

RECEIVED  
ORDER NO. 1287  
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POSTAL RATE COMMISSION  
OFFICE OF THE SECRETARY

UNITED STATES OF AMERICA  
POSTAL RATE COMMISSION  
WASHINGTON, D.C. 20268-0001

Before Commissioners: Edward J. Gleiman, Chairman;  
George A. Omas, Vice Chairman;  
Dana B. Covington, Sr.; Ruth Y. Goldway;  
and W.H. "Trey" LeBlanc III

Complaint on Post E.C.S.

Docket No. C99-1

ORDER DISPOSING OF MOTIONS  
FOR CLARIFICATION AND CORRECTION  
OF PROTECTIVE CONDITIONS ADOPTED  
IN ORDER NO. 1283

(March 1, 2000)

This Order addresses motions of the United States Postal Service and Complainant United Parcel Service for modifications in one portion of the protective conditions adopted in Order No. 1283 to govern access to sensitive information in this proceeding. For the reasons presented below, the Commission is making certain corrective and clarifying revisions requested by the Postal Service, but declines to make other changes proposed by the Service and by Complainant UPS.

Initial Postal Service Motion. On February 3, the Postal Service filed a motion in this docket requesting minor alterations in the protective conditions adopted in Order No. 1283. United States Postal Service Motion for Clarification and Correction of Order No. 1283, February 3, 2000. According to the Service, paragraph 1(b) of the Statement of Compliance setting out those conditions should be corrected to give effect to the

Commission's determination to exclude employees of participants in the case from eligibility for access to protected materials. *Id.* at 1. The Service further requests the inclusion of additional language in the same paragraph to provide further clarification of the ineligibility of employees of a participant for access. *Id.* at 1-2.

UPS Answer and Requested Amendment. Complainant United Parcel Service responded to the Service's motion in a pleading filed February 10. Answer of United Parcel Service to United States Postal Service Motion for Clarification and Correction of Order No. 1283, and Motion for Further Clarification, February 10, 2000. UPS states that it does not object to the Service's requested corrections and clarifications. However, it also proposes an alteration in paragraph 1(b) of the Statement of Compliance for the purpose of clarification. Specifically, UPS requests the insertion of a comma after the phrase "legal advice" in the last sentence of the paragraph, to clarify that the following phrase does not modify those two words. According to UPS, this change is appropriate because, in its view, "[l]egal advisors should have access to protected materials in all circumstances as long as they merely provide legal advice..." *Id.* at 1.

Postal Service Opposition and Further Request. The Postal Service responded to Complainant's request for an additional amendment to the protective conditions in a pleading filed on February 17.<sup>1</sup> The Service opposes the editorial change proposed by UPS on the ground that it "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." Postal Service Answer and Motion at 2. According to the Service, making the change requested by UPS would depart from the practice established in such recent proceedings as Docket No. R97-1 and MC97-5, and would

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<sup>1</sup> 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, February 17, 2000.

be fundamentally unfair to the Service in light of enforcement of the conditions upon Postal Service counsel in the latter proceeding. *Id.* at 2-4.

Further, the Service requests—although it did not propose this change in its original motion of February 3—that the Commission delete the last sentence of paragraph 1(b) of the Statement of Compliance. In the Service’s view, permitting access by counsel who participate in competitive decisionmaking so long as their advice is not in “direct furtherance” of competitive activities “would appear to give more liberal access to private participants’ legal advisors than to Postal Service counsel, which would be patently unfair.” *Id.* at 4. Therefore, in the interest of promoting a “level playing field,” the Service submits that this provision should be removed. However, it also states that it has no opposition to adopting an exception that would permit counsel to render advice on the double postage rule, as in the last omnibus rate proceeding. *Id.* at 4, n. 2.

UPS Answer Opposing Motion for Further Amendment. Complainant responded to the Service’s request for a further amendment to the protective conditions in a pleading filed on February 24.<sup>2</sup> UPS begins by observing that the Postal Service has misconstrued its position regarding legal advisors’ access to commercially sensitive information. Complainant states its position is *not* that legal advisors should always be permitted access to such materials; under its proposal, a lawyer who is actually involved in competitive decisionmaking would be precluded from access. The editorial change proposed by UPS is intended instead to incorporate its position “that a lawyer who provides legal advice, and nothing more, to those who are truly involved in competitive decisionmaking is not by that fact alone ‘involved in competitive decisionmaking.’” UPS Answer of February 24 at 2.

Complainant also opposes the Service’s request to delete the last sentence of paragraph 1(b) of the Statement of Compliance. UPS notes that the Commission in Order No. 1283 found this clarification of the term “involved in competitive

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<sup>2</sup> Answer of United Parcel Service in Opposition to Motion of United States Postal Service for Further Amendment to Protective Conditions, February 24, 2000.

decisionmaking” necessary, and argues that the Service provides no justification for altering this conclusion. Ibid.

