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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

PRESIDING OFFICER'S
RULING NO. C99-1/23

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

Complaint on Post E.C.S.

Docket No C99-1

PRESIDING OFFICER'S RULING GRANTING IN PART
UNITED STATES POSTAL SERVICE MOTION FOR
CLARIFICATION AND PARTIAL RECONSIDERATION
OF PRESIDING OFFICER'S RULING NO. C99-1/16

(Issued August 7, 2001)

This ruling addresses a motion¹ of the United States Postal Service for clarification and reconsideration of several aspects of my Ruling No. C99-1/16. In that ruling, following *in camera* inspection of a voluminous collection of documents responsive to Complainant's discovery requests, I directed the production of some of those documents under differing conditions, including release following redaction by the Postal Service.

On the same day it submitted its motion, the Service also filed a notice of its contemporaneous submission of a document that had inadvertently been omitted from the box of documents previously provided for *in camera* inspection. Following an examination of the document provided, I issued Ruling No. C99-1/18, which found it to contain too little relevant information about Post E.C.S. service to warrant production. I also suspended the deadline for the Service's production of redacted documents, as requested.

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

Complainant United Parcel Service and the Office of Consumer Advocate filed responses to the Service's motion.² The following day, the Postal Service filed a notice transmitting a letter expressing the views of Canada Post Corporation on the appropriate treatment of those documents it had provided to the Service that are under scrutiny in this case.³

Because the Postal Service's motion requests several forms of relief, each will be treated in turn.

Requested redaction of additional categories of information. One aspect of Ruling No. 16 on which the Service requests partial reconsideration concerns the materials it is permitted to redact from the 20 documents specified in paragraph 3 of that ruling. Specifically, in addition to the sensitive materials described in the body of the ruling, the Service seeks permission to redact eight additional categories of information:

1. Predecisional or commercial information of foreign postal administrations and the International Post Corporation (IPC);
2. Statements about foreign posts and the IPC related to their respective products or markets;
3. Customer names;
4. Past or projected volume statistics for Post E.C.S. or Electronic Postmark;
5. Past or projected financial statistics and projections;
6. Past or proposed prices of Post E.C.S.;
7. Vendor names and products; and

² Response of United Parcel Service to United States Postal Service Motion for Clarification and Partial Reconsideration of Presiding Officer's Ruling No. C99-1/16, August 1, 2000; Office of the Consumer Advocate Opposition to Motion for Clarification and Reconsideration, August 1, 2000.

³ United States Postal Service Notice of Filing Comments of Canada Post Corporation, August 2, 2000.

8. Estimates of expenses, and actual expenses, by the Postal Service and other stakeholders.

The Service claims that information in these categories constitutes sensitive business information of the Postal Service and foreign postal administrations, and would shed no light on the postal or non-postal nature of Post E.C.S. Motion at 3.

Complainant opposes additional redactions for most of the categories of information named by the Postal Service. UPS states that it has no objection to the redaction of customer names, vendor names and products, and estimates of expenses and actual expenses. However, in all other respects UPS argues that the documents should be produced in the form previously ordered. UPS also claims that some of the categories of information identified by the Postal Service are so vaguely described that they may encompass relevant material that should be produced. UPS Response at 2-4.

The Office of Consumer Advocate also opposes the requested redaction of additional information. According to OCA, the Service's listing of additional categories represents nothing more than re-assertion of claims of privilege already made, considered, and rejected in Ruling No. 16. OCA also observes that the Service's motion does not associate any of the eight categories of information with specific documents, and asserts that it is incumbent on the Service to do so. Additionally, OCA claims that entertaining the Service's request to apply broader rules of redaction would require re-submission of the documents and another *in camera* review of the material. OCA Opposition at 5-6.

In Ruling No. 16, I assessed the discoverability of a diverse collection of documents provided by the Service, which I found to "exhibit highly variable degrees of relevance and privilege." Ruling No. 16 at 5. Depending on the apparent sensitivity of relevant information therein, I directed that documents be made available publicly, under protective conditions, or only following redaction by the Service. Redaction is the more extreme protective measure, inasmuch as it removes the deleted information from

any participant's potential use. As the Postal Service notes in its motion, I restricted its use largely to deliberative information.

