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POSTAL RATE COMMISSION
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PRESIDING OFFICER'S
RULING NO. R2000-1/41

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 IN PART MOTION OF
UNITED PARCEL SERVICE TO COMPEL
PRODUCTION OF INFORMATION AND
DOCUMENTS REQUESTED IN INTERROGATORY
UPS/USPS-T34-11 TO WITNESS ROBINSON

(Issued April 14, 2000)

In its Interrogatory UPS/USPS-T34-11, intervenor United Parcel Service has asked the Postal Service to identify and describe all systems for measuring the service performance of Priority Mail, including the system known as Priority End to End System (PETE); to provide all documentation indicating how such systems operate and make measurements; and to provide results for all such systems annually from FY 1990 through FY 1999, and up to the present. The Service has objected to the interrogatory, claiming it is overbroad insofar as it requests performance information for years prior to those at issue in this case, and that responding would require a burdensome review and collection of documents. The Service also objects on the ground that the requested information "includes proprietary, confidential, commercially sensitive, geographically-specific performance data which the dictates of sound business practice render inappropriate for disclosure to the public, and in particular, to competitors such as UPS." Objection of February 28, 2000, at 1-2.

UPS Motion to Compel. In its Motion,¹ UPS argues that the requested information is highly relevant to determining an appropriate cost coverage for Priority Mail, and that it can be provided with neither undue burden nor injury to the legitimate interests of the Postal Service. However, in an effort to narrow the scope of the dispute with the Service, UPS also states its willingness to limit its request for relief to: (1) national, rather than more geographically-specific results; and (2) the period from FY 1993 to FY 1999, on a quarterly basis if available. Motion at 2.

UPS denies that its request for data prior to the base year in this case, with the modifications specified above, is overbroad. Such data are required, UPS argues, to enable the parties and the Commission to compare Priority Mail's current delivery performance—one aspect of value of service—to levels in periods leading up to the Commission's R97-1 decision. In that case, UPS observes, the Commission reduced the cost coverage for Priority Mail from the level recommended in Docket No. R94-1, in part because of one witness' analysis suggesting that Priority Mail often fails to provide a standard of service superior to, or sometimes even equal to, that of First-Class Mail. Therefore, UPS argues, a history of Priority Mail's actual performance from the base year in R94-1 (FY 1993) to the base year in R97-1 (FY 1996), and from that year through the most recent year, is highly relevant to determining an appropriate cost coverage for Priority Mail. *Id.* at 2-3.

Contrary to the Postal Service's objection, UPS also claims that the requested information can be provided without undue burden. UPS notes that the Service has not provided a statement of the effort required to answer the request, or estimates of cost and work hours required to do so, which § 26(c) of the rules of practice requires. According to UPS, it is unlikely that the Service "has such a plethora of systems for measuring Priority Mail performance that providing the manuals for each system would

¹ Motion of United Parcel Service to Compel Production of Information and Documents Requested in Interrogatory UPS/USPS-T34-11 to Witness Robinson, March 13, 2000.

be an undue burden.” *Id.* at 3-4. Additionally, UPS observes that the interrogatory would not require the Service to perform any new calculations, only to collect information that is already available.

Finally, UPS argues that responsive Priority Mail service performance information is not, and should not be, confidential. Even assuming the Postal Service’s objection extends only to geographically-specific performance information, UPS states, its confidentiality claim is “mystifying,” because the Service apparently publicizes such information on a regular basis.² *Id.* at 4-5. Furthermore, UPS states that the Postal Service refers to PETE data in its communications to the general public, such as the Comprehensive Statement on Postal Operations for 1998. *Id.* at 5. Even if geographically-specific performance data could be found to be confidential, UPS further argues, the Service has waived any such claim by distributing it to the public, and by providing information in response to similar questions posed by other intervenors.³ In conclusion, UPS states that it is “curious for the Postal Service to take the position that data it already has on the performance of a service that it sells to the public is no business of the public.” *Id.* at 6.

Postal Service Opposition. In its Opposition to the motion to compel,⁴ the Postal Service generally reiterates its concerns regarding the scope and burden of providing responsive information. More particularly, the Service states that it does have a system for measuring the actual service performance of Priority Mail, previously identified as the Priority End to End System (PETE), which was initiated in accounting period 5 of

² UPS attaches four Postal Service newsletters to illustrate this practice of reporting geographically specific PETE results, from the Colorado/Wyoming, Long Island, Triboro, and Fort Worth Performance Clusters. *Id.*, Attachment B.

³ Specifically, UPS cites two institutional Postal Service responses to interrogatories of Douglas Carlson: Response of the United States Postal Service to Interrogatory of Douglas F. Carlson Redirected from Witness Robinson (DFC/USPS-T34-8), February 25, 2000; and Response of the United States Postal Service to Interrogatory DFC/USPS-49, March 2, 2000.

