

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

**UNITED STATES POSTAL SERVICE
ANSWER IN OPPOSITION TO MOTION OF UNITED PARCEL SERVICE
TO COMPEL PRODUCTION OF DOCUMENTS REQUESTED IN
INTERROGATORY UPS/USPS—12, FILED APRIL 10, 2000**

On April 10, 2000, United Parcel Service (UPS) filed institutional interrogatory UPS/USPS-12. On April 20, the Postal Service filed an objection to interrogatory 12 on grounds of timeliness, relevance, commercial sensitivity and privacy (in part), law enforcement privilege (in part), and burden. On May 1, 2000, UPS filed its *Motion to Compel Production of Documents Requested in Interrogatory UPS/USPS-12* (hereinafter "Motion"). The Postal Service opposes UPS's Motion to Compel.

I. BACKGROUND

Subpart (a) of interrogatory 12 requests the production of twenty-two reports of the Inspector General, twenty of which are financial installation audits in specific postal units (in some cases including subordinate units) throughout the country, and two of which are related to commercial mail receiving agencies. Subpart (b) of interrogatory 12 requests twenty-nine Inspection Service reports ranging from financial installation audits of post offices, investigations of mailers in specific localities, investigations of postal units in specific localities, and a postal-wide report on the plant verified drop shipment system. The audit reports requested in subpart (a), as well as those in subpart (b) bearing the designation

"AF" or "PA",¹ consist of financial or performance audits of plants or facilities to determine whether internal controls are effective; revenue is properly collected, reported, and deposited; expenses are reasonable and proper; employees' work time is accurately recorded; assets are properly protected; and the unit's statements of account fairly represent the results of the financial operation for the performance period. Reports bearing the designation "RI" in the case report number are reports of revenue investigations, which include investigative reports of criminal fraud, revenue deficiencies by specific mailers, employee misconduct, and, in some cases, recommendations to management on how to correct procedures that result in revenue deficiencies.

II. MOOTNESS

In its Motion, UPS withdraws its request for four reports requested in subpart (a) and five reports requested in subpart (b). See Motion at 1 n.1.² These reports are accordingly not subject to the Motion to Compel. UPS's request for the report on plant verified drop shipment, numbered as AC-AR-99-001, is moot because the Postal Service provided this report in USPS LR-I-176, which was filed on February 4, 2000 in response to UPS/USPS-T10-2.

III. TIMELINESS

UPS completely fails to overcome the timeliness objection under Rule 25(a) of the Commission's Rules of Practice and Procedure. Rule 25(a) is the

¹ The Plant Verified Drop Shipment System Report (AC-AR-99-001) is an Inspector General Report.

² In subpart (a), this includes the reports numbered 1222661-AF(1), 1245456-PA(3), 1245454-PA(3), and 1245455-PA(3). In subpart (b), this includes the reports numbered 052-1234653-PA(3), 069-1266708-RI(2), 924-1254111-RI(1),

successor to Special Rule of Practice 2E, which was routinely used in Commission practice.³ Rule 25(a) provides that “[g]enerally, discovery against a participant will be scheduled to end prior to the receipt into evidence of that participant’s direct case.” This date was set as March 23 under P.O. Ruling No. R2000-1/4. An exception in Rule 25(a), which is identical to former Special Rule 2E, permits participants to request “information (such as operating procedures or data) available only from the Postal Service.” As clearly stated in Rule 25, however, the exception for operating procedures or data is “permissible only for the purpose of the development of *rebuttal testimony*” Rule 25(a) (emphasis added). PRC Order No. 1284 makes clear that the intent of the wording of this exception is to maintain consistency with prior precedent. PRC Order No. 1284 at 8.

