

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

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POSTAL RATE COMMISSION  
OFFICE OF THE SECRETARY

POSTAL RATE AND FEE CHANGES, 2000

Docket No. R2000-1

RESPONSE OF UNITED STATES POSTAL SERVICE TO  
PRESIDING OFFICER'S RULING NO. R2000-1/3  
(February 24, 2000)

Presiding Officer's Ruling No. R2000-1/3 (POR-3), issued on February 16, 2000, directed the Postal Service to provide additional information regarding its January 12, 2000 motion for waiver and for protective conditions (Motion) regarding the analyses of witnesses Yezer (USPS-T-31) and Kaneer (USPS-T-40). In short, the Ruling asks that the Postal Service distinguish what rules are to be waived from what material is to be protected; identify, designate and describe each affected document and provide apparently missing language from the proposed protective conditions.

On February 14, 2000, United Parcel Service had filed its Answer to the Motion, which claimed that the Postal Service's proposed protective conditions failed to reflect Commission precedent established after the filing of the Motion. In a set of partial objections filed February 22, 2000 regarding pending interrogatories directed to witness Hunter (USPS-T-5, regarding the bulk revenue, pieces and weight (BRPW) system), the Postal Service indicated that protective conditions would be appropriate for some of the requested material, and that the conditions which ultimately apply to witness Yezer's material would also be appropriate for witness Hunter's material. The Postal Service also noted therein that the language requested by United Parcel Service was not consistent with Commission precedent, and that this issue would be addressed in the Postal Service response to POR-3 on February 23, 2000. This response accordingly

responds both to POR-3 and the United Parcel Service Answer, beginning with a discussion of what was missing from the proposed protective conditions and what United Parcel Service proposes to add.

The Postal Service's proposed conditions are modeled quite closely on those applied in PRC Docket No. R97-1,<sup>1</sup> which are also quite close to what the Commission ordered in Docket No. C99-1, Order No. 1283. Aside from paragraph 2 in the Order No. 1283 protective conditions (which set up an eight-day pre-clearance process for individuals seeking access to protected material), the most substantial distinction between the protective conditions in that Order and what the Postal Service proposes is inclusion at the end of paragraph 1(b):

["Involved in competitive decision-making"] 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.

The United Parcel Service Answer does propose inclusion of these words (albeit with a significant change in punctuation) in the Yezer protective conditions. This language is, however, the subject of further motions practice in Docket No. C99-1. In that docket, United Parcel Service proposes an amendment in the form of a comma after "legal advice" in the second line 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.'<sup>2</sup>

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<sup>1</sup> The only intended substantive departure from the R97-1 protective conditions (which the Commission views as the current benchmark, Order No. 1283 at 4-5) was an expansion in paragraph 1(b) of a reference from "competitive advantage" to "commercial benefit or competitive advantage", although the syntax changes were greater than that. This change reflected the dual conclusions that witness Yezer's work might both be patentable and have commercial value.

<sup>2</sup> The United Parcel Service position and the United States Postal Service response, including citations to underlying documents are reflected in the February 17,

**United Parcel Service seeks this alternative punctuation with respect to witness Yezer's testimony, while claiming to use Commission-approved words. In the language proposed in the United Parcel Service February 14 Answer, the comma mysteriously appears without any explanation or notice given. Answer at 3.**

**For the reasons stated in its February 17 reply in Docket No. C99-1, the Postal Service vehemently opposes insertion of this comma in the protective language applicable to witness Yezer's materials. Moreover, also for the reasons stated in that reply, the Postal Service opposes inclusion of the language from Order No. 1283 which United Parcel Service proposes, even without the comma. See also, Emery's Informal Expression of Views on Conditions for Access to Protective Material, Docket No. R2000-1, filed on February 24, 2000 (demonstrating how the sentence which Order No. 1283 added to the end of paragraph 1(b) conflicts with a long history of the definition of "involved in competitive decision making", citing *U.S. Steel Corp. v. United States*, 730 F.2d 1465, 1468-69 (Fed. Cir. 1984)).**

