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PRESIDING OFFICER'S
RULING NO. R2000-1/29

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

Postal Rate and Fee Changes

Docket No. R2000-1

PRESIDING OFFICER'S RULING GRANTING
MOTION OF UNITED PARCEL SERVICE TO
COMPEL RESPONSES TO INTERROGATORIES
UPS/USPS-T34-1(a)-(c) AND 3(e) AND DIRECTING
APPLICATION OF PROTECTIVE CONDITIONS
TO PORTIONS OF RESPONSIVE MATERIALS

(Issued April 5, 2000)

Intervenor United Parcel Service has moved to compel responses to portions of two interrogatories that seek information regarding the contract between the Postal Service and Emery Worldwide Airlines ("Emery") pursuant to which Emery provides processing, surface transportation, and air transportation for Priority Mail. Parts (a) through (c) of UPS/USPS-T34-1 request a copy of the current contract, any other documents defining the relationship regarding Priority Mail services, and a copy of the contract used in developing the Priority Mail rates developed by witness Robinson if the current contract was not so used. UPS/USPS-T34-3(e) asks for the rate or rates the Postal Service will pay Emery in the test year under the contract currently in effect. The Postal Service objected to these discovery requests on the grounds that responsive material is confidential, privileged, and proprietary business and commercial information, with respect to both the Postal Service and the contractor. The Service also claims that UPS/USPS-T34-3(e) is redundant, inasmuch as it requests contractual information sought in UPS/USPS-T34-1.

The Motion. In its Motion to Compel,¹ UPS claims that the requested information is highly relevant to the determination of proper rates for Priority Mail, and argues that none of it requires submission under protective conditions. UPS notes that many of the issues raised by the Postal Service's objections regarding the Emery contract were resolved in the discovery stage of Docket No. R97-1, in which the Presiding Officer ordered the contract to be produced, with some sensitive information therein subject to a protective order.

Unlike the outcome of that discovery dispute, however, UPS argues that there is no longer a need to subject any of the responsive information to protective conditions in this case. According to UPS, the Postal Service has no legal ground for resisting disclosure under 39 U.S.C. § 410(c)(2), because federal courts have repeatedly held that contracts entered into by federal agencies are not exempt from disclosure under the Freedom of Information Act as privileged or confidential commercial or financial information. Furthermore, UPS contends that the Service's agreement with Emery is subject to the Service's obligation under 39 U.S.C. § 5005(b)(3) to make available for inspection any contract it has entered into with any carrier or person for the transportation of mail, and thus is not shielded from public disclosure. Motion at 2-6.

UPS also cites circumstantial facts to support its argument for public disclosure of the Emery contract. In R97-1, UPS observes, the Postal Service voluntarily filed library references containing specific contract cost information, including line items for the costs of the WNET contract between it and Evergreen International Airlines, Inc. UPS also attempts to show that the Postal Service makes non-transportation contracts available, including their price terms, by providing a copy of a Contract and Award for a Contract Postal Unit as an attachment to its motion. Finally, UPS claims that the Postal Service and Emery have effectively waived whatever claims of confidentiality they may

¹ Motion of United Parcel Service to Compel Production of Information and Documents Requested in Interrogatories UPS/USPS-T34-1(a)-(c) and 3(e) to Witness Robinson, March 3, 2000.

have had with respect to their contract because of various forms of disclosure about the contract that have occurred, which are also documented in attachments to the motion. In light of these disclosures, UPS argues, the contract cannot be considered information “which under good business practice would not be publicly disclosed.” *Id.* at 6-7.

Postal Service Opposition. In its response to the motion,² the Postal Service claims that UPS has presented no new information to counter its and Emery’s position, accepted by the Presiding Officer in Docket No. R97-1, “that the contract information sought is commercially sensitive, and is not the type of information that any rational business entity would willingly place in the hands of its competitors.” *Opposition* at 2. The Service argues that Commission precedent and practice, not judicial doctrines developed in the context of Freedom of Information Act litigation, apply to controversies concerning potentially commercially sensitive materials in the context of Commission proceedings. *Id.* at 4. According to the Service, UPS’ reliance on 39 U.S.C. § 5005(b)(3) as an alternative legal basis for disclosure of the Emery contract is misplaced. The Service argues that Congress did not intend the provision, which it purportedly enacted to provide a measure of security to “star route” and other highway contractors, to apply to a “complex amalgam of mail processing, distribution and transportation” such as the PMPC contract. In addition, the Service notes that the Presiding Officer in R97-1 applied protective conditions to the Emery contract notwithstanding an acknowledgement that § 5005(b)(3) apparently applied. *Id.* at 5.

Finally, the Service denies movant’s claim that recent disclosures by the Postal Service of materials from other contracts, and various statements made by Emery regarding its contractual relationship with the Service, constitute a waiver of any claim

² *Opposition of United States Postal Service to UPS Motion to Compel Production of Information and Documents Requested in Interrogatories UPS/USPS-T34-1(a)-(c) and 3(e) to Witness Robinson, March 10, 2000.*

of confidentiality they might otherwise assert. According to the Service, it and Emery have carefully protected pricing and other sensitive information in the PMPC contract from disclosure, and neither the Service's provision of materials from unrelated contracts nor Emery's public statements have revealed any of these sensitive aspects of the contract. Furthermore, the Service argues, parties who possess business documents that are commercially sensitive in part should be allowed some discretion in choosing to disclose non-sensitive aspects while continuing to protect the sensitive portions. *Id.* at 6.

