

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

RECEIVED
Aug 1 11 51 AM '00
POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

Complaint on Post E.C.S.)

Docket No. C99-1

OFFICE OF THE CONSUMER ADVOCATE
OPPOSITION TO MOTION FOR CLARIFICATION
AND RECONSIDERATION
(August 1, 2000)

To: Dana B. Covington, Sr.
Presiding Officer

The Office of the Consumer Advocate ("OCA"), pursuant to Rule 21(b) of the Rules of Practice and Procedure, hereby opposes the request of the United States Postal Service¹ (1) for clarification that all documents to be redacted be subject to the protective conditions developed in Order Nos. 1283 and 1287² and (2) for unilateral authority to expand the redaction of discoverable documents identified by Presiding Officer's Ruling No. C99-1/16.³ For the reasons given below, the OCA urges the Presiding Officer to permit more, rather than less, light to be shed on the seminal jurisdictional issues before the Commission.

¹ "United States Postal Service Motion for Clarification and Partial Reconsideration of Presiding Officer's Ruling No. C99-1/16," filed July 25, 2000.

² "Order on Protective Conditions Appropriate for Application to Sensitive Information Produced in this Proceeding," issued January 28, 2000, and "Order Disposing of Motions for Clarification and Correction of Protective Conditions Adopted in Order No. 1283," issued March 1, 2000.

³ "Presiding Officer's Ruling on Discoverability of *In Camera* Documents Produced by United States Postal Service in Response to Ruling No. C99-1/14," issued July 12, 2000.

Background

Throughout this complaint proceeding, the Postal Service has sought to avoid, minimize, and restrict all inquiry into the status of its new PosteCS service. It has steadfastly resisted discovery and disclosure. Yet without full information on the nature of PosteCS service, neither the participants nor the Commission will be able intelligently to address the critical and threshold issues of the jurisdiction of the Commission with respect to electronic services.

The Presiding Officer's willingness to review documents *in camera* represented a significant step toward resolving the impasse created by the Postal Service's intransigence. Ruling No. C99-1/16, with its careful delineation of the large number of documents reviewed, reflects the breadth of this undertaking. With respect to each document, the Presiding Officer selected one of four results: public release through a Presiding Officer's Library Reference, return to the Postal Service as irrelevant and undiscoverable, return to the Postal Service for redaction of specified "privileged portions of the contents,"⁴ or production under the elaborate protective conditions of Order Nos. 1283 and 1287.

Ruling No. C99-1/16 examined each of 22 categories of documents and considered not only the Postal Service's initial objections to discovery made in August 1999,⁵ but also supplemental objections that accompanied a February 2000 updated

⁴ *Id.* at 6.

⁵ "United States Postal Service Provision of Descriptive List of Responsive Documents and Associated Privileges Pursuant to Presiding Officer's Ruling No. C99-1/9," filed August 30, 1999.

listing of potentially responsive documents.⁶ Thus the decisions made on discoverable but sensitive or privileged documents—to redact and produce or to produce under protective conditions—have been carefully made with significant input from the Postal Service.

Argument

The Postal Service should not be given another opportunity to impede discovery in this case. The time has come for relevant documents to be made available to the participants, including the OCA, in accord with the carefully delineated rulings of Ruling Nos. C99-1/16 and C99-1/18.⁷

The OCA strongly believes in maximum public access to information concerning services offered by the Postal Service. The Postal Service is a unique government-sponsored enterprise with a substantial monopoly over letter mail. This means that there is a special need to assure that the Postal Service operates in accord with the statutory criteria and that all services are offered on a fair basis to both the public and potential competitors.⁸ That examination cannot be made without access to the facts in the possession of the Postal Service.

⁶ "United States Postal Service Response to P.O. Ruling No. C99-1/14 and Motion for Issuance of Tentative Ruling on Disclosure," pp. 3-4, filed February 22, 2000.

⁷ "Supplemental Ruling on Document Filed by United States Postal Service for *In Camera* Inspection and Interim Suspension of Deadline Established in Ruling No. C99-1/16 for Provision of Redacted Documents," issued July 28, 2000.

⁸ The Commission takes great care to consider relevant statutory criteria and potential impact upon private sector competitors in deciding on what terms a new service may be offered. See, e.g., "Opinion and Recommended Decision," Docket No. MC2000-2 (Mailing Online), issued June 21, 2000.

At the outset of this proceeding, the OCA stated its views on the application of restrictions to access. The OCA argued that “the Commission should limit the application of protective conditions only to those instances in which harm to the Postal Service resulting from release of the requested information is clearly documented by the Postal Service.”⁹ The OCA’s views have not changed. What *has* changed is that the Presiding Officer has undertaken an arduous *in camera* review of documents for which protection is claimed, thus providing an unbiased determination of what should be provided to the parties, what should be provided subject to redaction, and what should be provided under the restrictions of a protective order. This neutral review of the documents both satisfies the need for confirmation of the claimed harm and forecloses the Postal Service from further efforts to withhold relevant information.

