

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
ANSWER IN OPPOSITION TO UNITED PARCEL SERVICE
MOTION FOR FURTHER CLARIFICATION
AND
MOTION OF UNITED STATES POSTAL SERVICE FOR
FURTHER AMENDMENT TO PROTECTIVE CONDITIONS**

On February 3, 2000, the Postal Service filed a Motion for Clarification And Correction of Order No. 1283 (hereinafter "USPS Motion") requesting that the Commission adopt a few changes to the Protective Conditions attached to Order No. 1283, issued on January 28, 2000. On February 10, UPS filed its Answer to United States Postal Service Motion for Clarification and Correction of Order No. 1283, and Motion for Further Clarification (hereinafter "UPS Motion"). In that document, UPS expressed no opposition to the corrections and clarifications proposed by the USPS Motion; however, UPS moved that the Commission make an additional "clarification" to Order No. 1283. In particular, UPS requested that the Commission insert a comma after the phrase "legal advice" in the last sentence of paragraph 1(b) of the Statement of Protective Conditions. UPS explains that the purpose of this measure is to:

Clarify that the phrase 'not directly in furtherance of activities in competition with a person or entity having a proprietary interest in the protected material' does not modify the phrase 'legal advice.'

UPS Motion at 1. UPS further explains that the intent of this change is to permit legal advisors to have "access to protected materials in all circumstances as long

as they merely provide legal advice” UPS Motion at 1. The Postal Service opposes UPS’s proposed change.

While the removal of a comma in the last sentence of paragraph 1(b) may, at first blush, appear to be innocuous, in fact UPS’s proposed change would fundamentally alter and thoroughly undermine the Commission’s intent expressed in Order No. 1283 to prohibit access to protected information by all classes of representatives, including legal advisors, who are engaged in competitive decisionmaking. UPS’s proposed change would in essence exempt from the class of excluded persons involved in competitive decisionmaking all persons who provide legal advice, regardless of the degree to which they participate in competitive decisionmaking. This is fundamentally at odds with the thrust of Order No. 1283. Specifically, the Commission made clear that:

There is more than a remote possibility that advice solicited to guide competitive decisionmaking may be shaped by the advisor’s knowledge of potentially valuable sensitive information about a competitor. This potential risk would appear to justify precluding access by persons who render at least some forms of advice as an input to a client’s competitive decisionmaking.

Order No. 1283 at 9.

The application of the exclusion to legal advisors is, moreover, an accepted feature of Commission practice since Docket No. R97-1, when the Commission first introduced, and later refined, this measure in P.O. Ruling Nos. R97-1/46, -1/52, -1/60, -1/93. The UPS Motion offers absolutely no justification for departing from this well-established practice.

Finally, the Postal Service notes that it would be fundamentally unfair to grant the relief UPS requests. In Docket No. MC97-5, the Presiding Officer

explicitly rejected access to protected documents by legal advisors who were *only tangentially involved in competitive decisionmaking*. In that proceeding, the Presiding Officer extended the "PMPC" protective conditions from Docket No. R97-1 to the compelled production of competitors' prices for packaging services. Docket No. MC97-5, Tr. 6/1521. The Postal Service moved to amend the protective conditions, which restricted access to persons involved in competitive decisionmaking.¹ The Postal Service proposed that access be given to four persons: the undersigned Postal Service counsel and three postal witnesses in the proceeding, *none of whom bore primary responsibility for decisionmaking on the proposed competing product*. The Presiding Officer explicitly rejected the proposed changes to the protective conditions. These were, in the Presiding Officer's view, unsatisfactory. The Presiding Officer explained:

The protective conditions I have applied to this information that will be provided in response to the Postal Service discovery requests are intended to protect the most sensitive business information of individual businessmen and their umbrella organizations. The Postal Service states in its motion that it has, and I quote, absolutely no interest in using the information for competitive purposes, close quote. The general statement is reassuring, but our practice has been to provide specific conditions to assure that such general statements of intent are not inadvertently violated.

The Postal Service further states that it intends to consider the requested pricing information to evaluate claims that the Postal Service's entry into the packaging market will result in competitive harm. It offers to limit access to individuals who do not have, and I quote, primary responsibility for the development of implementation of the Postal Service packaging product, end quote. That is simply not good enough. Individuals without primary responsibility may and often do have input into decisions that have important competitive ramifications. The Postal Service is a large organization with numerous employees and consultants available to evaluate the impact of new competitors in a business situation. The protective conditions I applied in this case are being used to protect Postal Service information in Docket R97-1, and I expect

¹ Motion of United States Postal Service for Partial Reconsideration of Presiding Officer's Ruling Granting Protective Conditions (Tr. 6/1521) (Dec. 18, 1997).

the Postal Service to strictly adhere to them in this case.

P.O. Ruling, Docket No. MC97-5, Tr. 7/1648. The same principles should apply here. To grant UPS's request would be tantamount to *further widening* the potential double-standard that the Commission appears to have created in Order No. 1283. The last sentence of paragraph 1(b) of the protective conditions announced in Order No. 1283 permits access by counsel who participates in competitive decisionmaking as long as such counsel's role is not in "direct furtherance of activities in competition with a person or entity having a proprietary interest in the protected materials." This in effect would appear to give more liberal access to private participants' legal advisors than to Postal Service counsel, which would be patently unfair. UPS's Motion must be denied, as it would only widen this inequity. Further, in the interest of promoting the elusive "level playing field" upon which UPS so eloquently insists, the Postal Service respectfully requests that the Commission remove the last sentence of paragraph 1(b) from the protective conditions attached to Order No. 1283.²

WHEREFORE, the Postal Service respectfully requests that (1) UPS's Motion be denied, (2) that the Commission reaffirm that the "competitive decisionmaking" exclusion applies to a participant's counsel just as it would to any other representative of a party, and (3) that the Commission remove the last sentence of paragraph 1(b) of the protective conditions attached to Order No. 1283.

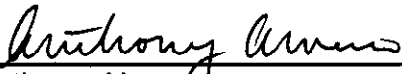
² The Postal Service has no opposition to an exception for advice on the double postage rule, as was permitted in the protective conditions attached to P.O. Ruling No. R97-1/93.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

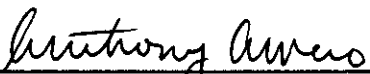
Daniel J. Foucheaux, Jr.
Chief Counsel, Ratemaking



Anthony Alverno
Attorney

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.



Anthony Alverno

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