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OFFICE OF THE COMMISSIONER

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

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PRESIDING OFFICER'S  
RULING NO. R2000-1 MAR 10 4 11 PM '00

POSTAL RATE COMMISSION  
OFFICE OF THE SECRETARY

Postal Rate and Fee Changes

Docket No. R2000-1

**PRESIDING OFFICER'S RULING  
GRANTING POSTAL SERVICE MOTION FOR PROTECTIVE CONDITIONS  
AND LIMITED WAIVER OF RULE 31(k) FILING REQUIREMENTS**

(March 10, 2000)

The Postal Service filed a Motion of United States Postal Service for Waiver and for Protective Conditions for Analysis of Witness Yezer (Motion) with its Request initiating this case. In the Motion, the Postal Service requests a waiver of the relevant portions of Rules 31(k) and 54(o) for the econometric analysis conducted by witness Yezer and the cost and box count data, by ZIP Code, used by witness Kaneer. The Postal Service further seeks to establish protective conditions to govern the provision of these materials claiming that these materials are commercially sensitive, may be patentable, and include issues of copyright and trade secrets. The Postal Service has proposed language for protective conditions in an attachment to the Motion.

The motion to waive the requirement to provide information pursuant to Rule 31(k)(3)(i) for witness Kaneer is granted. This shall not preclude the Commission or any party from requesting this information in the future if a need for this information arises. The Postal Service Motion for protective conditions for use with witness Yezer's and witness Kaneer's material is granted subject to the Commission's revisions to the proposed protective conditions. The protective conditions document is attached as an appendix to this Ruling.

Subsequent Procedural History. United Parcel Service (UPS) filed an answer to the Postal Service Motion on February 14, 2000. Answer of United Parcel Service to Motion of United States Postal Service for Waiver and for Protective Conditions for Analysis of Witness Yezer (Answer). UPS submits that the proposed protective conditions are overly restrictive and would deny access to those who have a legitimate need for access, including possibly legal counsel. Answer at 2. Generally, the proposed protective conditions restrict access to protected material by a "person who might gain commercial benefit or competitive advantage from access to or use of these materials."<sup>1</sup> This includes persons "involved in competitive decision-making." Motion Attachment at paragraph 1(b). The UPS remedy is to narrow the definition of those "involved in competitive decision-making" by adding the following sentence to the proposed Statement of Compliance with Protective Conditions, paragraph 1(b):

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.

Answer at 3. This sentence defines who is not involved in competitive decision-making. UPS characterizes this addition as being consistent with precedent set in the Docket No. C99-1 protective conditions. However, this language differs from the protective conditions language granted in Docket C99-1, Order No. 1283, by the insertion of a comma between the words "advice" and "or."<sup>2</sup>

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<sup>1</sup> The Commission defines the word "person" to mean an individual, a partnership, corporation, trust, unincorporated association, public or private organization, or government agency. Rule 5(f).

<sup>2</sup> UPS properly quotes the Docket C99-1, Order No. 1283, language in the body of its Answer. But in its final request, UPS inserts a comma between the words "advice" and "or." See Answer at 2-3. Including the comma changes the meaning of the sentence. The sentence could now be misconstrued to mean that anyone rendering legal advice is not involved in competitive decision-making. This is not the intended meaning. See Docket No. C99-1, Order No. 1287, for resolution of this same issue.

The Presiding Officer issued a ruling on February 16, 2000, directing the Postal Service to provide additional information in support of its Motion.<sup>3</sup> The Ruling asked for clarification of the Rules 31(k) and 54(o) waiver request, a description of each document, justification for protective conditions, reference designations for the material, and clarification of missing language from the proposed protective conditions.

The Postal Service filed an objection to the UPS Answer on February 22, 2000. Notice of United States Postal Service of Opposition to the United Parcel Service Answer to the Postal Service Motion Regarding Protective Conditions and Waiver of Supporting Material for Witness Yezer. The Postal Service opposes insertion of the proposed UPS language in the protective conditions alleging it is directly counter to precedent.

The Postal Service filed a response to a Presiding Officer Ruling on February 24, 2000, that includes greater detail on its objection. Response of United States Postal Service to Presiding Officer's Ruling No. R2000-1/3 (POR Response). Prior to providing specific answers to the Presiding Officer's Ruling, the Postal Service elaborates upon its opposition to inserting the proposed UPS language into the protective conditions. The Postal Service incorporates by reference the basis for opposition that it is using to oppose identical language in the Docket No. C99-1 protective conditions.<sup>4</sup> Except for the comma after the word "advice," the UPS language is the same as that used in the Docket No. C99-1 protective conditions. Specifically, the Postal Service opposes the UPS punctuation change alleging it alters the meaning of the sentence by exempting persons who provide legal advice from the class of excluded persons involved in competitive decision-making. Generally, the

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<sup>3</sup> Presiding Officer's Ruling Directing the Postal Service to Provide Additional Information. P.O. Ruling No. R2000-1/3.

<sup>4</sup> See 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, February 17, 2000.

Postal Service opposes the addition of the language even without the comma. The Postal Service states that this language appears to give more liberal access to protected material by private participant legal counsel than to Postal Service legal counsel.

