

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

SECTION 407 PROCEEDING

Docket No.
IM2016-1

**ANSWER OF UNITED STATES POSTAL SERVICE
IN OPPOSITION TO MOTION OF FEDERAL EXPRESS CORPORATION**
(June 23, 2016)

Pursuant to 39 C.F.R. § 3001.21(b), the United States Postal Service (the “Postal Service”) respectfully submits this Answer in Opposition to the Motion of Federal Express Corporation (“FedEx”) that was filed in the above-referenced docket on June 16, 2016 (the “Motion”). For the reasons, and to the extent, set forth below, the Commission should deny the Motion.

Background

Section 407(c)(1) of Title 39 provides, “[b]efore concluding any treaty, convention, or amendment that establishes a rate or classification for a [market-dominant postal product], the Secretary of State shall request the Postal Regulatory Commission to submit its views on whether such rate or classification is consistent with the standards and criteria established by the Commission under Section 3622.” Pursuant to Section 407(c)(1), on April 1, 2016, the Secretary of State asked the Commission to “provide its views on the consistency of proposals to amend rates or classifications for market dominant products or services within the Universal Postal Convention that will be considered at the upcoming 26th Universal Postal Union (UPU)

Congress [the “2016 UPU Istanbul Congress”] with the standards and criteria established by the Commission under 39 U.S.C. § 3622.”

On April 20, in accordance with its rules, 39 C.F.R. § 3017.3, the Commission established the instant docket to solicit comments to guide the Commission’s development of its views on the matters referenced in the Secretary of State’s request. On May 6 and June 20, the Commission posted certain proposals that may be considered at the 2016 UPU Istanbul Congress. These proposals address definitions for basic services and establish terminal dues rates. The Commission has set a deadline of July 21 for any comments.

Despite the absence of any cited basis for the Motion, FedEx’s Motion asks the Commission to disclose – or to compel the Postal Service to disclose – various “data, explanations, and documents” that are supposedly necessary for third-parties like FedEx to provide “informed comments” to the Commission in this docket.¹ In particular, the Motion seeks compelled disclosure of what it inaccurately calls merely “high-level summaries” of subcategories of the Postal Service’s both inbound and outbound international letter post mail streams’ volume, weight, terminal dues revenues, volume variable cost, product specific costs, and percentage in flows less than 75 t, with each such subcategory further broken down by separate country group, and within each country group further broken down between letters/flats and (separately) small packets.² It seeks this specific data for at least the past five years, in addition to explanations of the source of the data.³ The Motion further asks the Commission to require either the

¹ Motion at 1.

² Id. at 6-8.

³ Id. at 6.

Postal Service or the State Department⁴ to provide, in advance of when FedEx and others may file their comments, “an appropriate discussion of the objectives and factors of section 3622” if either contends that the terminal dues rates proposed before the UPU are consistent with section 3622 (or, alternatively, an affirmative statement that the rates are not consistent). As explained below, these requests conflict with the Commission’s own rules and rulings, and should be rejected.⁵

Argument

I. THE COMMISSION’S RULES FOR THIS TYPE OF PROCEEDING DO NOT CONTEMPLATE FACT-FINDING.

At heart, the Motion seeks to have the Commission open this proceeding to a form of fact-finding not contemplated by its rules.⁶ As a threshold matter, the Motion should be denied because there is no basis, either in the Commission’s rules or in the Motion, for fact-finding in this type of proceeding. This proceeding is authorized for a limited and specific purpose: to effectuate 39 U.S.C. § 407(c)(1) and submit Commission views to the Secretary of State on certain subjects proposed in international treaties and conventions. The Commission recently adopted procedural

⁴ The Commission, of course, has no jurisdictional authority over the Department of State. To the extent, then, that the Motion asks the Commission to compel the State Department to disclose or submit anything, the Motion should be denied for want of jurisdiction.

⁵ The Motion additionally asks the Commission to post in this docket any other “proposals defining rates and classifications for market dominant products.” Motion at 10. The Commission’s rules anticipate making specific proposals available only to the extent that it is able and only if such proposals are relevant to the proceeding. 39 C.F.R. § 3017.3(a). To the extent, then, that the Commission is able to post other UPU proposals, it should limit them to those that are relevant to this proceeding. Under 39 U.S.C. § 407(c)(1), a proposal is relevant only if it constitutes an international “treaty, convention, or amendment that establishes a rate or classification for” a market-dominant postal product. Any UPU proposal that would not establish a rate or classification for a market-dominant product is beyond the scope of this proceeding.

