

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 NOTICE OF REILING
ANSWER IN OPPOSITION TO MOTION OF THE OFFICE OF THE CONSUMER
ADVOCATE TO COMPEL RESPONSES TO INTERROGATORIES OCA/USPS-19,
20(A-B), 21, 23, 24, 26, 27(B-D), 28-33
(September 29, 1999)**

On September 28, 1999, the Postal Service filed its Answer in Opposition to Motion of the Office of the Consumer Advocate to Compel Responses to Interrogatories OCA/USPS-19, 20(a-b), 21, 23, 24, 26, 27(b-d), 28-33. The Postal Service has become aware that, due to a copying error, some copies of that document did not contain pages 3 to 5. The Postal Service believes, however, that most or all of the copies sent to the Commission, as well as copies sent to parties by mail, contain pages 3 to 5. Nevertheless, the Postal Service is reiling the document in the event that a participant receives a copy with less than 15 pages. The Postal Service regrets any inconvenience this may have caused.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

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Anthony Alverno

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ANSWER IN OPPOSITION TO MOTION OF THE OFFICE OF THE CONSUMER
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20(A-B), 21, 23, 24, 26, 27(B-D), 28-33
(September 28, 1999)

On August 25, 1999, the Office of the Consumer Advocate (OCA) filed interrogatories OCA/USPS-19-34. On September 7, the Postal Service filed objections to interrogatories OCA/USPS—19, 20(a-b), 21, 23-26, 27(b-d), and 28-33. On September 9, the Postal Service filed responses to interrogatories OCA/USPS-20(c), 22, 25, 27(a), and 34.¹ On September 21, the OCA filed its Motion to Compel Responses to Interrogatories OCA/USPS—19, 20(a-b), 21, 23, 24, 26, 27(b-d), 28-33 (hereinafter "Motion"). The Postal Service hereby responds to OCA's Motion.²

Interrogatories OCA/USPS-19. Subparts (a) through (e) of interrogatory 19 request information about the use, location, and internet protocol numbers for the Postal Service's "gk-east.usps.gov" and "gk-west.usps.gov" servers. The Postal Service objected to these subparts on grounds of relevance and commercial sensitivity. Subparts (f) through (i) of interrogatory OCA/USPS-19 request information about the

¹ The Postal Service filed a response to interrogatory 25; OCA accordingly states in its Motion that it is not moving to compel a response to this interrogatory.

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 endeavors not to repeat the arguments presented

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relationship between Martineau & Associates and the Postal Service. The Postal Service objected to these subparts on grounds of relevance.

In its Motion, OCA fundamentally misstates the Postal Service's objection by claiming that the Postal Service has asserted that "information in the Post E.C.S. registration form is 'commercially sensitive.'" OCA Motion at 1-2. The Postal Service has never contested that registration information about the domain name <postecs.com> is available to the public through the Network Solutions website. The nature of the questions posed by the OCA, however, extends well beyond the basic registration data available from Network Solutions. Indeed, subparts (a) through (e) of interrogatory delve into technical and sensitive information about the Postal Service's servers, which OCA cannot demonstrate is publicly available; rather, the subject matter would be considered sensitive by any large commercial enterprise that maintains a large-scale information system, much as the Presiding Officer recognized in P.O. Ruling No. C99-1/10. In that Ruling, the Presiding Officer accommodated the Postal Service's concerns about public disclosure of the physical locations of servers used in Post E.C.S. by permitting the Postal Service to respond in general terms. Similarly, here, the nature of the questions posed by the OCA in subparts (a) through (e) extends into sensitive information, such as the physical location and identity of servers used to provide Post E.C.S. Again, the Postal Service emphasizes that public disclosure of this

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in its initial Objection, but rather supplements those arguments in order to respond to
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type of information poses a risk to system security, as widespread dissemination of such information would enhance the ability of persons intent on penetrating system security to gain access to postal information systems.