In the Presiding Officer Ruling, the Postal Service was requested to identify what portions of Rules 31(k) and 54(o) it proposes to waive for witness Yezer's and witness Kaneer's testimony assuming that protective conditions would be granted. The Postal Service replied that a limited waiver of Rule 31(k) for witness Kaneer's material may be appropriate because finance numbers are redacted from that material.<sup>5</sup> This would render replication of his box count calculations impossible. A waiver of other portions of Rules 31(k) and 54(o) is not necessary. The Postal Service further identified the proposed protected material and elaborated on the basis for seeking protective conditions in the POR Response. A clarification of the missing language from the proposed protective conditions was also provided.

On February 25, 2000, Emery Worldwide Airlines, Inc. (Emery) filed Emery's Informal Expression of Views on Conditions for Access to Protected Material (Views). Emery is not a participant in Docket No. R2000-1, but may be affected by Commission procedures for disclosure of confidential materials.<sup>6</sup>

Emery opposes the language proposed by UPS modifying the definition of who is "involved in competitive decision-making." The proposed language "would narrow the definition of 'involved in competitive decision-making' and weaken the protection afforded to the protected material." Views at 5. Emery submits that the proposed

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<sup>5</sup> Although the Postal Service requests waiver of Rule 31(k)(3)(I), POR Response at 4, the Commission assumes that the proper section to be waived is 31(k)(3)(i).

<sup>6</sup> Emery's pleading was accepted as a Rule 20b Informal expression of views by persons not parties or limited participators (commenters). Rule 20b offers an intervenor only limited rights in a proceeding. If substantial issues are at stake, intervention by Rule 20a Limited participation by persons not parties, or Rule 20 Formal intervention should be considered.

language will make the “involved in competitive decision-making” test not applicable to attorneys. Emery states that attorneys should only have access to protected materials if they are not involved in competitive decision-making for an entity that might gain commercial benefit from the protected information.<sup>7</sup> The UPS proposal also allows individuals “performing other services that are not directly in furtherance of activities in competition...” to gain access to protected material. Emory objects to this language claiming that indirect activities can be just as competitively damaging as direct activities.

Emery proposes another modification to the protective conditions suggesting that further protection can be gained by requiring a five working day notice procedure prior to granting access to the protected material. This would allow the party that is providing the material to assess the requesting party’s involvement in competitive decision-making and avert possible inappropriate release of protected material.

Emery finally proposes a modification to the Certificate form by adding the following sentence to the form:

I certify that I am not involved in competitive business decision making as that term is used in U.S. Steel Corp. v. United States, 730 F.2d 1465, 1468-69 (Fed. Cir. 1984).

Emory states that there is no direct certification by an individual as to whether he or she is involved in competitive business decision-making and this will alert and remind the individual of the standards that apply.

Commission Determination. The Postal Service narrowed its request for waiver of the relevant parts of Rules 31(k) and 54(o) for witness Yezer’s and witness Kaneer’s material to a limited waiver of Rule 31(k)(3)(i) for witness Kaneer’s material. The

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<sup>7</sup> Emery uses the term “commercial benefit” in describing the entity that is denied access. Views at 5. The Postal Service uses the term “commercial benefit or competitive advantage.” Motion Attachment, paragraph 1(b). Both of these terms are broader than the term “competitive advantage” used in the Docket No. C99-1 protective conditions.

request for waiver has not been opposed by any party. The reason provided for the waiver is that the finance numbers are redacted from witness Kaneer's material. This makes it not possible to replicate his box count calculations. The Commission cannot determine at this time whether it requires the finance numbers or if it will be necessary to replicate witness Kaneer's box count calculations. This may be resolved after receiving and reviewing the witness Yezer and witness Kaneer material under protective condition. Until that time, however, the motion for waiver of Rule 31(k)(3)(i) is granted. This shall not preclude the Commission or any party from requesting this information in the future if a need for this information arises.

The Postal Service Motion for receiving the witness Yezer and witness Kaneer material under protective conditions has not been opposed by any party. Only the terms of the protective conditions are at issue. Although the Postal Service did not provide sufficient information to the Commission to determine if this material should be protected for patent, copyright, or trade secret reasons, there is sufficient support for reasoning that this material may be protected as commercially sensitive. Also, the protective conditions proposed by the Postal Service are broader than necessary.<sup>8</sup> The Postal Service Motion for protective conditions is granted subject to appropriate revisions to the Postal Service's proposed protective conditions.

In paragraph 1(b) of the protective conditions, the Postal Service uses the phrase "involved in competitive decision-making" to describe the class of persons "who might gain commercial benefit or competitive advantage." The Commission thoroughly reviewed this language in Docket No. C99-1. The Commission reverses the order of the two phrases and states: "[N]o person involved in competitive decision-making for

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<sup>8</sup> On March 1, 2000, the Commission issued an Order Disposing of Motions for Clarification and Correction of Protective Conditions Adopted in Order No. 1283. Docket C99-1, Order No. 1287. This order decided issues in a proceeding where participants are in direct competition. The attachment to Order No. 1287 contains protective conditions that will provide ample protection for Postal Service commercial interests, and are used as the basis for protective conditions in this docket.

an entity that might gain competitive advantage from use of this information shall be granted access to these materials.” “Involved in competitive decision-making” is the standard that the Commission shall use in this type of protective condition document. The phrase “competitive advantage” narrows the class of persons “involved in competitive decision-making.”