At page 3 of its Motion, UPS challenges the timeliness ground by incorporating its argument on pages 3 to 8 of its Motion Compel Production of Information and Documents Requested in Interrogatory UPS/USPS-6 or, in the Alternative, to Extend Discovery Deadline on BRPW Parcel Post Estimates, which was filed on April 28 (hereinafter Motion on UPS/USPS-6). That argument, however, rests on the patently disingenuous assertion that prior rulings interpreting the predecessor to Rule 25(a) are mere “dicta.” Motion on UPS/USPS-6 at 8. To the contrary, prior rulings squarely address the instant fact pattern, and make clear that Rule 25(a) discovery is permitted only to the

and 924-1281479-RI(1).

³ Rule 25(a) was adopted in its present form in accordance with Order No. 1284, which was issued on February 3, 2000, at the conclusion of Docket No. RM98-3.

extent that the discovering party establishes that it is intended for the purpose of preparation of rebuttal to participants *other than the Postal Service*. Indeed, P.O. Ruling No. R97-1/85 addressed the very same fact pattern at issue here. In the controversy addressed by P.O. Ruling No. R97-1/85, the participant filed the discovery request on December 1, 1997, in the window after the close of discovery on the Postal Service, but before submission of participants' cases in chief.⁴ The Presiding Officer ruled that such discovery was impermissible under Rule 2E:

The Commission adopted Rule 2E to enable a participant to obtain information available only from the Postal Service for the purpose of developing rebuttal testimony. However, it is generally not available *for the purpose of developing testimony to rebut the direct case of the Postal Service*. See Presiding Officer's Ruling MC96-3/36 at 2. If Rule 2E were available for this purpose, the discovery cutoff date would have little meaning.

P.O. Ruling No. R97-1/85 at 3 (emphasis added). Similarly, in P.O. Ruling No. R97-1/89, the Presiding Officer explained:

the case must move forward with deliberate speed as we are operating on a compressed schedule. Therefore, discovery cutoff dates must be respected and Special Rule 2.E. will continue serve the limited purpose of enabling intervenors to obtain certain information from the Postal Service for the purpose of rebutting other intervenors' cases.

P.O. Ruling No. R97-1/89 at 3 (citing P.O. Ruling R97-1/85 at 3-4; P.O. Ruling MC96-3/36 at 2). These rulings derived from prior rulings, which held that discovery under the predecessor to Rule 25(a) "is limited to when a participant needs data available only from the Postal Service in order to *prepare testimony*

⁴ Specifically, the discovery request was filed on December 1, more than two weeks after the close of discovery on the Postal Service (November 14, 1997) and almost one month prior to the filing of intervenors' direct cases and rebuttal to the Postal Service (December 30, 1997). See P.O. Ruling No. R97-1/55; P.O.

to rebut participants other than the Postal Service." P.O. Ruling No. MC96-3/36 at 3 (emphasis added). Presiding Officer's Ruling No. MC96-3/21 similarly explained that:

Rule 2.E was generally intended to extend the otherwise applicable discovery period for information that can be obtained only from the Postal Service that is needed to prepare *rebuttal testimony*.

P.O. Ruling No. MC96-3/21 at 2 (emphasis added). Rule 25(a) memorializes the substance of these rulings by explicitly providing that discovery on the Postal Service for data or information is only available for the "development of rebuttal testimony." Rule 25(a); *see also* PRC Order No. 1284.

In its Motion, UPS further attempts to distinguish prior Rulings by asserting that it foresees the need to rebut the direct case to be filed by Parcel Shippers Association (PSA). UPS's argument is, however, based on nothing more than its own convoluted and speculative beliefs formulated from PSA's written and oral cross-examination of witness Mayes. Motion at 3. PSA has not filed a direct case, and UPS does not represent that it knows of the contents of that evidence. The possible existence of an argument inferred from cross-examination, however, is no basis for overturning the substantial body of Commission precedent regarding the true application of Rule 25(a). To rule otherwise would indeed render useless the Commission's March 23, 2000 deadline for discovery on the Postal Service's direct case.

