

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

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POSTAL RATE COMMISSION  
OFFICE OF THE SECRETARY

Postal Rate and Fee Changes, 2000 )

Docket No. R2000-1

OFFICE OF THE CONSUMER ADVOCATE  
MOTION TO COMPEL A RESPONSE  
TO OCA/USPS-T9-43(b) TO WITNESS TAYMAN  
(April 10, 2000)

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To: Hon. Edward J. Gleiman  
Presiding Officer

The Office of the Consumer Advocate ("OCA"), pursuant to Rule 21 of the Rules of Practice of the Postal Rate Commission ("Commission"), hereby moves to compel a response to interrogatory OCA/USPS-T9-43(b) directed to witness Tayman. In accordance with the Commission's Rules 26(d) and 27(d), the interrogatory, filed March 15, 2000, is attached hereto together with the Postal Service objection filed March 27, 2000.

REQUEST

In part (b) of interrogatory OCA/USPS-T9-43, the OCA asked the Postal Service to provide "all documents, notes and analysis performed in determining the level of the contingency for the present docket." In its objection, the Postal Service makes the sweeping assertion that: "Any such documents, other than those filed as part of this case, were pre-decisional and would therefore fall under the deliberative process privilege."

## ARGUMENT

It is important to note at the outset what the Postal Service has not alleged: the Service has not questioned the relevance of the information requested by the OCA; nor has the Service alleged that it would be burdensome to produce the requested material. This leaves as the sole remaining issue to be resolved by the Presiding Officer whether any "deliberative process" privilege is sufficient to outweigh the OCA's and the Commission's need for the requested information.

A useful starting point for examining the Postal Service's objection is Presiding Officer's Ruling No. R2000-1/28.<sup>1</sup> In this ruling, the Presiding Officer described the *branches of the decision tree that must be followed before determining finally that a protection applies and will act to bar provision of otherwise relevant and discoverable material.*

First, the Postal Service must carefully review each document for which a claim of protection is asserted and, upon finding that the document is factual in nature or that factual information can be separated from opinion/policy information, such information must be furnished immediately.<sup>2</sup>

Second, the invoker of the claim must establish that the document in question is pre-decisional, *i.e.*, "it must be developed before the deliberative process is complete."<sup>3</sup>

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<sup>1</sup> "Presiding Officer's Ruling Granting Douglas F. Carlson's Motion to Compel Response to Interrogatories (DFC/USPS-18, 19(c) & 20(b)-(e)), issued April 3, 2000.

<sup>2</sup> *Id.* at 4: "Purely factual documents, even if used in deliberation, are usually not protected."

<sup>3</sup> *Id.* at 3.

An important caveat is imposed at this point in the evaluation—"if the document is expressly incorporated or adopted into a final decision," the protection is lost.<sup>4</sup>

Third, the information at issue must be deliberative and non-factual in nature.<sup>5</sup>

Fourth, in order to establish the twin conditions of pre-decisional and deliberative character, the party asserting the claim must prepare a Vaughn index, setting forth sufficient information to meet the initial burden of proving that the documents are both pre-decisional and deliberative in character.<sup>6</sup>

Fifth, the party requesting the document may then demonstrate that the need for the information outweighs the regulatory interest in preventing disclosure, since the privilege is only qualified, not absolute.<sup>7</sup>

The Postal Service's failure to accompany its objection (which is founded upon an assertion of privilege) with a Vaughn index is a violation of longstanding Commission and judicial policy,<sup>8</sup> and alone is grounds for dismissing the objection out of hand. In

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 4.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> The Presiding Officer, in Ruling No. R87-1/59 ("Presiding Officer's Ruling Granting in Part New York State Consumer Protection Board Motion to Compel," issued July 31, 1987) at 4, further clarified the Commission's position with respect to the deliberative process privilege:

[T]he privilege invoked by the Postal Service should properly be described as the common law deliberative functions privilege, the one that is reflected (but not created) in exemption (b)(5) of the Freedom of Information Act. This privilege is not coterminous with the "executive privilege," which is based upon the Constitutional principle of separation of powers, and must be invoked directly by the President, or his cabinet officials on his behalf.

