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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

PRESIDING OFFICER'S
RULING NO. R2000-1/18

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

Postal Rate and Fee Changes

Docket No. R2000-1

PRESIDING OFFICER RULING GRANTING ADVO MOTION TO COMPEL

March 24, 2000

On March 9, 2000, ADVO, Inc. (Advo) filed interrogatories Advo/USPS-T13-2 and 19(c) to Postal Service witness Raymond. For each contract he performed on the Engineered Standards (ES) project, interrogatory 2 asks witness Raymond to provide (a) a full description of the work plan proposed to the Postal Service, (b) the statement of work and list of deliverables, (c) a list of reports, analyses and all other documentation that he prepared, (d) contract initiation and completion dates. Interrogatory 19(c) asks witness Raymond to provide copies of all requests, proposals, instructions and correspondence he directed to the Postal Service or its contractors relating to use of the ES data to update the Street-Time Survey of carrier costs.

The Postal Service filed objections to these interrogatories on March 3, 2000.¹ It offers highly generalized assertions that much of the information requested would be irrelevant to carrier cost issues, and would disclose information that the Postal Service and the firms with which witness Raymond has been associated considers confidential. It also asserts that providing the information requested would disclose information that could compromise future negotiations with its labor unions, and could have commercial

¹ Objection of the United States Postal Service to ADVO Interrogatories ADVO/USPS-T13-2 and 19(c) to witness Raymond, filed March 3, 2000 (Objection).

value to its competitors. It argues that it would be unduly burdensome to “unscramble” the unobjectionable material from the mass of objectionable material with which it is intertwined. Objection at 2. The Postal Service objects to interrogatory 19(c) as overbroad. It also objects to it on the ground that litigation strategy or other privileged communications could turn up in the requested material. Objection at 3.

On March 9, 2000 Advo moved to compel production of the requested information.² It argues that these interrogatories seek the kind of basic information that should have been provided when witness Raymond’s testimony was filed. It notes that the data that witness Raymond has provided were collected in order to develop engineered work standards, rather than to estimate carrier costs, and that for costing purposes, the documentation of the manner in which the data were collected is “thin or non-existent.” It characterizes the Postal Service’s objections as part of a pattern of resisting legitimate discovery designed to document witness Raymond’s data collection methods. Motion at 1-2.

Advo argues that the failure of the Postal Service to maintain organized and focused documentation of witness Raymond’s data collection effort is not a legitimate ground for objecting to its discovery. *Id.* at 3-4. It observes that under the Commission’s discovery rules, the Postal Service must show that specific privileges apply to specific information requested, and that the Postal Service has not carried that burden by making generalized assertions of privilege based on speculations about what the requested documents *might* contain. Advo argues that if its interrogatories are broad, they are necessarily so, since the Postal Service has provided only vague descriptions of the documentation that it has. Motion at 5-6.

² Motion of ADVO, Inc. to Compel Answers to Interrogatories ADVO/USPS-T13-2 and 19(c) to Witness Raymond, filed March 9, 2000 (Motion).

In opposing Advo's motion³, the Postal Service asserts that the origin and purpose of witness Raymond's data collection effort must be considered when deciding whether it has lodged its overbreadth, undue burden, and privilege claims in good faith. It contends that because the purpose of the ES project was to develop comprehensive engineered standards for workload analysis, it collected a lot of data that is not relevant to carrier cost estimation. It also explains that much of the documentation generated by this effort concerns hypothetical work methods that may be the subject of future labor negotiations, rather than observations of actual carrier activity. Opposition at 3-4.

The Postal Service observes that the Raymond Engineered Standards project was abruptly suspended, and the hard copy records were stored in an unordered state. The data provided in witness Raymond's testimony, it notes, came from an electronic database that witness Raymond maintained. The Postal Service explains that witness Raymond has now finished "reconstituting" the hard copy records generated by the ES project, enabling the Postal Service to "refine its objections and possibly produce additional documentation." Id. at 5.