Because redaction is such a restrictive remedy, I am reluctant to expand its use to additional categories of potentially relevant information. However, I agree with the Postal Service and Complainant that most of the types of information encompassed in the Postal Service's categories three through eight are so slight in potential relevance that no appreciable harm is likely to result from their redaction.

Customer names are of no direct relevance to establishing the character of Post E.C.S. service and are commercially sensitive, as I found with respect to other documents treated in Ruling No. 16 (at page 7 thereof). Similarly, past or projected volume and financial statistics are of no direct relevance to pending issues and also warrant claims of commercial sensitivity. Past or proposed prices of Post E.C.S. service are of no relevance to establishing the character of the service, and therefore can likewise be redacted without consequent harm. The same conclusion applies to estimates of expenses, and actual expenses, incurred by the Postal Service and other stakeholders; these have no direct bearing on establishing the character of Post E.C.S. service.

A more qualified conclusion applies to the Service's request to redact "vendor names and products." The identity of vendors is of no direct relevance; however, the identity of a vendor's product may lead to the production of relevant evidence bearing on how Post E.C.S. operates. For this reason, I shall grant the Service's motion with respect to the redaction of vendor names, but not with respect to vendor products.

I also find the first two categories of information proposed for redaction by the Service—"predecisional or commercial information" and "statements related to the respective products or markets" of foreign postal administrations and the International Post Corporation (IPC)—to be overly broad and vague, as Complainant argues. On the basis of these extra-national entities' proprietary interests, redaction of market assessments and other information that is clearly deliberative in character would appear

to be justified. However, in keeping with established practice,⁴ redaction of factual information regarding these entities' products or commercial activities is not justified, particularly in view of the light such information may shed on the claimed international character of Post E.C.S. service. Accordingly, I shall grant the Service's motion regarding these two categories only with respect to statements related to the respective markets of foreign postal administrations and the International Post Corporation and deliberative materials prepared by or for these organizations.

Form of disclosure of redacted documents. The Service's motion also requests clarification of the conditions under which documents it has been directed to redact will be released. Specifically, the Service seeks a ruling that the redacted documents would only be made available to other participants under the protective conditions specified in Order No. 1287. According to the Service, this manner of access—which was directed in several rulings in Docket No. R97-1—is necessary here because even after redaction some documents would still contain proprietary and commercially sensitive information, such as customer information and proprietary market analyses. To avoid the potential harm resulting from public release of this residual sensitive matter, the Service accordingly asks for a declaration that redacted documents will be available exclusively under protective conditions.

Both the Complainant and OCA oppose this requested relief. UPS states that the earlier ruling apparently intends access under protective conditions to be an alternative to redaction, rather than an adjunct, and argues the earlier ruling should be clarified to emphasize that documents for which redaction has been ordered should be

⁴ In Docket No. R97-1, the Presiding Officer acceded to the Service's proposed redaction of prospective deliberative information in a Postal Service study on alternate delivery, but ordered that factual material and retrospective analyses be included in responsive documents. Presiding Officer's Rulings No. R97-1/46, October 15, 1997; No. R97-1/52, October 23, 1997; and No. R97-1/60, November 13, 1997. The Presiding Officer Docket No. R200-1 adopted the same approach in ruling on the discoverability of an updated version of the study. Presiding Officer's Ruling No. R2000-1/21, March 28, 2000.

made publicly available when that process has been completed. UPS Response at 1-2. OCA observes that redaction is a more radical remedy than production under protective conditions, inasmuch as it prevents any access to the shielded information, and contends that there is no basis for a further restriction of access to information that has already been found relevant in Ruling No. 16. OCA Opposition at 4-5.

As UPS correctly gathers, the redaction mechanism adopted in Ruling No. 16 was intended at that time as an alternative to restricted access to entire documents under protective conditions. Redaction is indeed a more restrictive alternative, as noted in the previous section of this ruling, because the process negates any possibility of access to the highly sensitive information that has been deleted. It also obviates any claim of privilege that may apply to the redacted material, as its disclosure is no longer in issue.