OCA has also done nothing to demonstrate the relationship of subparts (f) through (i) to the matters at issue in this proceeding, other than to offer its bare assertion that such information would shed light on the "control" of equipment to provide Post E.C.S. service. The questions themselves, however, extend far beyond simple questions about the Postal Service's relationship to information on the registration form. They are deeply invasive questions about the role of named individuals and firms involved with Post E.C.S. This is well beyond the permissible scope of discovery identified by P.O. Ruling Nos. C99-1/3 and 1/10, and is clearly not relevant to the question of whether Post E.C.S. is a "postal" service. Further, OCA has done nothing to distinguish subparts (f) through (i) from P.O. Ruling No. C99-1/9. In that Ruling, the Presiding officer refused to compel production of information about the Postal Service's organizational units and personnel involved with Post E.C.S. on grounds that such information "would not illuminate the service itself." P.O. Ruling No. C99-1/9 at 2. As the Postal Service explained in its initial Objection, the facilitation of various facets of Post E.C.S. made possible by contractors does not in any way make Post E.C.S. any more or less "nonpostal" than it already is for purposes of the Commission's jurisdiction.

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arguments raised in UPS's Motion to Compel.

Interrogatory OCA/USPS-20(a)-(b). Subparts (a) and (b) of interrogatory 20 request that (i) the Postal Service quantify the market research that it has conducted according to the foreign and domestic origin and destination pairs, (ii) disclose any updates to the market research it has conducted, and (iii) quantify all market research according to origin and destination pairs. The Postal Service objected to these subparts on grounds of commercial sensitivity and privilege.

In its Motion, OCA argues that the Postal Service's commercial sensitivity objection is outweighed by the participants' need for information about Post E.C.S. transactions. OCA Motion at 3. OCA further attempts to distinguish P.O. Ruling No. R97-1/60, the precedent the Postal Service cited in support of its initial Objection to this interrogatory, by suggesting that subparts (a) and (b) ask for purely factual information. OCA's characterization of its interrogatories, as well as its legal analysis, are fundamentally flawed.

First, OCA is wrong to suggest that the information sought by interrogatory 20 is factual, since the only information available is qualitative and not broken down into the categories the OCA seeks. As explained in the Postal Service's Answer in Opposition to UPS's Motion to Compel Responses to Interrogatories UPS/USPS-15-17, the Postal Service has received customer feedback and researchers' qualitative summaries of that information. By necessity, therefore, the interrogatory asks the Postal Service to perform an analysis of its market research by attempting to sort and quantify the

findings according to origin and destination pairs. The Postal Service does not represent that such analysis could be performed with the information it has collected from customer feedback; however, even if such an analysis could be attempted, the process of assigning survey participants' responses in the manner suggested by the interrogatory would necessarily entail highly subjective judgments.

Furthermore, in its Motion, OCA constructs an inherently flawed analogy to P.O. Ruling No. R97-1/60, which permitted the Postal Service to withhold market researchers' recommendations and analysis of underlying factual information. OCA appears to rely on P.O. Ruling No. R97-1/60 for the proposition that factual market research information must by necessity be disclosed. OCA fails to note, however, that the Presiding Officer in Docket No. R97-1 permitted the Postal Service to provide the factual information contained in the Postal Service's proprietary market research report under protective conditions. P.O. Ruling No. R97-1/60. P.O. Ruling No. R97-1/60 therefore offers the OCA little comfort, for it makes clear that participants' need for the full and complete *public* disclosure that the OCA seeks here can be outweighed by the very real and probable risk of commercial harm.

Second, the ratios requested by the subparts (a) and (b) are essentially meaningless because the survey was neither designed nor intended to generate a statistical sample; consequently, ratios of informal customer feedback, even if they could be estimated from the data in the Postal Service's custody, would be based on numerators and denominators of dubious value. As such, they would shed no useful

information on proportions of origin and destination pairs.