For these reasons, the Service requests a finding that the commercial sensitivity of information sought by UPS from the PMPC contract outweighs its relevance to ratemaking issues in this proceeding, which it asserts should not be overemphasized because of the tenuous and somewhat experimental nature of the processing system. In the event of a finding that disclosure of some or all of the contract materials is warranted, the Service strongly urges that disclosure be conditioned on "the application of protective conditions at least as strict as those governing the limited disclosures ordered in Docket No. R97-1." *Id.* at 7.

Opposition of Emery Worldwide. In addition to the Service's opposition, Emery Worldwide Airlines independently filed comments opposing the relief sought by UPS.³ Emery contends that the PMPC contract should not be publicly disclosed because it contains confidential and proprietary information that would cause substantial competitive harm to Emery if released to the public. More specifically, Emery states that the contract contains over 100 pages of detailed pricing schedules, which include separate line items for transporting flats, parcels and outsides among various transportation and processing centers, as well as adjustment factors that reflect

³ Emery's Opposition to Motion of United Parcel Service to Compel Production of Information and Documents Requested in Interrogatories UPS/USPS-T34-1(a) to 1(c) and UPS/USPS-T34-3(e) to Witness Robinson, March 10, 2000.

Emery's business experience and its analysis of expected costs and profits on the various routes. *Id.* at 1-2. According to Emery, public disclosure of this detailed proprietary and confidential information would allow UPS, or any other competitor, to avoid the extensive work involved in developing such a pricing strategy, and to estimate and undercut Emery's bids on other commercial and government air freight contracts. Emery asserts that the likelihood of this outcome renders public disclosure of this sensitive material in the PMPC contract contrary to both the Freedom of Information Act and the Trade Secrets Act. *Id.* at 3-5.

Emery likewise denies that 39 U.S.C. § 5005 requires public disclosure of the contract. In Emery's view, this statutory provision applies strictly to contracts for mail transportation alone, not contracts for the operation of large-scale transportation and processing networks of the kind Emery developed and operates for the Service. Emery also states that the contract does not contain a "public release" warning, but to the contrary has been subject to strict non-disclosure requirements at all times, including the solicitation process. *Id.* at 8-9.

Emery also asserts that the Service's release of information from the WNET and TNET contracts does not justify public release of corresponding PMPC information, as determinations to release contract information must be made on a case-by-case basis. Moreover, Emery asserts that the WNET and TNET contracts differ greatly from the PMPC contract, as the former contain much less extensive and detailed price terms; do not disclose the operations of a complex network for the delivery of a product that faces fierce marketplace competition; and do not correlate per-piece unit prices to volumes and origin-destination pairs. These differences, Emery argues, would result in far more competitive benefit to UPS and substantial harm to Emery's competitive position. Emery also denies that its release of general, non-confidential information in the form of facility tours and press releases concerning performance under the contract compels or justifies releasing its confidential information. *Id.* at 6-7.

On the basis of these considerations, Emery asserts that portions of the PMPC contract, to the extent they are relevant to issues in this proceeding, should be provided only under strict protective conditions to prevent disclosure of Emery's confidential and proprietary information. As it stated in earlier comments,⁴ these conditions should bar access by any individual involved in competitive decisionmaking. *Id.* at 9-10.

Considerations Underlying the Ruling. I agree with the Postal Service that the precedent for treating PMPC contract material established in the last omnibus rate case provides better guidance here than analogies to court decisions interpreting the Freedom of Information Act or other federal statutes. For the reasons presented in the analysis of applicable law in Presiding Officer's Ruling No. R97-1/62, I find no bar to disclosure of information from the PMPC contract in this case on the basis of either the Freedom of Information Act or the Trade Secrets Act.⁵ Consequently, the governing consideration is the balance of the apparent relevance of the PMPC contract information sought against the harm likely to result from disclosure of demonstrably privileged content.

Although the Postal Service argues that "the role of [the] PMPC contract in determining the ongoing costs and rates of the Postal Service should not be overemphasized" because "the PMPC network still is somewhat experimental, and may or may not continue into the future[,]" Postal Service Opposition at 6-7, it is clear that

⁴ Emery's Information Expression of Views on Conditions for Access to Protected Material, February 28, 2000.