The Postal Service cites a series of Presiding Officer's Rulings from Docket No. R97-1 that provided both for access under protective conditions and redaction or exclusion of certain information from the materials at issue. However, that series of rulings concerned a single study performed for the Postal Service on an intrinsically competitive subject—the status of alternate delivery systems—and thus dealt with an area where protective conditions could reasonably be expected to apply to information in the study generally. In addition, certain advisory and deliberative components of the study materials were found to be exempt from disclosure.⁵ By contrast, the documents produced by the Service for *in camera* inspection that I found to be appropriate for redaction contained highly sensitive information, but did not consist entirely of such

⁵ The Presiding Officer in R97-1 found that, “[t]he Service’s analysis and interpretation of the SAI research, along with the SAI researchers’ recommendations, may be regarded as privileged information not subject to disclosure. However...[t]he underlying data and collected information should be available to those evaluating Postal Service testimony, so long as it is subject to protective conditions adequate to assure that this information is not available to anyone involved in competitive decisionmaking to the potential detriment of the Service.” Presiding Officer’s Ruling No. R97-1/46, October 15, 1997, at 5-6.

material. Therefore, as a general matter, my earlier finding in this case that a given document containing relevant information should be released only after redaction of some highly sensitive content would not automatically justify an additional barrier in the form of protective conditions.

Nonetheless, after reviewing my notes on the materials at issue, I recognize the possibility that, even after redaction of highly sensitive material and the additional items authorized in the preceding section, some documents or the context in which they were prepared may still be sufficiently sensitive that protective conditions arguably should apply. In view of this possibility, and to forestall further dispute regarding access to the 20 documents at issue, I shall grant the Postal Service's motion for application of protective conditions to the redacted materials at this time. Should a participant who gains access to these materials wish to include a document containing relevant information in the evidentiary record, and believes after examining the document that it does not include commercially sensitive or otherwise confidential information, I will entertain a motion for removal of protective conditions from that document, pursuant to paragraph nine of the attached protective conditions.

Production of Canada Post documents. The Postal Service also requests reconsideration of the portions of Ruling No. 16 that ordered production of certain documents of Canada Post Corporation. The Service argues that four documents I directed it to produce following redaction should not be produced because they are irrelevant to the Postal Service or are cumulative. The Service also asks for reconsideration of the relevance of two documents that were produced publicly in LR-PO-1, consisting of draft versions of a Canada Post press release, which the Service claims are irrelevant because this proceeding relates to the Service's own Post E.C.S. product. Motion at 3-4.

In a letter attached to a Postal Service Notice,⁶ counsel for Canada Post Corporation (CPC) opposes release of CPC-related documents to the public. According to the letter, CPC provided its documents to the Postal Service with an understanding that they would be treated confidentially, as they contain privileged or highly commercially sensitive information. CPC anticipates that the release of any such information could readily be used by CPC's competitors to harm its existing and future business. Therefore, CPC supports the Service's motion to the extent it seeks to redact information about foreign markets and foreign posts. To the extent such documents must be disclosed, CPC submits that the Commission should do so only under strict protective conditions.

Both Complainant and OCA oppose the Service's request for reconsideration of the discoverability of the Canada Post documents. UPS supports the initial ruling that the documents in question contain relevant information, arguing that the views of an alternative provider of Post E.C.S. service are highly relevant to questions such as whether Post E.C.S. is a substitute for a service that is admittedly postal in nature. UPS Response at 4. OCA argues that the Service's claims do not warrant altering the documents' status as relevant and discoverable materials at this stage of the proceeding, and that the Service's objections can be revisited should any party seek to introduce the documents into evidence at a later time. OCA Opposition at 6.

I shall deny the Postal Service's request for reconsideration as to the Canada Post documents at issue here. As Complainant has argued, the Service's disavowal of any relation between their content and its offering of Post E.C.S. service does not obviate the potential relevance of another provider's actions and views regarding the service. Illustratively, information contained in the documents may shed light on the Service's claim that Post E.C.S. service is international in character.

As to the potential sensitivity of the Canada Post material, I find no likelihood of commercial harm from public release of the draft CPC press releases—dating from May

⁶ Note 3, *supra*.