Fiscal Year 1997 and is contracted out to PriceWaterhouseCoopers (PWC), which also administers the program. Opposition at 2. The Service further represents that it possesses very little documentary information that would be responsive to UPS Interrogatory UPS/USPS-T34-11(a); that it has provided the only publication it has issued regarding PETE in response to Interrogatory DFC/USUS-49; and that the Service has determined that PWC does not have any manuals, guidelines, or directives indicating how the PETE system operates or makes performance measurements.

According to the Service, the only PWC document arguably responsive to the interrogatory is its proposal in connection with bidding for the PETE contract. The Service resists its production because PWC views it as commercially sensitive and confidential information. The Service also argues that any detailed information regarding the internal functions of the PETE system should be kept confidential "to prevent possible manipulation of the results by persons inside or outside the Postal Service, who may have an interest in the performance results of Priority Mail." *Id.* at 3.

The Service also denies that its publication of PETE information in internal Postal Service newsletters, whose intended audience is employees of the Service, constitutes a waiver of its claim of confidentiality. According to the Service, the limited amount of Priority Mail performance information disclosed to postal employees, which did not disclose the methodology used in calculating performance or include any details of the Service's contract with PWC, says nothing about the confidentiality and commercial sensitivity of the performance measurement criteria to be protected in this instance. In the event that disclosure is ordered, the Service strongly urges that it be under protective conditions as least as strict as those governing limited disclosures ordered in Docket No. R97-1.

⁴ Opposition of United States Postal Service to UPS Motion to Compel Production of Information and Documents Requested in Interrogatories UPS/USPS-T34-11 to Witness Robinson, March 24, 2000.

Lastly, with respect to the request for descriptive information about the PETE system in LPS/USPS-T34-11(b), the Service states it is prepared to withdraw its objection, inasmuch as it has already provided an answer in its response to interrogatory DFC/USP3-49.

Considerations Underlying the Ruling. There can be no doubt, and the Postal Service does not dispute, that the Priority Mail delivery performance information sought by UPS is highly relevant to issues to be decided in this case. As UPS correctly notes, such performance over time, and in comparison with other services provided by the Postal Service, is an important indicator of Priority Mail's value of service under § 3622(b)(2). The Commission's decision in R97-1, and subsequent judicial review, bear this out.⁵

As LFS also notes, the Postal Service has already provided some Priority Mail delivery performance information to other participants in this case.⁶ In light of its voluntary limitation of its request to the FY 1993 through FY 1999 period, and of the Service's failure to estimate the required effort and cost of responding as required in § 25(c) of the rules of practice, I find the Service's claim of undue burden to be unsubstantiated.

With regard to the Service's claims of confidentiality and commercial sensitivity, I find them wholly inapplicable to the interrogatory insofar as it requests actual delivery performance statistics on a nationwide basis. The Service has already provided partial performance results to other requesters, as noted above, and evidently is comfortable with sharing even localized PETE measurements on a current basis with its many employees. However, the four Postal Service newsletters may have come into non-

⁵ FRC Dkt. R97-1, Vol. 1, para. 5308; *United Parcel Service v. U.S. Postal Service*, 184 F.3d 821, 843-45 (D.C. Cir. 1999).

⁶ In addition to the institutional responses cited in note 3 *supra*, the Postal Service has provided quarterly PETE statistics to UPS in its response to APMU/USPS-T34-8, and direct to front witness Robinson, filed March 13, 2000.

possession, the breadth of the intended audience undermines a conclusion of confidentiality. For all practical purposes, such publications are in the public domain.

On a more basic ground, to the extent the Service's objection to this request can be interpreted as a claim that actual performance results for the Priority Mail service it offers and actively promotes is none of the mailing public's business, I categorically reject that position. Therefore, I shall direct that the Postal Service provide the performance data requested by UPS in a public response.

The interrogatory's request for manuals and other documentation that indicate how measurements are made and how the system operates involves potentially more serious concerns. The Postal Service's pleading is somewhat unclear on the subject of these materials; while strenuously insisting that they are sensitive and merit disclosure only under protective conditions, the Service represents that it "possesses very little documentary information that would be responsive[,]” and that the only arguably responsive PWC document is material which accompanied its contract bid. Opposition at 2. Nevertheless, in light of the Service's apparently legitimate concerns about maintaining the integrity of the PETE system, and of the Commission's prior protection of sensitive contractual documents, I will allow the Postal Service to submit whatever responsive system documentation may be found under the protective conditions currently in use in this proceeding.


In view of the Postal Service's withdrawal of its objection to UPS/USPS-T34-11(b), I expect the Service to provide a response forthwith.

RULING

1. The Motion of United Parcel Service to Compel Production of Information and Documents Requested in Interrogatory UPS/USPS-T34-11 to Witness Robinson, filed March 13, 2000, is granted, under the terms specified in the body of this ruling.

2. Manuals, guidelines, directives, or other responsive documents indicating how Priority Mail delivery performance measurements are made and how systems operate may be filed pursuant to the protective conditions attached to this ruling.

3. The Postal Service's response is due no later than April 21, 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. R2000-1/41 (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
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- (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.
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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. R2000-1/41 (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. R2000-1/41 (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 _____
