

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

RECEIVED

FEB 24 3 12 PM '00

POSTAL RATE COMMISSION  
OFFICE OF THE SECRETARY

COMPLAINT ON POST E.C.S.

Docket No. C99-1

**TUMBLEWEED COMMUNICATIONS CORP.'S  
COMMENTS ON THE RELEASE OF COMMERCIALY  
SENSITIVE INFORMATION TO UPS AND THE PUBLIC**

Tumbleweed Communications Corp. (formerly named Tumbleweed Software Corporation) respectfully requests that the Tumbleweed documents sought by UPS be released, if at all,<sup>1</sup> pursuant to the protective conditions outlined in Order No. 1283, issued in this proceeding on January 28, 2000.

**BACKGROUND**

Tumbleweed is a leading provider of software infrastructure that allows the secure and trackable delivery of electronic documents over the internet. Both the Postal Service and UPS are customers of Tumbleweed; each uses Tumbleweed software as the infrastructure for its branded on-line document delivery product. Customers (such as American Express, Chase Manhattan Bank, etc.) also buy directly from Tumbleweed. In other words, Tumbleweed competes with both the Postal Service and UPS in this growing market.

On May 14, 1999, UPS served its first set of interrogatories and requests for production of documents on the Postal Service. These discovery requests seek highly confidential and proprietary information developed by Tumbleweed in connection with its software licensing agreement with the Postal Service for Tumbleweed's Post E.C.S.

---

<sup>1</sup> The Postal Service argues that several of these documents are irrelevant to the issues in this proceeding and should not be disclosed to UPS. Tumbleweed takes no position

software.<sup>2</sup> UPS, for example, seeks copies of the contracts between Tumbleweed and the Postal Service, which includes sensitive pricing data and other highly confidential information.<sup>3</sup>

The Postal Service objected to producing these materials, arguing that they were commercially sensitive and irrelevant to the narrow legal issue before the Commission – namely, whether Post E.C.S. is postal in character and subject to the Commission's mail classification and ratemaking authority.<sup>4</sup> UPS moved to compel the production of these documents on June 8, 1999. On February 7, 2000, the Presiding Officer ruled that the disputed documents be produced for *in camera* inspection so that a determination could be made as to whether they should be produced, and if so, under what conditions.<sup>5</sup> On February 22, 2000, the Postal Service complied with this ruling.<sup>6</sup>

## ARGUMENT

Tumbleweed documents deserve protection. It is well established that a company's confidential and proprietary information, particularly pricing information, should be released only pursuant to strict protective conditions. See, e.g., *Matsushita Electric Industrial Co. v. United States*, 929 F.2d 1577, 1579-80 (Fed. Cir. 1991); *U.S.*

---

on this issue.

<sup>2</sup> The Postal Service provided a list of responsive documents on August 30, 1999, and updated this list on February 22, 2000. See United States Postal Service Response to P.O. Ruling No. C99-1/14 and Motion for Issuance of Tentative Ruling on Disclosure, at 4-5 and Attachment (February 22, 2000). Tumbleweed documents are listed as responsive to Interrogatories UPS/USPS 5, 6, 10, 12 and 14.

<sup>3</sup> See Interrogatory UPS/USPS –14. International Post Corporation, Canada Post and LaPoste are also parties to these agreements.

<sup>4</sup> See Objection of the United States Postal Service to UPS Interrogatories UPS/USPS 1-24, at 2 (May 25, 1999).

<sup>5</sup> P.O. Ruling No. C99-1/14.

<sup>6</sup> See United States Postal Service Response to P.O. Ruling No. C99-1/14 and Motion for Issuance of Tentative Ruling on Disclosure.

*Steel Corp. v. United States*, 730 F.2d 1465, 1468 (Fed. Cir. 1984).<sup>7</sup> Indeed, the Commission has routinely protected commercially sensitive information from disclosure to the public and to a party's decisionmakers. See, e.g., Presiding Officer Ruling No. MC98-1/11 (November 3, 1998); Presiding Officer Ruling No. R97-1/46 (October 15, 1997).

Accordingly, if the Commission determines that Tumbleweed's documents are relevant to the proceeding, they should be subject to the protective conditions set forth in Order No. 1283, which permit access only by UPS' outside counsel and consultants. The Order further provides that access should not be permitted to these individuals if they participate in UPS' competitive decisionmaking.<sup>8</sup>

These strict protective conditions should apply to Tumbleweed's documents because Tumbleweed and UPS are competitors. Several of these documents contain sensitive pricing information, as well as the confidential terms of the contract between the Postal Service and Tumbleweed. Tumbleweed would therefore suffer competitive harm of the terms of these agreements were disclosed to UPS' competitive decisionmakers. UPS also seeks several sensitive marketing and sales strategy documents. These documents should likewise be subject to the protective conditions set forth in Order 1283.