The Postal Service says that it has now determined that it has little documentation that is responsive to interrogatory 19(c), and therefore withdraws its objection to answering that interrogatory. Id. at 6. With respect to interrogatory 2, however, it asserts that cannot comply with Advo's demand that it support its objections by providing a full list of all reports, analyses, and all other documentation prepared under each contract, and discuss specific privileges that apply to specific documents. If it did, it contends, it would prematurely disclose to postal labor unions the types of time standards and work methods that could become the subject of future negotiations. Id. at 6-7. Instead, the Postal Service argues that the information sought by interrogatory 2

³ Opposition of United States Postal Service to Advo Motion to Compel Answers to Interrogatories ADVO/USPS-T13-2 and 19© to Witness Raymond, filed March 16, 2000 (Opposition).

should be provided under strict protective conditions. It estimates that it could provide the descriptions and listing sought

in a reasonable time (perhaps a week) if the Postal Service were allowed, when necessary, to list categories of similar documents (such as hundreds of daily data collection reports transmitted from field data collectors) rather than be required to list each individual document produced.

Id.

Because the Postal Service has withdrawn its objection to answering Advo interrogatory 19(c) to witness Raymond, Advo's motion to compel a response to that interrogatory will be granted. Because the Postal Service has volunteered to answer Advo interrogatory 2 if its responses are subject to strict protective conditions, Advo's motion to compel a response to Advo interrogatory 2 will also be granted subject to the protective conditions attached to this ruling. The Postal Service may, where appropriate, list categories of similar documents. The Postal Service estimates that it would approximately take a week to compile the information requested by interrogatory 2. Presumably it has already begun that effort. Therefore, it should be feasible to provide a response by March 29, 2000.

After having seen the Postal Service's response to interrogatory 2, Advo will be in a better position to argue that some of the information provided is sufficiently relevant to carrier cost estimation that it should be publicly disclosed, and the Commission will be in a better position to make an informed judgment as to whether protective conditions should continue to attach to any such information identified by Advo.


Up to this point, the protective conditions adopted in Presiding Officer's Ruling No. R2000-1/11 have been serving as a model for rulings that conclude that material should be subjected to strict protective conditions. Ruling 11 requires persons obtaining access to protected material to certify that they are eligible for access and will

comply with the protective conditions prescribed. The certification includes a requirement that the person mark every page of the material obtained with that person's name. It appears that this marking requirement is likely to become cumbersome and impractical with respect to hard copy material that is unusually voluminous, such as the material documenting the Engineered Standards project. It also appears to be impractical with respect to electronically filed material.

Although the requirement that every page be marked adds marginally to the security of the protected material, it appears that this marginal benefit is outweighed by its impracticality in many circumstances. Accordingly, the certification requirements attached to this ruling require a signature only on the cover or label of the protected material that is returned. The certification requirements accompanying other rulings that have used the protective conditions attached to Ruling 11 as a model will be amended in the same manner.

RULING

1. The Motion of ADVO, Inc. to Compel Answers to Interrogatories ADVO/USPS-T13-2 and 19(c) to Witness Raymond, filed March 9, 2000, is granted with respect to interrogatory 19(c).
2. The Motion of ADVO, Inc. to Compel Answers to Interrogatories ADVO/USPS-T13-2 and 19(c) to Witness Raymond, filed March 9, 2000, is granted with respect to interrogatory 2, subject to the protective conditions attached to this ruling.
3. Responses to interrogatories ADVO/USPS-T13-2 and 19(c) to witness Raymond shall be due on or before March 29, 2000.
4. The certification requirements accompanying the protective conditions imposed by Presiding Officer Ruling Nos. R2000-1/11, -1/12, -1/15, -1/17 are hereby modified to require that a person that has viewed protected material sign only to cover or label on the protected material returned to the Commission's docket section.


Edward J. Gleiman
Presiding Officer

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. R2000-1/18 (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. R2000-1/18 (hereinafter, "these materials" or "the information") has been authorized by the Commission.

The cover or label of the copy obtained is marked 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. R2000-1/18 (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 _____