⁵ See Presiding Officer's Ruling No. R97-1/62, November 17, 1997, at 5-8. The Postal Service suggests, in its Opposition at 4-5, that even if Commission precedent and practice did not govern this controversy, interpretations of the ambit of Exemption 4 under the Freedom of Information Act would not be dispositive because of judicial recognition that the more inclusive exemption in 39 U.S.C. § 410(c)(2) "trumps" FOIA disclosure requirements. I do not find this principle pertinent in the current controversy. While it may define the standard of disclosure to which the Postal Service will be held in FOIA litigation, the Commission has limited its recognition of the applicability of § 410(c)(2) to settings in which "the public hearing provisions of Chapter 36 of the Postal Reorganization Act do not apply." See Order No. 1261, Order Denying Appeal of Piper & Marbury from the Commission's Disposition of Its FOIA Request for a Copy of the Commission's Report on International Mail, September 15, 1999, at 4.

PMPC contract costs are directly relevant to determining the level of Priority Mail costs in the test year, as well as the appropriate design of Priority Mail rates. Witness Robinson's proposed Priority Mail rates incorporate an "Emery Adjustment" for recovering the Cost Segment 16 costs associated with the PMPC contract.⁶ USPS-T-34 at 12-13. This adjustment is designed, in part, to recognize that under the contract "the Postal Service is incurring costs (at least in the short run) on a less weight-related basis." *Id.* at 14. Thus, the component prices charged under the contract bear directly on estimated Priority Mail costs in the test year, and their configuration may yield evidence germane to proper rate design for the subclass.

As in Docket No. R97-1, the sensitivity of different portions of the PMPC contract material is likely to be highly variable. Presiding Officer's Ruling No. R97-1/62 found certain contract information—even some of "the prices paid Emery by the Postal Service[,] " which would be responsive to movant's interrogatory UPS/USPS-T34-3(e) in this case—to be insufficiently revealing of Emery's direct costs to warrant production under protective conditions. Presiding Officer's Ruling No. R97-1/62, November 17, 1997, at 11. However, for other materials, the Presiding Officer accepted Emery's argument that public disclosure of price variations in the contract's pricing schedule—reflecting Emery's industry experience and its analysis of costs and profits on various routes—could work to its competitive detriment. For this reason, the Presiding Officer ruled in favor of production under protective conditions.

Emery raises essentially identical considerations in its Opposition and supporting Declaration with respect to the current PMPC contract, which it represents to contain "over 100 pages of pricing schedules and over 10,000 prices for point-to-point transportation over a five-year period." Declaration of Michael Nadolski at 1. Contrary

⁶ This adjustment is consistent with witness Meehan's treatment of direct payments to Emery under the PMPC contract as 100 percent volume variable. See Response of United States Postal Service Witness Meehan to Presiding Officer's Information Request No. 3, response to question POIR/USPS-4, February 28, 2000.

to movant's arguments, I cannot regard the cited conduct or general statements by Emery about the contract as constituting a waiver of its proprietary interests in this sensitive information. Nor does the Postal Service's disclosure of the price terms of other contracts justify the indiscriminate release of the more complex and commercially sensitive terms apparently contained in the PMPC contract. Accordingly, I conclude that these sensitive portions of the PMPC contract merit disclosure only under the protective conditions that have been applied to other privileged material in this proceeding.

However, the less sensitive portions of the contract should be available for public scrutiny, as they were in Docket No. R97-1. In that case, the Postal Service agreed to file a redacted version of the PMPC contract then in effect as a public library reference. See Presiding Officer's Ruling No. R97-1/62 at 1. The Presiding Officer also ordered that the information in the library reference be supplemented by the production of other responsive material. *Id.* at 11, 13 (Ruling, para. 1). Only the detailed pricing information found to be privileged was allowed to be produced under protective conditions. *Id.* at 11-12, 13 (Ruling, para. 2).

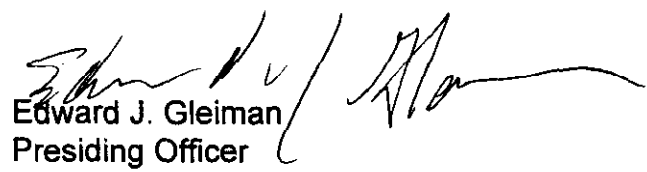
Inasmuch as this outcome apparently allowed participants access to relevant information without compromising the commercially sensitive portions of the contract material, I shall direct the same treatment in this case. The Postal Service shall file the complete body of contractual material responsive to the interrogatories in controversy under the protective conditions that have been applied to other sensitive information in this proceeding.⁷ I will also direct the Service to submit a public library reference containing the same materials, redacted to remove all the detailed pricing information referenced in the Emery Opposition and Declaration of Michael Nadolski.

⁷ Should rate information responsive to UPS/USPS-T34-3(e) be duplicative of material responsive to UPS/USPS-T34-1, the Service need only provide a cross-reference citing the germane portions of the former.

RULING

1. The Motion of United Parcel Service to Compel Answers to Interrogatories UPS/USPS-T34-1(a)-(c) and 3(e), filed March 3, 2000, is granted, subject to the protective conditions attached to this ruling. Responsive material shall be filed by April 12, 2000.

2. The United States Postal Service shall file a redacted version of materials responsive to Interrogatories UPS/USPS-T34-1(a)-(c) and 3(e), as described in the body of this ruling, by April 12, 2000.


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. R2000-1/29 (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.
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. R2000-1/29 (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. R2000-1/29 (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 _____