**Item 4 requested by the Commission in POR-3 is:**

**Reference the proposed Statement of Compliance with Protective Conditions contained in the Motion. The last sentence of paragraph 3© in the Statement of Compliance with Protective Conditions is not complete. Please propose language to complete this sentence.**

**The last sentence of paragraph 3© should, in its entirety, read:**

**The participant immediately shall notify the Postal Rate Commission and United States Postal Service counsel in Docket No. R2000-1 of the termination of any such business and consulting arrangement or retainer or affiliation that occurs before the closing of the evidentiary record.**

**The remainder of this response to POR-3 responds directly to the three**

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**2000 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 (Docket No. C99-1). The Postal Service hereby adopts the position it takes in that pleading, and incorporates it by reference.**

remaining directives in that Ruling, after first quoting each.

1. Describe what specific "relevant portions of rules 31(k) and 54(o)" the Postal Service proposes to waive for witness Yezer's material and for witness Kaneer's material. Please explain the necessity for a waiver if the proposed protective conditions are granted.

The Postal Service believes that, with one exception, no waiver is necessary if the protective conditions are granted. Because finance numbers are redacted from witness Kaneer's materials, replication of his box count calculations is not possible. Thus a limited waiver of Rule 31(k)(3)(I) might still be appropriate.

2. Describe each document that witness Yezer and witness Kaneer propose[] to provide under protective conditions. For each document, describe in detail how each is commercially sensitive, patentable, includes issues of copyright, or contains trade secrets.
3. Please provide reference designations for all material to be submitted under protective conditions for identification purposes.

The materials provided, which are electronic in form, include three basic types: input data, processing of data, and output data. With respect to input data sets, witness Yezer divides the domestic service area into forty-four geographic units for purposes of his analysis;<sup>3</sup> each has its own input data set, which is a subset of the information provided to him by the Postal Service. Each data set contains commercially sensitive and trade secret information specific to facilities. Presentation of the input data in this form permits an analyst to run witness Yezer's regressions and replicate his results or ask "what if" questions and produce different results. The input data sets are designated Y100 through Y143.

The second basic type of materials provided consists of a report of statistical techniques and includes the equation by means of which witness Yezer matched

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<sup>3</sup> Thirty files are for states or state groups, thirteen are for cities or city groups, and one is for territories. The state files could be described as states excluding Metropolitan Statistical Areas (MSAs).

up rent and ZIP Codes. While the undersigned counsel has been informed by the Postal Service intellectual property counsel that these materials may be protectable by copyright or patent, or both, final legal conclusions as to their status are unavailable at this time. If a patent application is prepared, it would be prepared by outside counsel.

Of particular import, however, is that the intellectual property counsel advises that if any intellectual property rights are to be retained, the materials themselves must be kept confidential. Thus the regressions must be kept confidential; in addition, because they could be derived by an appropriately skilled analysis who had access to both the input and output data, those must also be protected.

The Postal Service believes retention of its intellectual property rights is appropriate because of the commercial value inherent in witness Yezer's work, which effectively creates the first nationwide estimates of real estate values. No other source of such comprehensive rental estimates for commercial space exists for the entire United States. Indeed, the major competing source of rental data is the DB Commercial/Torto Wheaton Database, which includes rental indices for 54 large metropolitan areas. These data are sold commercially as part of the *CB Commercial Office and Industrial Outlook Reports* at a recently advertised price of \$550 per metropolitan area. See also, William C. Wheaton, Raymond G. Torto and Jon A. Southard, "The CB Commercial/Torto Wheaton Database," 5 *Journal of Real Estate Research* No. 1 (January, 1997).

This second type of materials consists of a single document designated Y200.

The third type of materials is output data, which consists of a match between five-digit ZIP Codes and the estimated market value of space used to provide post office box service. Since these output data are also witness Kaneer's input data, this file has been designated K100. Witness Kaneer's input data set also includes other

data elements necessary for his analysis, including counts of post office boxes and in use. These data are commercially sensitive, since they could be used by competitors in deciding where to locate competitive facilities. The Postal Service notes that at least one intervenor, United Parcel Service, is planning to open retail outlets that would provide mailboxes, among other products.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

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### 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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