evidence. As long as customer names are redacted, there is no reason why these documents should not be publicly available.

Interrogatory 5(e). Marketing plans such as these are, by their very nature, likely to contain information on the nature and features of the service, and on its possible substitutability for other services. Indeed, the Postal Service's description of the table of contents of the "pilot plan" merely highlights why these documents should be produced; that description indicates that the document discusses the market for (*i.e.*, the uses of) the product, trends in communication and the implications of those trends, and other matters which go to substitutability. The table of contents also contains a heading entitled "service overview," Descriptive List at 10 n.5, which fits even the Postal Service's narrow definition of relevant documents.

Interrogatory 5(f). Again, the Postal Service's own descriptions of these documents indicate that they contain information about how customers perceive

PostECS. Customer comments concerning the product's strengths and weaknesses are relevant to substitutability. The documents also undoubtedly contain descriptions of the features of the service. All of them should be produced and made publicly available, with customer names redacted.

Interrogatory 6. According to the Postal Service, these documents are also responsive to interrogatory 5(c); therefore, they have been addressed above.

Interrogatory 10. The Postal Service has indicated that it has no objection to providing most of these documents. However, it does object to producing a document entitled, "Here's Something About . . . PostECS," and a document entitled, "Customer Service and Support." UPS withdraws at the present time, without prejudice, its request to the extent that it calls for the production of the "Customer Service and Support" document. However, the other document should be produced. Its very title indicates that it describes PostECS. The document therefore is likely to contain information relevant to the nature and features of the service and the needs it meets, and the document may also contain information relevant to substitutability. Since the document was distributed to at least some test participants, the Postal Service's claim of confidentiality is unwarranted.

Interrogatory 12. According to the Postal Service, these documents are also responsive to other requests; therefore, they have been addressed above.

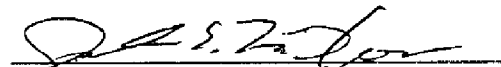
Interrogatory 13. The portions of these documents dealing with PostECS should be produced. Target markets could very well contain information relevant to substitutability. Such descriptions are also likely to discuss the nature and features of

the service. UPS is willing at the present time, without prejudice, to withdraw this request to the extent that memoranda from counsel fall within it.

Interrogatory 14. This request seeks the final agreements pursuant to which PostECS service is being provided. Since draft agreements are not requested, the attorney work product and attorney/client privilege objections are unwarranted. These documents should be produced, with "Technical Materials" (as defined in UPS's request) redacted.

WHEREFORE, United Parcel Service respectfully renews its request that the Presiding Officer order the United States Postal Service to produce, to the extent indicated herein and within seven days of the Presiding Officer's ruling, the documents requested in interrogatories UPS/USPS-5, 6, 10, 12, 13, and 14.

Respectfully submitted,



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INTERROGATORY UPS/USPS-5 (INTRODUCTORY SUBPART)

1. Documents related to Project Progress and Strategy Meetings and Teleconferences, including agendas, schedules, minutes
2. Draft Agreements among USPS, foreign posts, IPC, and/or Tumbleweed and related communications
3. Client communications, plans and reports concerning data security issues
4. Various email messages and other communications regarding account creation, implementation and management process and procedures
5. Various email messages regarding billing process and procedures
6. Various email messages concerning customer relations and sales issues
7. Status reports concerning customer activity, service usage, and telemarketing results
8. Internal PowerPoint presentations regarding project status and service features
9. PowerPoint presentations to postal conference attendees
10. Communications and draft creative for proposed internal and external public relations activity
11. Draft specifications and other communications related to integration of Postal Service and vendor services
12. Client notes, research, communications regarding product development
13. Counsel's draft pleadings
14. Records of counsel's communications with clients regarding PostECS litigation, other litigation-related communications
15. Counsel's notes of conversations with representatives of foreign posts, IPC and/or Tumbleweed
16. Legal memoranda
17. Memoranda of attorney/client briefings
18. Obsolete or superseded sales and marketing plans (See 5e)

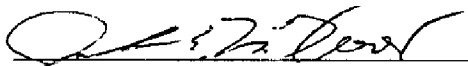
19. Communications and reports concerning project budgeting, planning and measurement
20. Documents concerning other Postal Service initiatives which tangentially refer to PostECS
21. Public Relations Marketing Communications
22. Communications and reports from vendors regarding product development issues
23. Task orders with vendors for support services related to PostECS
24. Cost estimates for hardware to be supplied in support of PostECS
25. Management briefing papers concerning PostECS activities and status
26. Documents concerning research of similar services and technologies in marketplace
27. Draft price lists and sales support information
28. Reports concerning demand for foreign posts' implementation of PostECS

INTERROGATORY UPS/USPS-5(c)

1. Product Demo Script
2. USPS PostECS Sales & Technical Workshop manual used in training on August 25-26, 1998
3. Sample Applications PostECS 8/17/99
4. PostECS Competitors 8/17/99
5. PostECS Quick Reference Guide
6. Customer Case Study presentation 8/17/99
7. Driving Post E.C.S. Transactions, IPC meeting, November 1998
8. Post E.C.S. for Trainers
9. PostECS Hands-on Training Agenda 8/13/99
10. Anatomy of a Sales Call 8/17/99
11. PostECS Training Guide 5/21-22/98
12. Sales Workshop 8/17/99
13. Accelerated PostECS Training Course 5/6/98
14. PostECS Sales Training Guide 5/6/98
15. PostECS User's Guide (4 versions)
16. PostECS Step-By-Step Guide to Receiving a PostECS Package Using a Netscape
17. Browser (2 versions)
18. PostECS Step-By-Step Guide to Sending a PostECS Package
19. Sales Strategies for PostECS
20. PostECS Demonstration Scheduling

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.


John E. McKeever

Dated: September 9, 1999
Philadelphia, PA