Ruling No. R2000-1/28, the Presiding Officer stated unequivocally that: "the Service should accompany its objections with a Vaughn index."<sup>9</sup>

In Presiding Officer's Ruling No. MC95-1/22,<sup>10</sup> for example, the Postal Service asserted the deliberative process privilege in an attempt to escape provision of documents requested by ANM. The Postal Service's Opposition to ANM's motion to compel was characterized by the Presiding Officer as "making broad claims about the kind of documents for which various forms of evidentiary privilege are available, but . . . avoid[ing] discussi[on] [of] the kind of showing that the law requires to sustain a claim that these privileges apply."<sup>11</sup> The Presiding Officer continued:

The Postal Service . . . utterly fails to show to what extent any specific document or set of documents responsive to ANM's request . . . contains "the recommendations, options, and considerations" of Postal Service employees. The law requires such a showing if a claim of privilege is to be sustained.

The evidentiary privileges available in the Commission's formal hearings correspond to those available in Federal civil courts. The basis for the privilege covering trial preparation materials in Federal civil courts is Rule 26(b) of the Federal Rules of Civil Procedure. Federal Rule 26(b)(5) describes the showing that is necessary to invoke an evidentiary privilege. It states

When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information

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<sup>9</sup> Ruling No. R2000-1/28 at 4.

<sup>10</sup> "Presiding Officer's Ruling Granting ANM Motion to Compel Answers to Document Requests to USPS Witness Pajunas," issued June 16, 1995.

<sup>11</sup> *Id.* at 5.

itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

With respect to the privilege for trial preparation materials, the Postal Service clearly has not provided a showing of the kind described in Federal Rule 26(b)(5). Its pleadings fail to expressly invoke the trial preparation materials privilege with respect to any specific document, let alone describe any document in a manner that is specific enough to allow independent evaluation of the claim that the privilege for trial preparation materials applies to it.<sup>12</sup>

In that case, the bare assertion of privilege, without the requisite description of responsive documents sufficient to enable a participant to determine whether the documents at issue consist predominantly of legal opinions and litigation strategy or contain severable factual material, was held not to satisfy the requirements of Federal Rule 26(b)(5).<sup>13</sup> Accordingly, the Postal Service was ordered to produce the requested documents.

The Commission's practice of requiring an informative description of the contents of documents for which a deliberative process privilege is claimed is derived from a body of judicial case law that explicates the burdens and conditions that must be met when claiming protection for pre-decisional material.<sup>14</sup> In *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F. 2d 395, 404-05 (D.C. Cir. 1984), the Court of Appeals held that:

[D]eliberative process privileges [] are narrowly drawn privileges which must be asserted according to clearly defined procedures.

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 7.

<sup>14</sup> *EPA v. Mink*, 410 U.S. 73 (1972) is in the forefront of cases that define the scope of the privilege, and is followed by the Commission. See Rulings MC95-1/22 at 7, in which the Presiding Officer stated that, while the *Mink* case is an interpretation of exemption (b)(5) of the Freedom of Information Act, Congress intended the exemption "to parallel the scope of the deliberative process privilege in the context of civil litigation;" and R87-1/59 at 4.

[T]he deliberative process privilege . . . is relative to the need demonstrated for the information. The litigant's need for the information cannot be balanced against its sensitive and critical role in the government's decisionmaking process without any indication of what the information is. Any claim that the documents would be protected by this privilege is purely speculative.

Assertion of the deliberative process privilege . . . requires a formal claim of privilege by the head of the department with control over the information. The formal claim must include a description of the documents involved, a statement by the department head that she has reviewed the documents involved, and an assessment of the consequences of disclosure of the information.<sup>15</sup>

Two additional elements in evaluating the propriety of applying the privilege were identified in the *Arthur Andersen* case—(1) the role of the government as plaintiff and (2) the seriousness of the litigation.<sup>16</sup> The district court cited the common sense principle that, “in evaluating the procedural fairness of ordering disclosure, the role of the government as plaintiff is instrumental to the determination of whether governmental claims of privilege must give way.”<sup>17</sup> In addition, “when the factors shaping decisions made by government officials are at issue, privileges designed to shield the deliberative process ‘may not be raised as a bar against disclosure.’”<sup>18</sup>

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<sup>15</sup> Citations omitted. See also *Dept. of Economic Development v. Arthur Andersen & Co.*, 139 FRD 295, 300 (SDNY 1991), *reconsid. den.*, 139 FRD 594 (SDNY 1991) (citations omitted): “Blanket claims asserting attorney client privileges are improper. The privilege must be determined on a case by case analysis of the relevant factors not upon a blanket assertion of the privilege. . . . The party asserting the privilege bears the burden of presenting the underlying facts or circumstances demonstrating the existence of the privilege.”