⁶ FedEx may claim that the information it seeks will ultimately benefit the Commission in its development of views, but that should not obscure the fact that FedEx itself seeks to obtain the Postal Service’s information (not only for the Commission) to support FedEx’s own comments.

rules to govern this type of proceeding. 39 C.F.R., Part 3017.⁷ To facilitate public participation in the development of the Commission's views, the Commission expressly provided a means for any interested persons to file comments, which the Commission will review in its discretion prior to submitting its views to the State Department. 39 C.F.R. §§ 3017.4, 3017.5. The Commission's rules did not provide interested persons with discovery, and the rules did not contemplate that the Commission would use these proceedings for fact-finding purposes. That choice was reasonable, given that the nature of this proceeding is not an adjudication or other adversarial proceeding. The Commission so held when it adopted its procedural rules, ordering that "the purpose of a part 3017 docket is not to facilitate an adversarial proceeding"⁸ In accordance with this ruling, the Commission adopted clear and limited procedures in its rules governing this type of proceeding under Section 407(c)(1), and those rules do not contemplate fact-finding as if this were an adversarial proceeding.⁹

II. FEDEX'S DEMANDS FOR DATA ARE UNREASONABLE.

For the reasons discussed above, no discovery is warranted in this proceeding. But even if the Commission were to entertain potential discovery or similar fact-finding, the Motion's specific demands for data are unreasonable. FedEx's proffered

⁷ Docket No. RM2015-14, Order No. 2960, Order Adopting Final Rules on Procedures Related to Commission Views, December 30, 2015.

⁸ Order No. 2960 at 27.

⁹ Because the Commission has adopted specific rules that govern this specific type of proceeding, and because those rules do not provide for fact-finding, that should dispositively resolve the Motion. Furthermore, even under the general Part 3001 rules, discovery is permissible only when "reasonably calculated to lead to admissible evidence." Rule 25(a); see also Rules 26(a), 27(a). In the present proceeding, any form of discovery would not be reasonably calculated to lead to admissible evidence, because there will be no admission of any evidence in this case, whether by evidentiary hearing or otherwise.

justification is that it needs “only high-level aggregations”¹⁰ and “high-level summaries”¹¹ of data, but the specific categories and subcategories appearing in the rows and columns of its proposed charts¹² belie any high-level, aggregated, summary labels. FedEx euphemistically attempts to characterize the data in this “high-level” manner in apparent recognition of the very real threat of commercial injury to the Postal Service from compelled disclosure of non-public, commercially sensitive Postal Service data.¹³ In any event, classifying the data as “high” or “low” level is irrelevant in this respect; if it is commercially sensitive and it is not in the public domain, then its confidentiality should be protected. Moreover, the threat of commercial harm to the Postal Service is especially pronounced when, as is the case here, the very party that seeks the compelled disclosure is one of the Postal Service’s leading commercial competitors.¹⁴

The Commission should consider the Motion’s proffered premise at face value – that is, FedEx needs “only high-level aggregations” or “high-level summaries” of volume, cost, and revenue data. High-level aggregations of such data are already publicly available to FedEx, without the Commission having to expose more detailed, commercially sensitive, non-public data of the Postal Service to a competitor. Pursuant to 39 U.S.C. § 3652, each year the Postal Service must file its Annual Compliance Report,¹⁵ including mail volumes and other product information for all market-dominant products. Though some supporting information, such as working papers, are not filed publicly, “high-level aggregations and summaries” of volume, weight, and revenue data

¹⁰ Motion at 5.

¹¹ Id. at 6.

¹² Id. at 6, 8.

¹³ Id. at 5.

¹⁴ For the reasons set forth herein, the Motion should be denied. However, if the Commission disagrees (though it should not), it would need to ensure appropriate protections of the Postal Service’s commercially sensitive and confidential data, as through its procedures for only certified, limited use.

¹⁵ E.g., FY 2015 ACR, December 29, 2015.

for market-dominant products are publicly filed. Those data include the annual volume, weight, and revenue figures for inbound and (separately) outbound international market-dominant products. FedEx, like the public at large, already has access to these data through the Commission's website.¹⁶

FedEx compares this proceeding to the Commission's Annual Compliance Determination,¹⁷ but there are significant differences. By statute, the Postal Service is required to prepare and submit its Annual Compliance Report supported by much detailed data, which the Commission then uses to evaluate the Postal Service's compliance. 39 U.S.C. §§ 3652-53. Within the Annual Compliance Report, the Postal Service has the statutory duty "to demonstrate that all products during such year complied with all applicable requirements of this title [39]" 39 U.S.C. §§ 3652(a)(1). By contrast, in the present type of proceeding,¹⁸ Section 407(c)(1) imposes neither a requirement that the Commission host a public forum for solicitation of comments, nor a requirement that the Postal Service participate or even submit specific data. Likewise, the Commission's Part 3017 rules for this type of proceeding impose no obligations on the Postal Service. They certainly afford the Postal Service, just like FedEx, the opportunity to submit comments. In short, under Section 407(c)(1) and the Commission's implementing regulations in Part 3017, the Postal Service – on equal footing with FedEx – has neither a burden of production nor a burden of proof.