Thus, under Rule 25(a) and under longstanding Commission precedent interpreting Special Rule 2E, discovery would not be permissible for the purpose of preparing rebuttal to *the Postal Service's* direct case. Rather, discovery under the exception for data and operating procedures is available only for the purpose of rebutting *other participants'* cases-in-chief, *not* the Postal Service's direct

case. See, e.g., P.O. Ruling Nos. R97-1/85, R97-1/89, MC96-3/36 at 3, MC96-3/21. Simply put, UPS cannot possibly direct discovery to the Postal Service for purposes of the preparation of rebuttal testimony to other participants' cases-in-chief, since the other participants have not even filed any cases-in-chief. To the extent UPS intends interrogatory 12 for the purpose of rebutting the Postal Service's direct case or preparing its case-in-chief, its opportunity to pose interrogatory 12 expired on March 23, seventeen days prior to the date on which interrogatory 12 was actually filed. Hence, UPS's Motion must be denied on this ground alone.

IV. LAW ENFORCEMENT RECORDS

UPS further states in its Motion that it will withdraw its request for those reports that "actually [fall] within FOIA Exemption 7", *i.e.*, those reports that are not for "general agency internal monitoring" instead of "alleged illegal acts." UPS Motion at 7-8. The Postal Service confirms that, through consultation with Office of Counsel in the Inspection Service, reports with the designation "RI" consist of either investigative memoranda prepared for criminal fraud prosecutions and revenue deficiency actions against mailers, and/or investigative summary reports on how revenue protection can be improved at specific installations.⁵ Many of the reports relate to investigations of shortpayment associated with mail not submitted in compliance with postal regulations, such as, for example, misuse of nonprofit mailing permits, inconsistencies in the application of value added refunds, bulk mail acceptance irregularities, and noncompliance with CASS

⁵ The report numbered IS920-1207670-RI(1) and IS 069-1296866-RI(1) was

certification requirements. Others extend to intentional misconduct, such as bribery and fraud by a mailer in combination with a postal employee. Such reports lead to either criminal prosecutions, revenue deficiency actions, administrative actions, or, depending on the findings, decisions to take no enforcement action whatsoever. In addition, some reports contain recommendations to management on how to better protect revenue at specific installations, such as a bulk mail acceptance unit.

Thus, the Postal Service submits that it has established that all of the reports bearing the designation "RI" in subpart (b) of interrogatory 12 are investigative reports. Such reports fall within FOIA Exemption 7 as they are investigative in nature. *See Stern v. F.B.I.*, 737 F.2d 84, 89 (D.C. Cir. 1984) (Records of internal agency investigations are considered to be compiled for "law enforcement purposes" when the investigations focus on specifically alleged acts, which, if proved, could amount to violations of civil or criminal law.). Consequently, the requested revenue investigation reports, or portions thereof, may be exempt from disclosure under applicable provisions of FOIA Exemption 7. In the absence of appropriate redactions, disclosure would be expected to interfere with enforcement proceedings for open cases, *cf. Western Journalism Center v. Office of the Independent Counsel*, 926 F. Supp. 189, 192 (D.D.C. 1996); could reasonably result in an unwarranted invasion of personal privacy, *cf. Fitzgibbon v. Central Intelligence Agency*, 911 F.2d 755, 767 (D.C. Cir. 1990); *Dunkelberger v. Department of Justice*, 906 F.2d 779, 781 (D.C. Cir.

prepared for a case that is still open.

1990) (observing that Exemption 7 embraces the privacy interest of “suspects, witnesses, or investigators, ‘in not being associated unwarrantedly with alleged criminal activity’”) (quoting *Stem v. FBI*, 737 F.2d 84, 91-92 (D.C. Cir.1984)); could disclose the identity of confidential sources; could disclose techniques and procedures for law enforcement investigations or prosecutions; and could disclose guidelines for law enforcement investigations or prosecutions. Cf. 5 U.S.C. § 552(b)(7). UPS's Motion to Compel should accordingly be considered moot with respect to reports bearing the designation “RI,” as these are investigative reports within the scope of FOIA Exemption 7.