<sup>16</sup> 139 FRD at 298-99.

<sup>17</sup> *Id.* at 299.

<sup>18</sup> *Id.* (citations omitted).

The information sought by the OCA falls squarely within this description. First, the Postal Service is the proponent for change in the instant proceeding; it seeks to increase the rates of all classes and services of mail by \$2.8 billion,<sup>19</sup> 60 percent of which is derived from the proposed contingency.<sup>20</sup> Furthermore, the material sought by the OCA goes directly to the information used by witness Tayman to balance “management’s assessment of the degree of financial risk” against “the Postal Service’s desire to keep rate increases as low as possible.”<sup>21</sup> Witness Tayman has articulated some reasons for which a contingency of 2.5 percent is thought appropriate by management, but it is possible that there are additional reasons not yet expressed for the record. The Postal Service owes the Commission and the participants a full explanation of the reasons underlying the proposal of 2.5 percent, particularly in light of the significant increase in the contingency request from Docket No. R97-1.<sup>22</sup> Any reasons that have shaped the size of the proposed contingency—including pre-decisional studies, discussions, or other information—have been put at issue by the Postal Service by bringing its Request to the Commission. Moreover, it appears that such materials may now be “incorporated into” the Service’s decision to request a 2.5 percent contingency, rendering the materials discoverable.<sup>23</sup>

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<sup>19</sup> “Request of the United States Postal Service for a Recommended Decision on Changes in Rates of Postage and Fees for Postal Services,” filed January 12, 2000, at 2.

<sup>20</sup> *I.e.*, \$1.68 billion in the TYAR. USPS-T-9 at 43.

<sup>21</sup> Interrogatory 43 quotes this statement from the Tayman testimony at 43.

<sup>22</sup> Compare the 1 percent contingency of \$0.6 billion in Docket No. R97-1 to the 2.5 percent contingency of \$1.68 billion proposed in the Tayman testimony.

<sup>23</sup> Ruling No. R2000-1/28 at 3.

The seriousness of the litigation—the second factor noted in Arthur Andersen—is also involved in any discovery effort to learn more about the factors underlying the proposed contingency. As is stated in the preceding paragraph, the increase in the contingency is the largest single factor in the increase in rates being sought. The large proportion of the total requested increase that the contingency comprises—60 percent—is unprecedented.<sup>24</sup> In accordance with the shifting of burden noted in Ruling No. R2000-1/28, the need for a complete understanding of all of the factors involved in the Postal Service's decision to seek such a proportionately high contingency far outweighs any Postal Service need for concealment.

The Postal Service's failure to file a single scrap of information (let alone a Vaughn index) on the types of materials that are responsive to the OCA's interrogatory prevents the OCA from fully addressing several of the criteria outlined in Ruling No. R2000-1/28, *e.g.*, whether the documents requested are factual in nature or whether factual content is severable from deliberative content;<sup>25</sup> whether the material is pre-decisional; and whether Postal Service claims that its interests would be injured by disclosure are unfounded. The Postal Service was obligated, both under Commission precedent and judicial case law, to file a Vaughn index together with its objection so that the OCA could exercise its rights to challenge the Postal Service's claims. The interests of the OCA have been severely prejudiced by the Postal Service's failure, and for that reason alone, the objection should be dismissed. Nevertheless, the OCA has

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<sup>24</sup> See Appendix.

<sup>25</sup> However, since the OCA requested "documents, notes and analysis," it is reasonable to expect that some of this material contains factual content.



established the importance of the information requested in interrogatory 43(b) and, whatever the Postal Service's later argues, the need for the material in question clearly outweighs any Postal Service interest in concealing it. Accordingly, production of all responsive material should be ordered forthwith.

Witness Tayman is scheduled to stand oral cross-examination on April 11, 2000, long before the Presiding Officer will be in a position to rule on the OCA's motion to compel.<sup>26</sup> Given the Postal Service's resistance to disclosing any information the Service considers "pre-decisional" or "deliberative," even if it underlies the proposal for a 2.5 percent contingency, the OCA may request that witness Tayman be recalled to the stand for additional oral cross-examination on material that may be furnished at a later time.