¹⁶ FedEx is surely familiar with this information. The Motion itself refers to it, Motion at 4, though it glosses over the fact that the information includes data for market-dominant international postal products just as it does for market-dominant domestic products.

¹⁷ Motion at 4.

¹⁸ This proceeding arose from a request to the Commission by the State Department, not by the Postal Service.

Finally, the Postal Service should not need to cull or organize its publicly-produced data in the manner the Motion seeks simply to reduce FedEx's own work or cost in presenting whatever comments it wishes to submit in this case. As Congress directed when it required the production of this data for purposes of the Annual Compliance Report, the Commission must duly consider "avoiding unnecessary or unwarranted administrative effort and expense on the part of the Postal Service" 39 U.S.C. § 3652(e)(1)(B). Having already produced the data in the form and content that the Commission prescribed, requiring the Postal Service to present it differently now for FedEx's benefit in an entirely different matter would conflict with this congressional intent and would impose an undue burden and expense on the Postal Service.

III. COMPELLING THE POSTAL SERVICE'S PRELIMINARY CONTENTIONS WOULD CONFLICT WITH THE COMMISSION'S PRIOR RULING AGAINST REPLY COMMENTS.

To the extent that the Motion asks the Commission to compel the Postal Service (or the State Department) to submit preliminary contentions of how proposed terminal dues rates¹⁹ are consistent with the objectives and factors of 39 U.S.C. § 3622, the Motion also conflicts with the Commission's prior explicit ruling against reply comments. Last year, the Public Representative and United Parcel Service advocated that the Commission should allow rounds of both initial and reply comments in these Section 407(c)(1) proceedings.²⁰ The Postal Service opposed this suggestion, in part because

¹⁹ In the Motion, FedEx mischaracterizes the Postal Service or the State Department (or both) as "the proposer" of new terminal dues rates before the UPU. Motion at 8. In any event, regardless of the identity of the entity that introduces individual proposals before the UPU, the Postal Service certainly has no burden of proof in this proceeding before the Commission.

²⁰ See Order No. 2960 at 26-27.

these are not supposed to be adversarial proceedings.²¹ The Commission agreed with the Postal Service and rejected having two rounds of comments whereby parties could respond to other parties' positions.²² The Commission explained its reasoning as follows:

The Commission appreciates that reply comments may provide additional useful insights; however, as the Postal Service observes, the purpose of a part 3017 docket is not to facilitate an adversarial proceeding, but rather to provide an opportunity for commenters to provide input on how the views should be developed. This can be accomplished without reply comments. As such, the Commission does not plan to provide an opportunity for reply comments in the ordinary course of a part 3017 docket.

Order No. 2960 at 27-28.

To grant the Motion and compel the Postal Service to submit its positions on the consistency of the terminal dues proposals with section 3622's objectives and factors in advance of when FedEx and other interested persons may submit their comments would arbitrarily conflict with the Commission's prior ruling rejecting a round of reply comments. Indeed, to allow such a two-step procedure during the very first Section 407(c)(1) proceeding following the Commission's adoption of its new procedural rules for such proceedings would be especially egregious.²³ Yet that is what the Motion seeks. FedEx pleads that "[i]t would be extremely helpful for potential commenters" to know in advance the Postal Service's positions to enable FedEx and others to use their comments to respond to those positions. Whether or not that contention is accurate,

²¹ Id. at 27.

²² Id. at 27-28.

²³ FedEx's Motion attempts an end-run around the procedural rules that the Commission adopted just late last year to govern these Section 407(c)(1) proceedings going forward. The new rules, moreover, were a deliberate departure from the procedures that the Commission followed in its Section 407(c)(1) proceeding in 2012 before the UPU Congress that year. In that 2012 proceeding, FedEx moved to file reply comments, recognizing that the Commission had not provided for them, and the Commission granted that motion. Informed by that history and experience, the Commission last year decided not to allow reply comments in its Section 407(c)(1) proceedings going forward.

however, that is precisely the adversarial, two-step procedure that the Commission has already rejected.

Conclusion

For the foregoing reasons, the Commission should deny the Motion.

Respectfully submitted,

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