V. RELEVANCE

UPS cannot overcome the relevancy ground for objection. UPS states that the reports would show “a pattern that throws doubt on the accuracy of the Postal Service's PERMIT System-based estimates.” UPS Motion at 4. On May 2, one day after UPS's Motion was filed, the Postal Service filed its response to UPS/USPS-T5—28 and USPS LR-I-323, which provided copies of audit reports pertaining to internal control deficiencies in the Business Mail Entry Unit. Thus, UPS already has access to audit reports that it believes can be used to frame an argument relating to PERMIT system-based estimates.⁶ UPS does not explain

⁶ The response to UPS/USPS-T5-28, filed on May 2, provided the response to the following document request:

- Provide a copy of any audit results concerning the accuracy or inaccuracy of BY 1998 postage statements.
- a. Explain whether each such audit provides for verification procedures of actual mail delivered by the mailer against what was indicated by the mailer on the postage statement. If so, describe these procedures.

how or why it needs the additional enumerated audits, now that it has access to the audits supplied in response to UPS/USPS—T5-28.

Furthermore, as the Postal Service explained in its Objection, the reports constitute audits or investigations of specific installations, specific mailers, or operations in a specific geographic area.⁷ It is fanciful, at best, for UPS to suggest that requested reports from a handful of postal installations can be used to frame conclusions on estimates from the PERMIT System, which draws information from thousands of postal units throughout the country. UPS's discovery request is, moreover, far too broad, and it does not narrow the scope of the requested information to a specific class of mail, *i.e.*, Parcel Post, or to a particular installation, *i.e.*, the bulk mail entry unit, thereby compiling the burden associated with responding to the discovery request. In sum, UPS has failed to show that the reports are relevant to the rate and classification proposals in this docket.

VI. COMMERCIAL SENSITIVITY

UPS does not appear to contest the Postal Service's commercial sensitivity and individual privacy grounds. UPS Motion at 5-7. As the Postal Service explained in its Initial Objection, the reports contain sensitive information such as facility-specific figures for excess cash; facility and employee-specific inventory figures; employees' accountability; specific figures for mailer-, permit number-, or

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- b. Explain whether each such audit determines the number of errors discovered by mail class, subclass and error type. If so, provide the results of all such determination.

⁷ The report entitled "Plant Verified Drop Shipment System" (AC-AR-89-001) is not limited to a geographic area, although since it has already been filed in this

Periodical-specific revenue deficiencies found during the audits or investigations; names of employees at facilities subject to audits, and names of individual employees conducting audits. Such facility- and employee-specific is either sensitive commercially to the Postal Service or to mailers, or involves individuals' privacy, and must therefore not be disclosed. Inasmuch as UPS does not appear to be moving to compel the production of this information, the Postal Service should be given sufficient time to redact it.

VII. BURDEN

UPS's claim that the Postal Service's burden objection is an overstatement, UPS Motion at 8, does not withstand scrutiny. The Postal Service estimated that it would consume approximately 5 person-hours per Inspection Service report to review the documents to determine which types of information must be redacted. The exercise would likely be similar for the documents requested in subpart (a). The objection is based on the Inspection Service Office of Counsel's longstanding experience with performing redactions for FOIA purposes, and provides a meaningful basis for estimating the burden here.⁸ Thus, UPS has not overcome the Postal Service's burden objection.

case, the controversy surrounding its production here is moot.

⁸ Since UPS has withdrawn its request for some of the interrogatories, the burden is estimated to be 200 person hours (40 reports * 5 hours/report). Again, this not only includes time for an individual to perform redactions, but also includes time needed to consult with local officials on advice regarding commercial sensitivity, and time to consult with inspectors on pertinent law enforcement records exemptions under FOIA.


WHEREFORE, the Postal Service requests that UPS's Motion to Compel be denied.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

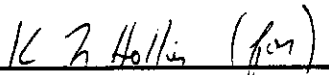
Daniel J. Foucheaux, Jr.
Chief Counsel, Ratemaking



Anthony Alverno
Attorney

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all participants of record in this proceeding in accordance with section 12 of the Rules of Practice.



Anthony Alverno

475 L'Enfant Plaza West, S.W.
Washington, D.C. 20260-1137
(202) 268-2997; Fax -6187
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