Request for Clarification. The Postal Service first asks that the Presiding Officer “clarify” that documents to be redacted will then be made available only under the protective conditions of Order Nos. 1283 and 1287. The clarification should be denied. Redaction is already a more radical remedy than production under protective conditions—the former prevents any access to the shielded information, while the latter at least permits certain qualifying individuals to view the sensitive material. The redactions ordered in Ruling No. C99-1/16 are document-specific, meaning that the Presiding Officer has already made a document-by-document determination of what should be withheld from the participants and what should be made available. There is

⁹ “Office of the Consumer Advocate Comments in Response to P.O. Ruling No. C99-1/2,” p. 3, filed June 8, 1999. The OCA notes that the Presiding Officer reaffirmed the Commission’s general precept that “disclosure rather than protection is the rule.” Ruling No. C99-1/16 at 5.

no basis for the Postal Service to layer the shield of restrictive protective conditions over the relevant and producible portions of these documents.

Motion for Reconsideration. Taking its third bite at the discovery-avoidance apple, the Postal Service now asks the Presiding Officer to permit the Postal Service unilaterally to redact *eight* additional “categories of information.” This request should also be denied.

At first blush, it would seem that the Postal Service is now asking for exclusion of material for reasons not stated in August 1999 or in February 2000, when it made its prior claims of protection. Those claims were not limited or narrowly drawn, however. The Postal Service variously claimed one or more of the following as reasons not to produce responsive documents: (1) deliberative process, (2) attorney/client, (3) relevance, (4) commercial sensitivity, (5) attorney work product, (6) trade secret, (7) proprietary information, (8) proprietary information of foreign posts, (9) jurisdiction, (10) predecisional communications, and (11) confidential third-party information.

Comparing the breadth of the objections and privileges already claimed with the list of eight “additional categories of information” in the Postal Service’s instant motion shows that the supposedly new categories fall under one or more of the eleven types of protections already asserted with respect to the responsive documents. In many instances, Ruling No. C99-1/16 rejected these claims; often, however, the Ruling specified certain sensitive or privileged information that should be redacted. It appears that the list of “additional categories” amounts to nothing more than another assertion of the claims already made, considered, and rejected.

Nor has the Postal Service specified which of the eight supposedly new claims would apply to the documents to be redacted. At the very least, to avoid the potential for whole non-disclosure through redaction, it is incumbent upon the Postal Service to specify what information in each of the redaction documents is subject to which of the eight "categories." Without such specificity, the Presiding Officer would be writing the Postal Service a blank check to remove information that the Presiding Officer has deemed discoverable.

The Postal Service request should be denied for practical reasons also. The Presiding Officer has finished the review of the documents and has already directed the return of the documents, forthwith, to the Postal Service. In the case of documents to be redacted, he has identified the material that may be removed. The Postal Service cannot now be allowed to apply broader redaction rules of its own creation to these documents. Any consideration of the Postal Service request would require re-submission of the documents and another *in camera* review of the material.

Other relief. The Postal Service requests that the Presiding Officer reconsider the status of five documents involving Canada Post. The only reasons given are that they are not the work of the Postal Service or that they are cumulative. This does not warrant altering their status as relevant and discoverable documents at this stage of the case; such considerations may be revisited if the documents are sought to be introduced into evidence at a later time.

The Postal Service asks that it be given more time to comply with Ruling No. C99-1/16. This was effectively granted in Ruling No. C99-1/18. Given the substantial

pressure under which participants in this Docket are operating in Docket No. R2000-1, the OCA agrees that some additional time is warranted.

Finally, the OCA encourages the Presiding Officer to address another outstanding discovery matter. The OCA filed a motion to compel responses to certain interrogatories as to which the Postal Service had objected.¹⁰ The Postal Service opposed the OCA motion.¹¹ This matter is still pending but, with the resolution of the dispute over the documents responsive to the United Parcel Service's discovery requests, the OCA motion to compel is now ripe for resolution.

WHEREFORE, the OCA requests that the Presiding Officer deny the Postal Service's motion for clarification and reconsideration, and order the Postal Service to

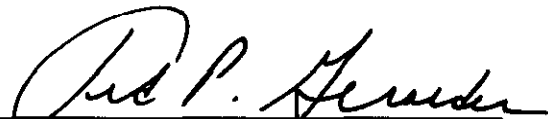
¹⁰ "Office of the Consumer Advocate Motion to Compel Responses to Interrogatories OCA/USPS-19, 20(a-b), 21, 23, 24, 26, 27(b-d), and 28-33," filed September 21, 1999.

¹¹ "United States Postal Service Answer in Opposition to Motion of the Office of the Consumer Advocate to Compel Responses to Interrogatories OCA/USPS-19, 20(a-b), 21, 23, 24, 26, 27(b-d), and 28-33," filed September 28, 1999.

produce documents redacted in accordance with Ruling No. C99-1/16 in a reasonable period of time.

Respectfully submitted,

OFFICE OF THE CONSUMER ADVOCATE



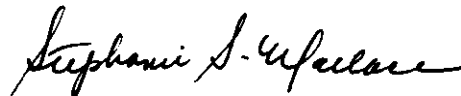
Ted P. Gerarden
Director

Shelley S. Dreifuss
Attorney

1333 H Street, N.W.
Washington, D.C. 20268-0001
(202) 789-6859; Fax (202) 789-6819

CERTIFICATE OF SERVICE

I hereby certify that, on behalf of the Office of the Consumer Advocate, 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.



Stephanie S. Wallace

Washington, D.C. 20268-0001
August 1, 2000