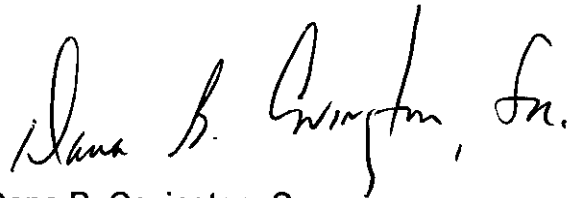
and November, 1998—in documents 5G21-12 and -13, which I earlier included in the public Library Reference LR-PO-1. The remaining Canada Post materials will, like the other documents to be redacted by the Postal Service, be made available only under the protective conditions attached to this ruling. This treatment is responsive to CPC's expressions of concern regarding commercial sensitivity.

Requested extension of period for redacting documents. Finally, the Service requests additional time to redact the documents for which that treatment was prescribed in Ruling No. C99-1/16. The Service explains that the process is time-consuming, and that the redaction of lengthier documents will require more time, depending upon the outcome of its motion.

In view of the additional categories of information I am approving for redaction in this ruling, I shall also grant this request. Filing of redacted documents will be due on September 7, 2001.

RULING

1. The United States Postal Service is authorized to redact the additional categories of information described in the body of this ruling from the documents listed in Presiding Officer's Ruling No. C99-1/16, ruling paragraph three.
2. The redacted materials referenced in paragraph one shall be available in the Office of the Secretary for inspection by qualified individuals under the protective conditions attached hereto.
3. The deadline for filing the referenced redacted materials shall be September 7, 2001.
4. The United States Postal Service Motion for Clarification and Partial Reconsideration of Presiding Officer's Ruling No. C99/1-16, filed July 25, 2000, is denied in all other respects.



Dana B. Covington, Sr.
Presiding Officer

**STATEMENT OF COMPLIANCE
WITH PROTECTIVE CONDITIONS**

The following protective conditions limit access to materials provided in Docket No. C99-1 by the Postal Service or other parties that the Presiding Officer or the Commission has directed to be produced and examined under protective conditions. 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) an individual participant in Postal Rate Commission Docket No. C99-1; or a person (not an employee) acting as outside counsel, agent, consultant, contractor, affiliated person, or other representative of such participant for purposes related to the litigation of Docket No. C99-1; 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. Counsel for a person who fully satisfies the qualifications set forth in paragraph 1(b) above shall serve by hand delivery or facsimile transmission a copy of that person's completed certification on counsel for the party that has provided the material to which the person wishes to be granted access. The person shall not be granted access until the eighth day after such service has been made. The party providing the material, or any other party with an interest in the protection of the material, shall have until seven days after receipt of the certification to object to access being granted to such person, by filing an objection with the Commission and serving opposing counsel by hand delivery or facsimile transmission. If such an objection is filed, the participant seeking to examine protective materials may file a response within seven days from the time the objection is filed with the Commission. Any such response must be served upon filing the objection, by hand delivery or facsimile

transmission. If the Presiding Officer determines that the objection is not meritorious on its face, the Presiding Officer may issue a ruling granting access before receiving a response.

3. 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.

4. 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. C99-1; or

(b) the date on which that participant formally withdraws from Docket No. C99-1; or

(c) the last date on which the person who obtains access is under contract or retained or otherwise affiliated with the Docket No. C99-1 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.

5. Immediately after the Commission issues its recommended decision or otherwise closes Docket No. C99-1, 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.

6. 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.

7. 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.

8. These conditions shall apply to any revised, amended, or supplemental versions of materials provided in Docket No. C99-1.

9. The duty of nondisclosure of anyone obtaining access to these materials is continuing, terminable only by specific order of the Commission.

10. Any Docket No. C99-1 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. C99-1 by a participant in response to rulings of the Presiding Officer or orders of the Commission and filed under protective conditions (hereinafter, "these materials" or "the information") has been authorized by the Commission.

The copy obtained is marked on every page with my name.

I agree to use the information only for purposes of analyzing matters at issue in Docket No. C99-1.

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**

When I obtained materials provided in Docket No. C99-1 by a participant in response to rulings of the Presiding Officer or orders of the Commission and filed under protective conditions, I certified to the Commission that I was eligible to receive it. 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. C99-1.
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 _____