Commission Determination. The Commission will adopt the editorial changes to the Statement of Compliance requested by the Postal Service in its original motion of February 3. As the Service correctly observes, the inclusion of employees of participants in paragraph 1(b) is inconsistent with the Commission’s determination in the body of the Order to exclude such persons. Consequently, this editorial error shall be corrected in the revised Statement of Compliance attached to this Order. The additional language proposed by the Service will also be included, inasmuch as it clarifies the intent of the restriction.

However, the Commission will not delete the last sentence of paragraph 1(b), as the Service requests in its motion of February 17. In response to the parties’ arguments, and in light of its institutional experience in past proceedings where disclosure of potentially sensitive information was at issue, the Commission found it appropriate in Order No. 1283 to adopt language clarifying the “involved in competitive decisionmaking” restriction. However, rather than re-using the narrowly tailored “double postage rule” exception, which was crafted to accommodate the special circumstances presented in Docket No. R97-1, the Commission developed a more general standard to accommodate other forms of permissible advice. The general standard, which permits rendering advice or performing other services not directly in furtherance of competition with those having a proprietary interest in the protected material, is intended to apply equally to Complainant, the Postal Service, and all other participants who may wish to seek access to protected materials in this proceeding.

The Commission finds no basis for the Service’s assertion that adopting this general provision would create a “potential double-standard” that could operate inequitably by granting greater freedom of access to Complainant than to the Service. Nor would the standard necessarily operate to grant counsel for Complainant access in circumstances similar to those that precluded access by certain Postal Service personnel in Docket No. MC97-5. In that proceeding, the Presiding Officer declined to

authorize access on the basis of the Postal Service's representation that none of these personnel had "primary responsibility" for decisionmaking on the proposed competitive packaging product. He found this degree of uninvolvement insufficient, noting that "[I]ndividuals without primary responsibility may and often do have input into decisions that have important competitive ramifications." Docket No. MC97-5, Tr. 7/1649.

This action is fully compatible with the standard adopted in Order No. 1283. Individuals without "primary responsibility" for competitive decisionmaking may nonetheless be involved in the process, either by direct participation or rendering services "directly in furtherance" of competitive activities. Consequently, this provision cannot properly be viewed as either a double standard or an inequitable departure from past Commission practice, and it shall be retained for use in this proceeding.

Nor will the Commission make the editorial change requested by Complainant, as it is incompatible with the determination in Order No. 1283. As noted above, the purpose of the change proposed by UPS is to grant legal advisors to competitors unrestricted access to protected materials, regardless of the character of the legal advice they render, unless they participate in actually making competitive decisions. Complainant argued for this outcome in defending its proposed protective conditions, and the Commission explicitly rejected it in the following discussion:

Complainant's argument that the "involved in competitive decisionmaking" restriction is potentially broader in application than the standards commonly applied in civil litigation appears to find support in the authorities it cites. However, it is far from clear that these decisions fully justify Complainant's position that the restriction should preclude access only by those who actively participate in making competitive decisions, and not by counsel or others whose involvement is limited to rendering advice. 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 8-9. (Emphasis added.) To implement an appropriately narrow restriction on the forms of legal advice that would preclude counsel from access to protected materials, the Commission adopted a standard that disqualifies only those who render “legal advice...directly in furtherance of activities in competition with a person or entity having a proprietary interest in the protected material.”<sup>3</sup> Id. at 9, Appendix A at 1, para. 1(b). Thus, Order No. 1283 contemplates a limited restriction on the forms of legal advice—as well as on other types of services—that a person eligible for access may perform for a competitor. The Commission therefore declines to remove the intended limitation through editorial change.

It is ordered:

1. The Motion of United States Postal Service for Clarification and Correction of Order No. 1283, filed February 3, 2000, is granted.
2. The Motion of United Parcel Service for Further Clarification, filed February 10, 2000, is denied.
3. The Motion of United States Postal Service for Further Amendment to Protective Conditions, filed February 17, 2000, is denied.

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<sup>3</sup> In the Commission's view, this limitation is not so restrictive that it would preclude counsel from eligibility for access simply for rendering advice on matters of legal interpretation—such as the application of the double postage rule to a private competitor's rates—as in past proceedings.

4. The revised protective conditions specified in Appendix A to this Order are hereby adopted for use in this proceeding.

By the Commission.

(S E A L)

A handwritten signature in black ink, reading "Margaret P. Crenshaw". The signature is written in a cursive style with a large, sweeping initial "M".

Margaret P. Crenshaw  
Secretary

**STATEMENT OF COMPLIANCE  
WITH PROTECTIVE CONDITIONS**

The following protective conditions limit access to materials provided in Docket No. C99-1 by the Postal Service or other parties that the Presiding Officer or the Commission has directed to be produced and examined under protective conditions. Individuals seeking to obtain access to such material must agree to comply with these conditions, complete the attached certifications, provide the completed certifications to the Commission, and serve them upon counsel for the party submitting the confidential material.