---

<sup>7</sup> Courts have also refused to compel the production of commercially sensitive information if the relevance of the information is "indirect and circumstantial at best." E.g., *Duracell Inc. v. SW Consultants, Inc.*, 126 F.R.D. 576, 579 (N.D.Ga. 1989).

<sup>8</sup> Order No. 1283, at 9-10. In the body of this Order, the Commission noted that "competitive decisionmaking does not include rendering legal advice or performing other services that are not directly in furtherance of activities in competition with a person or entity having a proprietary interest in the protected material." *Id.* at 10. The ordering paragraphs in this Order, however, appear to be inconsistent with the Commission's findings. On February 3 and 17, 2000, the Postal Service sought clarification of this

Finally, Tumbleweed joins in the Postal Service's request that the Presiding Officer first issue a preliminary ruling identifying the documents to be disclosed and under what conditions, so that interested parties may express their views to the Commission on the terms of the disclosure before specific documents are released to UPS or to the public. As the Postal Service noted, such a procedure "will insure that the Presiding Officer makes informed determinations on the status of each document before the risk of competitive harm to a stakeholder becomes imminent."<sup>9</sup>

### CONCLUSION

For the foregoing reasons, Tumbleweed respectfully requests that the Tumbleweed documents sought by UPS be subject to the protective conditions set forth in Order No. 1283, subject to the modifications sought by the Postal Service.

Respectfully submitted,



Catherine Kane Ronis  
SKADDEN ARPS, SLATE,  
MEAGHER & FLOM LLP  
1440 New York Avenue, N.W.  
Washington, DC 20005-2111  
Phone: (202) 371-7209  
Facsimile: (202) 371-7978

Attorneys for Tumbleweed  
Communications Corp.

February 24, 2000

---

ruling. Tumbleweed agrees with the relief requested in these filings.

<sup>9</sup> United States Postal Service Response to P.O. Ruling No. C99-1/14 and Motion for Issuance of Tentative Ruling on Disclosure, at 6 (February 22, 2000).

**CERTIFICATE OF SERVICE**

I hereby certify that on the 24<sup>th</sup> day of February, 2000, I served by hand delivery or overnight mail the foregoing document upon the parties included on the attached Service List , in accordance with Section 12 of the Rules of Practice.

A handwritten signature in cursive script that reads "Catherine Kane Ronis". The signature is written in black ink and is positioned above a horizontal line.

Catherine Kane Ronis

## Service List for C99-1

Association of Online Professionals (AOP)	David P. McClure Executive Director Association of Online Professionals 6096 Franconia Road, Suite D Alexandria, VA 22331 Phone (703) 924-5800
Douglas F. Carlson (Carlson)	Douglas F. Carlson P.O. Box 13116 Berkeley, CA 94712-4116 Phone (510) 597-9995 dfc@uclink4.berkeley.edu
Coalition Against Unfair USPS Competition (CAUUC)	Steven W. Silver Robertson, Monagle & Eastaugh 2300 Clarendon Blvd., Suite 1010 Arlington, VA 22201 Phone (703) 527-4414 Fax (703) 527-0421 ssilver628@aol.com
David B. Popkin (Popkin)	David B. Popkin P.O. Box 528 Englewood, NJ 07631-0528 Phone (201) 569-2212 Fax (201) 569-2864 w2cc@idt.net
United Parcel Service (UPS)	John E. McKeever, Esq. Piper Marbury Rudnick & Wolfe L.L.P. 3400 Two Logan Square 18 <sup>th</sup> and Arch Streets Philadelphia, PA 19103-2762 Phone (215) 656-3310 Fax (215) 656-3301 john.mckeever@piperrudnick.com
United Parcel Service (UPS)	United Parcel Service 1200 19 <sup>th</sup> Street, N.W. Washington, DC 20036 Phone (202) 861-3900
United States Postal Service (USPS)	Daniel J. Foucheaux Chief Counsel, Ratemaking United States Postal Service 475 L'Enfant Plaza West, S.W. Room 6535 Washington, DC 20260-1137 Phone (202) 268-2989 Fax (202) 268-5402