The Postal Service’s proposed paragraph 1(b) language differs from the Docket No. C99-1 protective conditions language in one other substantive respect. The Postal Service proposes that no person who might gain “commercial benefit or competitive advantage” shall be granted access. Motion Attachment at paragraph 1(b). Order No. 1287 uses the term “competitive advantage,” and not the term “commercial benefit.” The term commercial benefit was proposed to reflect the Postal Service’s claim that portions of the materials may be patentable, and thus have commercial value. Response Footnote 1. The Commission considers the term “commercial benefit” to be excessively broad and not appropriate for inclusion in the protective conditions at this time.

Another difference between the proposed protective conditions and those implemented in Docket No C99-1 is the final date of any participant’s access to protected material. In paragraph 3, the Postal Service proposes three conditions to determine dates to terminate access. The first date is the date on which the Postal Rate Commission closes the evidentiary record. To conform the language to that recommended by Order No. 1287, this date shall be changed to the date on which the Postal Rate Commission issues its recommended decision or otherwise closes Docket No. R2000-1. This change will facilitate preparation of briefs by allowing continued access to the protected material.

The UPS proposal to refine the definition of “involved in competitive decision-making” by adding a sentence to the end of paragraph 1(b) is identical to the UPS proposal submitted for protective conditions in Docket No. C99-1. This proposal was

thoroughly examined in Docket No. C99-1 and ruled on in Order No. 1287. Following this precedent, the UPS proposed language shall be added to the protective conditions under discussion, excluding the comma after the word "advice."

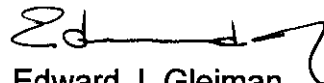
The Emery proposal to add a five working day notice procedure prior to granting access to the protected material shall not be implemented. Although similar conditions were implemented in the Docket C99-1 protective conditions, the Postal Service did not request this provision. If a notice provision had been requested, the Commission would likely have to scrutinize the proposed protected material prior to considering such a request. The sensitivity of the material would have to be weighed against the short 10 month time requirement imposed by a major rate case. A request to include a prior notice procedure in the last omnibus rate case, Docket No. R97-1, was rejected as too time-consuming.


The Emery proposal for modifications to the Certification form certifying that the individual is not involved in competitive business decision-making as that term is used in U.S. Steel Corp. shall not be implemented. Presently, the Certification form requires the individual to certify that he/she has read and understands the eligibility requirements of paragraph 1. Paragraph 1 utilizes the "involved in competitive decision-making" phrase offered in U. S. Steel Corp., but it also defines the meaning of the phrase for use in Commission dockets. Accepting the Emery proposal would override parts of the definition in paragraph 1(b) and change the Commission's interpretation of "involved in competitive decision-making."



### RULING

1. The limited waiver of Rule 31(k)(3)(i) for finance numbers in witness Kaneer's material shall be granted. This shall not preclude the Commission or any party from requesting this information in the future if a need for this information arises.
2. The Postal Service shall provide the witness Yezer and witness Kaneer material to the Commission.
3. The Postal Service motion for protective conditions of the witness Yezer and witness Kaneer material is granted subject to the protective conditions attached to this Order.

  
Edward J. Gleiman  
Chairman



## STATEMENT OF COMPLIANCE WITH PROTECTIVE CONDITIONS

The following protective conditions limit access to materials provided in Docket No. R2000-1 by the Postal Service in response to Presiding Officer's Ruling No. R2000-1/11. (hereinafter, "these materials"). 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) a participant in Postal Rate Commission Docket No. R2000-1; or a person employee by such participant, or acting as agent, consultant, contractor, affiliated person, or other representative of such participant for purposes related to the litigation of Docket No. R2000-1; 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. 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.
3. 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. R2000-1; or
  - (b) the date on which that participant formally withdraws from Docket No. R2000-1; or

- (c) the last date on which the person who obtains access is under contract or retained or otherwise affiliated with the Docket No. R2000-1 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.
- 4. Immediately after the Commission issues its last recommended decision in Docket No. R2000-1, 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.
- 5. 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.
- 6. 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.
- 7. These conditions shall apply to any revised, amended, or supplemental versions of materials provided in Docket No. R2000-1.
- 8. The duty of nondisclosure of anyone obtaining access to these materials is continuing, terminable only by specific order of the Commission.
- 9. Any Docket No. R2000-1 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. R2000-1 by the Postal Service in response to Presiding Officer's Ruling No. R2000-1/11 (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. R2000-1.

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**

Pursuant to the Certification which I previously filed with the Commission regarding information provided in Docket No. R2000-1 by the Postal Service in response to Presiding Officer's Ruling No. R2000-1/11 (hereinafter, "these materials" or "the information"), received on behalf of myself and/or the party which I represent (as indicated below), 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. R2000-1.
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 \_\_\_\_\_