

RECEIVED

MAR 29 12 21 PM '00

POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

PRESIDING OFFICER'S
RULING NO. R2000-1/22

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

Postal Rate and Fee Changes

Docket No. R2000-1

RULING GRANTING UNCONTESTED POSTAL SERVICE MOTION
FOR PROTECTIVE CONDITIONS FOR MATERIAL PROVIDED
PURSUANT TO CERTAIN ANM INTERROGATORIES
AND REQUIRING CERTAIN NOTICES

(March 29, 2000)

This ruling grants the Postal Service's uncontested motion for adoption of proposed protective conditions for material it anticipates providing in response to certain interrogatories of the Alliance of Nonprofit Mailers (ANM). See Uncontested Motion of United States Postal Service for Protective Conditions for Material to be Provided in Response to Alliance of Nonprofit Mailers Interrogatories concerning Management Analyses of Flat Sorting Machines and Related Equipment (March 27, 2000) ("Postal Service Motion"). The interrogatories in issue seek, among other things, management analyses of flat sorting machines, the Carrier Sort Bar Code Sorter, accelerated deployment of flat sorters, and the tray management system.¹

Issues and concerns related to production of this material have been addressed in pertinent filings and, although not repeated here, materially influence this ruling.²

¹ The requested analyses include Decisional Analysis Reports (DARs). According to witness Tayman, DARs are prepared as of a given point in time and are used to evaluate investment opportunities. See Tayman Response to ANM/USPS-T9- 23(e) (filed February 29, 2000).

² See Objection of the United States Postal Service (USPS) to Interrogatories ANM/USPS-T10-4, 7, 8 and 11 and Partial Objection to ANM/USPS-T10-10 (filed February 17, 2000); Objection of the USPS to Interrogatory ANM/USPS-T10-32(d) (filed February 22, 2000); Objection of USPS to Interrogatories of the ANM to Witness Tayman (ANM/USPS-T9-18(j) and (k), 19(g) and (h), 22(c), 22(f)(in part) and 23(a) (in part) (filed February 22, 2000); and Motion of ANM to Compel Answers to ANM/USPS-T9-18(j) and (k); 19g and (h), 22(c), 22(f), and 23(a); and T10-4, 7, 8, 10, 11 and 32(d) (filed March 7, 2000). See also Association for Postal Commerce's Comments in Support of ANM Motion to Compel (March 10, 2000).

Participants' efforts in developing a workable solution that balances legitimate interests raised in the referenced filings are appreciated.

Terms. An attachment to the Service's motion, entitled Statement of Compliance with Protective Conditions, includes the terms proposed by the Service and adopted here. According to the Service, the protective conditions in paragraphs 1 through 9 are nearly identical to those generally used in Commission proceedings. Postal Service Motion at 2. The Service also says that the conditions in paragraphs 10 through 15 have been used by other regulatory agencies to establish an orderly procedure for the use of the protected material in testimony or hearings. *Id.*

As the provisions in the first nine paragraphs are familiar to participants, their adoption should pose no difficulties. Other provisions, although not routinely used at the Commission, are deemed acceptable under the circumstances here, which presumably include negotiations among counsel interested in the immediate issues. Obviously, more extensive consideration of the appropriateness of adopting these terms as standard conditions will be necessary before they can be sanctioned across the board.³

Advance notice of interest in limited hearing. A practical concern is that paragraph 12 raises the possibility that a limited hearing may be required, as of right, in certain situations. In the event a participant invokes this provision, I am directing that adequate advance notice be provided to the Commission so that suitable arrangements can be made. This action, however, does not require any formal amendment to the document the Service has provided.⁴

Notice of certification. In P.O. Ruling No. 20 (issued March 27, 2000), participants were informed of a new procedure requiring them to file, at least a day prior to seeking access, a brief notice with the Commission containing the name, title, and

³ These terms, among other things, assign burden in questions of declassification and establish "preponderance of the evidence" as the related standard of proof.


⁴ In the second sentence of paragraph 14, the term "designed" has been changed to "designated" to conform the wording to the clear intent of the document. Also, a standard Commission header and formatting have been applied. These changes do not affect the substance of the statement itself or the accompanying certifications.

position of each person nominated to obtain access to material placed under protection. Service of the notice on the participant requesting the protective conditions is also required. Participants are reminded that the new notice requirements apply in this situation.