1. Only a person who is either:

(a) an employee of the Postal Rate Commission (including the Office of the Consumer Advocate) with a need-to-know; or

(b) an individual participant in Postal Rate Commission Docket No. C99-1; or a person (not an employee) acting as outside counsel, agent, consultant, contractor, affiliated person, or other representative of such participant for purposes related to the litigation of Docket No. C99-1; shall be granted access to these materials. However, no person involved in competitive decision-making for any entity that might gain competitive advantage from use of this information shall be granted access to these materials. "Involved in competitive decision-making" includes consulting on marketing or advertising strategies, pricing, product research and development, product design, or the competitive structuring and composition of bids, offers or proposals. It 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.

2. Counsel for a person who fully satisfies the qualifications set forth in paragraph 1(b) above shall serve by hand delivery or facsimile transmission a copy of that person's completed certification on counsel for the party that has provided the material to which the person wishes to be granted access. The person shall not be granted access until the eighth day after such service has been made. The party providing the material, or any other party with an interest in the protection of the material, shall have until seven days after receipt of the certification to object to access being granted to such person, by filing an objection with the Commission and serving opposing counsel by hand delivery or facsimile transmission. If such an objection is filed, the participant seeking to examine protective materials may file a response within seven days from the time the objection is filed with the Commission. Any such response must be served upon filing the objection, by hand delivery or facsimile transmission. If the Presiding Officer determines that the objection is not meritorious on



its face, the Presiding Officer may issue a ruling granting access before receiving a response.

3. No person granted access to these materials is permitted to disseminate them in whole or in part to any person not authorized to obtain access under these conditions.

4. The final date of any participant's access shall be:

(a) the date on which the Postal Rate Commission issues its recommended decision or otherwise closes Docket No. C99-1; or

(b) the date on which that participant formally withdraws from Docket No. C99-1; or

(c) the last date on which the person who obtains access is under contract or retained or otherwise affiliated with the Docket No. C99-1 participant on whose behalf that person obtains access, whichever comes first. The participant immediately shall notify the Postal Rate Commission and counsel for the party who provided the protected material of the termination of any such business and consulting arrangement or retainer or affiliation that occurs before the closing of the evidentiary record.

5. Immediately after the Commission issues its recommended decision or otherwise closes Docket No. C99-1, a participant (and any person working on behalf of that participant) who has obtained a copy of these materials shall certify to the Commission:

(a) that the copy was maintained in accordance with these conditions (or others established by the Commission); and

(b) that the copy (and any duplicates) either have been destroyed or returned to the Commission.

6. The duties of any persons obtaining access to these materials shall apply to material disclosed or duplicated in writing, orally, electronically or otherwise, by any means, format, or medium. These duties shall apply to the disclosure of excerpts from or parts of the document, as well as to the entire document.

7. All persons who obtain access to these materials are required to protect the document by using the same degree of care, but no less than a reasonable degree of care, to prevent the unauthorized disclosure of the document as those persons, in the ordinary course of business, would be expected to use to protect their own proprietary material or trade secrets and other internal, confidential, commercially-sensitive, and privileged information.
8. These conditions shall apply to any revised, amended, or supplemental versions of materials provided in Docket No. C99-1.
9. The duty of nondisclosure of anyone obtaining access to these materials is continuing, terminable only by specific order of the Commission.
10. Any Docket No. C99-1 participant or other person seeking access to these materials by requesting access, consents to these or such other conditions as the Commission may approve.

**CERTIFICATION**

The undersigned represents that:

Access to materials provided in Docket No. C99-1 by a participant in response to rulings of the Presiding Officer or orders of the Commission and filed under protective conditions (hereinafter, "these materials" or "the information") has been authorized by the Commission.

The copy obtained is marked on every page with my name.

I agree to use the information only for purposes of analyzing matters at issue in Docket No. C99-1.

I certify that I have read and understand the above protective conditions and am eligible to receive access to materials under paragraph 1 of the protective conditions. I further agree to comply with all protective conditions and will maintain in strict confidence these materials in accordance with all of the protective conditions set out above.

Name \_\_\_\_\_

Firm \_\_\_\_\_

Title \_\_\_\_\_

Representing \_\_\_\_\_

Signature \_\_\_\_\_

Date \_\_\_\_\_

**CERTIFICATION UPON RETURN OF  
PROTECTED MATERIALS**

When I obtained materials provided in Docket No. C99-1 by a participant in response to rulings of the Presiding Officer or orders of the Commission and filed under protective conditions, I certified to the Commission that I was eligible to receive it. I now affirm as follows:

1. I have remained eligible to receive access to materials under paragraph 1 of the protective conditions throughout the period those materials have been in my possession. Further, I have complied with all conditions, and have maintained these materials in strict confidence in accordance with all of the protective conditions set out above.
2. I have used the information only for purposes of analyzing matters at issue in Docket No. C99-1.
3. I have returned the information to the Postal Rate Commission.
4. I have either surrendered to the Postal Rate Commission or destroyed all copies of the information that I obtained or that have been made from that information.

Name \_\_\_\_\_

Firm \_\_\_\_\_

Title \_\_\_\_\_

Representing \_\_\_\_\_

Signature \_\_\_\_\_

Date \_\_\_\_\_