Finally, OCA does nothing to overcome the Postal Service's genuine concerns that disclosure of the requested information will result in commercial harm. The Postal Service's market research for Post E.C.S. is proprietary,³ and the Postal Service reiterates that disclosure of any such information would be highly detrimental to the Postal Service by disclosing to competitors information about the market characteristics of Post E.C.S. usage. Disclosure of such information would be harmful, as it could be used to analyze market trends and determine the market segments in which competitors should concentrate their energies.

Interrogatory OCA/USPS-21. Interrogatory 21 tests a representation regarding the ability of Adobe Acrobat portable document format technology to enable recipients to read documents. The Postal Service objected to this interrogatory on grounds of relevance. In its Motion, OCA claims that information is relevant, since it refers to the Adobe Acrobat portable document format (PDF) technology "available to Post E.C.S. users" OCA Motion at 4. Given that OCA's Motion has made it clear that the interrogatory is confined to the capabilities of Adobe Acrobat software when combined with Post E.C.S., the Postal Service is prepared to respond to this interrogatory as narrowed in the Motion.

Interrogatories OCA/USPS-23-24. These interrogatories ask whether it would

³ Again, the Postal Service does not concede that any meaningful analysis could be performed to respond to this discovery request.

be theoretically possible to redesign Post E.C.S. so as to require the user to respond to questions regarding sender and recipient physical locations. The Postal Service objected to this interrogatory on grounds of relevance. In its Motion, OCA contends that the questions are relevant because they would show whether the Postal Service could “readily determine” which transactions are “wholly domestic.” OCA Motion at 5. The interrogatories, however, elicit absolutely no factual information about the present product design for Post E.C.S.; rather, they extend beyond the scope of the first phase of this proceeding into OCA's own ideas of how it would exercise its own management prerogative to redesign the service. This is unwarranted. The Commission has made clear that the inquiry concerning the international versus domestic nature of Post E.C.S. is confined to “the *factual support* for the Service’s claim that Post E.C.S. is not a domestic service.” Order No. 1258 at 4 (emphasis supplied). P.O. Ruling No. C99-1/3 and Order No. 1258 clearly establish limits on the scope of this proceeding to the question of whether Post E.C.S. is a “postal” service for jurisdictional purposes. The product under review here is the one currently in operation, and it should be evaluated on the merits of the product design that has been implemented. The subject matter of the interrogatories transcends far beyond any reasonable scope of inquiry and instead delves into *alternative product designs not presently before the Commission*. Furthermore, OCA's contention that the interrogatory is proper because the Commission could someday “recommend the inclusion” of various questions about the location of senders and recipients, OCA Motion at 6, itself demonstrates that the OCA

is stepping beyond the simple legal question now at issue.⁴ While the OCA might theoretically be free to speculate itself on the advantages of alternative service designs at another stage of this proceeding, to maintain that its discovery attempts are mandated by the Commission's authority to dictate product design in making a recommendation is clearly beyond the scope of this proceeding, and is inconsistent with the court's observations in *Mail Order Ass'n v. United States Postal Serv.*, 2 F.3d 408, 424 (D.C. Cir. 1993), *amended, reh'g denied*, 1993 U.S. App. LEXIS 24994 (D.C. Cir. Sept. 22, 1993) ("MOAA"). In *MOAA*, the District of Columbia Circuit cautioned that Commission recommended decisions should not intrude into postal management's decisionmaking.

Interrogatory OCA/USPS-26. Interrogatory 26 tests representations made in connection with the Postal Service's Electronic Postmark™ product and also requests production of all memoranda, documentation, legal research, and all other materials that address the quoted claims. The Postal Service objected to this interrogatory on grounds of relevance and privilege.