"Marking" requirement. The certification the Service has proposed here includes the requirement that the copy obtained pursuant to protective conditions be marked on every page with the name of the person seeking access. This requirement, which has been a standard feature in Commission-sanctioned certification procedures, was recently lifted, in P.O. Ruling No. 20, for certain voluminous documents and electronic filings. As the concerns underlying that change may not pertain here, no amendment is made to the certification; however, to the extent compliance may prove problematic, affected participants may apply for a waiver.

RULING

1. The protective conditions proposed by the Postal Service in its uncontested March 27, 2000 motion are adopted, and are included in the attachment to this ruling.
2. Any participant that anticipates the need for a limited hearing, under the terms in the first sentence of paragraph 12 of the Protective Conditions adopted in this ruling, shall provide adequate advance written notice to the Commission of this circumstance.
3. The advance notice provisions set out in P.O. Ruling No. 20 relating to the identity and affiliation of those filing certifications for access to protected material apply here.


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. R2000-1/22 (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 employed 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, or as specified in paragraphs 10 through 15, below.
- 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.

10. The Postal Service shall clearly mark the following legend on each page, or portion thereof, that the Service seeks to protect under this agreement: "Confidential—Subject To Protective Conditions In Docket No. R2000-1 Before The Postal Rate Commission" or other markings that are reasonably calculated to alert custodians of the material to its confidential or proprietary nature. Except with the prior written consent of the Postal Service, or as hereinafter provided, no protected information may be disclosed to any person.
11. Any written materials—including but not limited to discovery requests and responses, requests for admission and responses, deposition transcripts and exhibits, pleadings, motions, affidavits, written testimony and briefs—that quote, summarize, or contain materials protected under these protective conditions are also covered by the same protective conditions and certification requirements, and shall be filed with the Commission only under seal. Documents submitted to the Commission as confidential shall remain sealed while in the Secretary's office or such other place as the Commission may designate so long as they retain their status as stamped confidential documents.
12. Any oral testimony, argument or other statements that quote, summarize or otherwise disclose materials protected under these protective conditions shall be received only in hearing sessions limited to Postal Service representatives and other persons who have complied with the terms of the protective order and have signed the attached certifications. The transcript pages containing such protected testimony shall be filed under seal and treated as protected materials under paragraph 11.
13. Notwithstanding the foregoing, protected material covered by paragraphs 11 or 12 may be disclosed to the following persons without their execution of a compliance certificate. Such disclosure shall not exceed the extent necessary to assist in prosecuting this proceeding or any appeals or reconsideration thereof.
 - (a) Members of the Commission.
 - (b) Court reporters, stenographers, or persons operating audio or video recording equipment for such court reporters or stenographers at hearings or depositions.
 - (c) Any other person designated by the Commission in the interest of justice, upon such terms as the Commission may deem proper.

- (d) **Reviewing courts and their staffs.** Any person seeking to disclose protected information to a reviewing court shall make a good faith effort to obtain protective conditions at least as effective as those set forth in this document. Moreover, the protective conditions set forth herein shall remaining in effect throughout any subsequent review unless overridden by the action of a reviewing court.
14. **A participant may apply to the Commission for a ruling that documents, categories of documents, or deposition transcripts, stamped or designated as confidential, are not entitled to such status and protection.** The Postal Service or other person that designated the document or testimony as confidential shall be given notice of the application and an opportunity to respond. To revoke confidential status, the proponent of declassification must show by a preponderance of the evidence that public disclosure of the materials is consistent with the standards of the Freedom of Information Act, 5 U.S.C. §552(b)(1)-(9), and Commission precedent.
15. **Subpoena by Courts or Other Agencies.** If a court or other administrative agency subpoenas or orders production of confidential information which a participant has obtained under the terms of this protective order, the target of the subpoena or order shall promptly (within two business days) notify the Postal Service (or other person who designated the document as confidential) of the pendency of the subpoena or order to allow the designating party time to object to that production or seek a protective order.

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. R2000-1/22 (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/_____ (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 _____