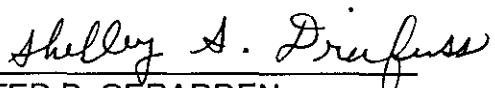
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<sup>26</sup> The Postal Service may file a response to the instant motion to compel as late as April 17, 2000, under Commission rules 26(d) and 27(d).

WHEREFORE, the OCA requests that the Postal Service be directed to respond to interrogatory OCA/USPS-T9-43(b) in full, and to provide all documents relating to determining the level of the contingency request in this case.

Respectfully submitted,

OFFICE OF THE CONSUMER ADVOCATE

  
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APPENDIX

Case	Requested Increase in Revenue	Amount of Contingency	Contingency/Revenue Increase
<sup>1</sup> R76-1	\$2.31 billion <sup>2</sup>	\$0.54 billion <sup>3</sup>	23%
R77-1	\$1.97 billion <sup>4</sup>	\$0.66 billion <sup>5</sup>	34%
R80-1	\$3.75 billion <sup>6</sup>	\$0.54 billion <sup>7</sup>	14%
R84-1	\$3.11 billion <sup>8</sup>	\$1.0 billion <sup>9</sup>	32%
R87-1	\$4.3 billion <sup>10</sup>	\$1.3 billion <sup>11</sup>	30%
R90-1	\$6.16 billion <sup>12</sup>	\$1.6 billion <sup>13</sup>	25%
R94-1	\$4.11 billion <sup>14</sup>	\$1.05 billion <sup>15</sup>	26%
R97-1	\$2.24 billion <sup>16</sup>	\$0.6 billion <sup>17</sup>	27%

Average proportion of contingency to revenue increase for the eight omnibus rate cases is 26.4%.

<sup>1</sup>

<sup>2</sup> USPS Request, filed December 19, 1975.

<sup>3</sup> PRC Op. R76-1 at 19.

<sup>4</sup> USPS Request, filed July 13, 1977.

<sup>5</sup> PRC Op. R77-1 at 42.

<sup>6</sup> USPS Request, filed April 21, 1980.

<sup>7</sup> PRC Op. R80-1, ¶ 0138.

<sup>8</sup> USPS Request, filed November 10, 1983.

<sup>9</sup> PRC Op. R84-1, Appendix A.

<sup>10</sup> USPS Request, filed May 10, 1987.

<sup>11</sup> PRC Op. R87-1, Appendix A.

<sup>12</sup> USPS Request, filed March 6, 1990.

<sup>13</sup> PRC Op. R90-1, Appendix A.

<sup>14</sup> USPS Request, filed March 8, 1994.

<sup>15</sup> PRC Op. R94-1, Appendix A.

<sup>16</sup> USPS Request, filed July 10, 1997.

<sup>17</sup> PRC Op. R97-1, Appendix C.

OCA/USPS-T9-43. On page 43 of your testimony, you state, "This mid-range contingency balances the Postal Service's desire to keep rate increases as low as possible with management's assessment of the degree of financial risk that currently faces the Postal Service."

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(b) Please provide copies of all documents, notes and analysis performed in determining the level of the contingency for the present docket.

OBJECTION OF UNITED STATES POSTAL SERVICE TO INTERROGATORY  
OF THE OFFICE OF THE CONSUMER ADVOCATE TO WITNESS TAYMAN  
(OCA/USPS-T9-43(B))

The United States Postal Service hereby objects to interrogatory OCA/USPS-T9-43(b). This interrogatory seeks "all documents, notes and analysis performed in determining the level of the contingency for the present docket." This question is virtually identical to DMAIUSPS-TS-36, to which the Postal Service objected on March 2,2000, stating: "Any such documents, other than those filed as part of this case, were pre-decisional and would therefore fall under the deliberative process privilege." Similarly, the Postal Service objects to the instant interrogatory on the same grounds.

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing document upon all participants of record in this proceeding in accordance with section 12 of the rules of practice.

*Shelley S. Dreifuss*  
SHELLEY S. DREIFUSS

Washington, D.C. 20268-0001  
April 10, 2000