In its Motion, the OCA asserts that Electronic Postmark™ is relevant to the nonpostal character of Post E.C.S. because this feature is available as an option with Post E.C.S. OCA ignores the fact that the Electronic Postmark™ product can be used

⁴ The Postal Service further notes that such information would serve absolutely no purpose for the successful operation of Post E.C.S., and would unnecessarily burden users with time-consuming questions that would adversely impact the product's ease of use.

not only with Post E.C.S., but also in other contexts. See 61 Fed. Reg. 42,219 (August 14, 1996). Indeed, the Complaint in this docket does not even mention the Electronic Postmark product, and the Postal Service submits that inquiries into Electronic Postmark go well beyond scope of the Complaint and would unnecessarily encumber this proceeding with jurisdictional inquiries into a host of other products.

The OCA also contends that the Postal Service must provide a *Vaughn* index to support its claims of privilege. In support of this contention, the OCA relies on P.O. Ruling No. C99-1/9, where the Presiding Officer directed the Postal Service to provide a listing of the categories of documents responsive to numerous discovery requests propounded by UPS. That ruling, however, establishes no overarching principles with respect to Commission practice. Rather, Rule 26 of the Commission's Rules of Practice and Procedure merely requires an objecting party to identify *the privilege asserted*. To require more would represent a fundamental and unwarranted change in Commission practice that would be unsupported by its Rules of Practice and Procedure and be inconsistent with the leading authority on civil procedure, which recommends against "rigid insistence on certain logging or indexing procedures" 8 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2016.1 (2d ed. 1994). The burden of producing such an index on a routine basis would, moreover, be immense. Thus, except in extraordinary circumstances, there is no need for participants to engage in the task of preparing unusually detailed logs in order to preserve privilege objections.

P.O. Ruling No. C99-1/9, moreover, should be understood in the context of the controversy it resolved. Specifically, the Ruling required that the Postal Service provide listings or categories of documents responsive to various discovery requests to which the Postal Service raised numerous objections on multiple grounds, particularly commercial sensitivity. Here, by contrast, interrogatory 26 leaves no doubt that it requests legal memoranda that are inherently privileged and shielded from disclosure by the attorney-client privilege. The Postal Service has identified memoranda from legal counsel responding to client requests for advice as potentially responsive to this request. Since the objection was filed, the Postal Service has also identified another potentially responsive legal memorandum that, in addition to providing a legal analysis, also contains predecisional policy recommendations in relation to criminal laws. On the basis of the above descriptions of potentially responsive documents, it is beyond question that the documents are privileged. Nothing further should be required to preserve the privileges asserted in connection with this discovery request.

Interrogatory OCA/USPS-27(b-c), 28, 29, and 30. Subparts (b) and (c) of interrogatory OCA/USPS-27 request an opinion from the Postal Service on the degree to which transactions are initiated in the United States. Interrogatory OCA/USPS-28 requests that the Postal Service guess whether the proportion of "domestic" Post E.C.S. transactions has been less than any of a number of given fractions. Interrogatory 29 requests that the Postal Service offer guesses of the proportions for future Post E.C.S. transactions in fiscal year 2000. Interrogatory 30 requests that the

Postal Service state the basis for the belief that "some" Post E.C.S. transactions will be "international."

The Postal Service objected to these interrogatories on multiple grounds. Specifically, it objected to interrogatory 30 on grounds that it is cumulative; to interrogatories 28, 29, and 30 on grounds of vagueness;⁵ and to interrogatories 27(b)-(c), 28, 29, and 30 on grounds that these interrogatories request unsubstantiated conjecture and pure speculation. In its Motion, OCA does nothing to cure the cumulative and vagueness grounds for objection; hence, the objections should be sustained on these grounds alone. OCA's Motion also does nothing to overcome the objection that these interrogatories require the Postal Service to engage in unsubstantiated speculation. Indeed, OCA readily admits that these discovery requests require the Postal Service to make "logical inferences" about Post E.C.S. traffic. This is not proper discovery. *Cf.*, 2 SPENCER A. GARD, JONES ON EVIDENCE § 14:2 (6th ed. 1972) ("an opinion which is merely conjectural or speculative is not admissible"). Furthermore, the authority cited by OCA, *Government of the Virgin Islands v. Frederico et al.*, 739 F.2d 936, 841 (3d Cir. 1984), offers no support for OCA's contentions. The underlying controversy in *Frederico* concerned whether a jury verdict for a criminal violation was supported by the evidence, and thus whether the circumstantial evidence was sufficient to support the jury's findings. The analogy to

⁵ These interrogatories ask for opinions on proportions of "domestic" transactions, but the term is not defined for purposes of these interrogatories. As the term is undefined,
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Frederico is therefore inapposite. In its capacity as a trier of fact, the Commission is not at this stage of the proceeding being asked to make logical inferences on the basis of factual information, or to use circumstantial evidence to arrive at a legal conclusion; rather, the OCA is attempting to subvert normal discovery procedures to force the Postal Service to offer opinions that necessarily require it to engage in unsubstantiated speculation. The Postal Service has made clear in prior responses to discovery that it has no mechanism to determine the proportion of transactions based on origin and destination pairs; consequently, the type of information requested in these interrogatories would be of absolutely no probative value. The Postal Service's objection should accordingly be sustained.

Interrogatory OCA/USPS-27(d), 31, 32, and 33. Subpart (d) of interrogatory OCA/USPS-27 requests that the Postal Service state whether the Postal Service has any Post E.C.S. licensed users with addresses outside the United States. Interrogatories 31 and 32 request information on whether the Postal Service registers individuals in Canada and France, respectively. Interrogatory 33 requests information on the Postal Service's policy regarding the location of licensed users.

The Postal Service objected to these interrogatories on grounds of relevance, commercial sensitivity, privilege, and jurisdiction. In its terse Motion to Compel, the OCA claims that the Postal Service has supported its objections with "feeble

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the Postal Service does not know how to even perform the requested analysis.

generalizations.” OCA Motion at 11. To the contrary, the Postal Service thoroughly explained the basis for each ground for objection, and also cited binding authority demonstrating precisely why the requests were improper. OCA’s Motion, moreover, does nothing to overcome the argument that the discovery requests are impermissible in light of P.O. Ruling No. C99-1/9, which rejected UPS’s Motion to compel substantially similar inquiries contained in interrogatories UPS/USPS-26 and 29. Those UPS interrogatories requested information on whether the Postal Service has licensed Post E.C.S. users in foreign countries. The Presiding Officer determined to not compel responses to these questions on grounds that the participation of nondomestic users has no bearing on the matters at issue in this proceeding. P.O. Ruling No. C99-1/9 at 6.

Further, OCA says nothing to overcome the Postal Service’s well grounded concerns that these interrogatories delve deeply into the relationships between the Postal Service and the foreign posts. Post E.C.S. is a new service in test status, and the posts that have helped to create and launch the service are engaged in a process of determining how to define their interrelationships, as well as relationships between themselves and other entities that may elect to offer the product in the future. Such relationships are the subject of ongoing discussion and negotiation, and are considered predecisional and confidential information of the parties. Disclosure at this stage would compromise negotiating positions and undermine program effectiveness. *See Comstock International v. Export-Import Bank of the United States*, 464 F. Supp.

804 (D. D.C. 1979) (upholding federal agency's refusal to disclose a loan agreement and reports related to the agency's financing of a construction project because disclosure of the agreement would significantly impair the bank's function of promoting United States exports and disclosure of the reports would result in substantial harm to the competitive position of the suppliers of the information).

CONCLUSION

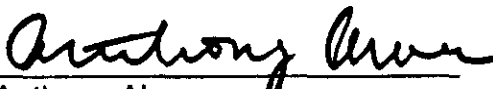
WHEREFORE, the Postal Service requests that OCA's Motion to Compel responses to interrogatories OCA/USPS—19, 20(a-b), 21, 23, 24, 26, 27(b-d), 28-33 be denied. The undersigned counsel has sent a copy of this document to counsel for UPS via facsimile transmission.

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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