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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

PRESIDING OFFICER'S
RULING NO. C2001-1/13

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

Complaint on Sunday and Holiday Collections

Docket No. C2001-1

PRESIDING OFFICER'S RULING
CERTIFYING APPEAL TO COMMISSION
OF PRESIDING OFFICER'S RULING NO. C2001-1/10

(Issued September 19, 2001)

On August 28, 2001, the Postal Service requested certification to the Commission of an appeal from Presiding Officer's Ruling No. C2001-1/10.¹ This ruling pertained to interrogatory DFC/USPS-19, which requested nine data elements from the Collection Box Management System (CBMS) for every collection box in the United States.² The initial ruling concerning interrogatory DFC/USPS-19, Presiding Officer's Ruling No. C2001-1/6, granted a Carlson motion to compel the Postal Service to respond to this interrogatory.³ It also accepted a Postal Service proposal to provide this material under protective conditions.⁴ The second ruling, Presiding Officer's Ruling No. C2001-1/10, which is the object of this appeal considered three individual motions to

¹ Motion of the United States Postal Service for Certification of Appeal From Presiding Officer's Ruling No. C2001-1/10, issued August 28, 2001 (Motion).

² Douglas F. Carlson Interrogatory to the United States Postal Service (DFC/USPS-19), filed May 25, 2001.

³ Presiding Officer's Ruling on Motion to Compel the United States Postal Service to Respond to Interrogatories DFC/USPS-19-21, issued July 23, 2001 (POR No. 6).

⁴ At the time of this ruling, FOIA litigation was pending in federal court requesting access to the same data that was required to answer this interrogatory. Providing this material under protective conditions allowed the presiding officer to defer to the federal court to resolve the related issue of public disclosure of this material and to substantially eliminate without analysis the Postal Service issues of mail safety and carrier safety. The ruling did not analyze whether the material in question would otherwise be suitable for dissemination absent protective conditions.

reconsider POR No. 6.⁵ POR No. 10 affirmed the ruling in POR No. 6. Furthermore, as a compromise, it ordered that a subset of the data be provided absent protective conditions.

The remedy that the Postal Service seeks through this appeal process is to limit the scope of data provided to data from 27 identified districts (contrary to the findings in POR Nos. 6 and 10 that the complete database should be provided), and to only provide this material under protective conditions (as outlined in POR No. 6 and affirmed in POR No. 10).⁶ The Postal Service also urges the Commission to abandon the compromise solution outlined in POR No. 10 specifying provision of a subset of the database absent protective conditions.

The Postal Service asserts there are two questions of law and policy involved that would substantiate certification of this appeal. As stated in the Postal Service Motion at 2:

Narrowly stated, there are two important questions of law and policy involved. Those are: 1) what are the standards by which the scope of permissible discovery on a large database should be evaluated, and 2) what are the conditions under which access to sensitive material should be allowed, in circumstances in which the requesting party's actions and statements suggest that support for the complaint may be at best a secondary purpose for seeking access to an entire database, only a part of which is even arguably relevant or "on point."

In the remainder of the Motion, the Postal Service argues in support of its position that the decision in POR No. 10 is flawed and relates this position to the two questions of law outlined above. Review of these arguments is more appropriate once an appeal is certified to the Commission.

⁵ Presiding Officer's Ruling on Reconsideration of Presiding Officer's Ruling No. C2001-1/6, issued August 21, 2001 (POR No. 10). This ruling considered motions for reconsideration from the Postal Service, Carlson, and Popkin. The Postal Service motion requested that the scope of the response be limited. The Carlson motion requested that the response be provided without protective conditions. Popkin's motion was in support of Carlson's motion.

⁶ The Postal Service has stated it will provide all of the data elements requested for these districts. Absent from the discussion is the separate database previously mentioned by the Postal Service that included data from boxes that had holiday collections.

Carlson filed an answer in opposition to the Postal Service Motion on September 7, 2001.⁷ He accepts the outcome of POR No. 10, and alleges that this Postal Service Motion is “yet another meritless Postal Service tactic to delay resolution of the issues in this proceeding.” The two issues that Carlson identifies as possibilities to substantiate certification are: the relevance of data for districts beyond the 27 identified by the Postal Service, and whether protective conditions are appropriate for the data subset specified in the presiding officer’s compromise solution. Carlson’s position is that the issues identified are not important issues of law or policy that would substantiate an interlocutory appeal pursuant to Rule 32(b). However, he would support certification of appeal to avoid further delay if it is determined that a subsequent appeal directly to the Commission pursuant to Rule 32(c) is likely.

Analysis. “The Commission will not review a ruling of the presiding officer prior to its consideration of the entire proceeding except in extraordinary circumstances.” Rule 32(a). The guidelines for determining an extraordinary circumstance when it is permissible for the presiding officer to certify a ruling for Commission review are delineated in Rule 32(b)(1). Rule 32(b)(1) states:

Before the issuance of an initial decision pursuant to § 3001.39(a) of the certification of the record to the Commission pursuant to § 3001.38(a), rulings of the presiding officer may be appealed when the presiding officer certifies in writing that an interlocutory appeal is warranted. The presiding officer shall not certify an appeal unless the officer finds that (i) the ruling involves an important question of law or policy concerning which there is substantial ground for difference of opinion and (ii) an immediate appeal from the ruling will materially advance the ultimate termination of the proceeding or subsequent review will be an inadequate remedy.

The presiding officer considered two predominant issues in POR Nos. 6 and 10. The first was whether the discovery request was reasonably calculated to lead to admissible evidence. In this instance, this question turned on whether the interrogatory sought relevant material. The second predominant issue was whether it is appropriate

⁷ Douglas F. Carlson Answer in Opposition to Postal Service Motion for Certification of Appeal, filed September 7, 2001 (Answer). Carlson had previously filed a motion Douglas F. Carlson Motion for Extension of Time to Respond to Postal Service Motion for Certification of Appeal, filed September 4, 2001. The motion for extension of time is granted.

to provide this material under protective conditions. In this instance, factors other than commercial sensitivity were under consideration when approving the Postal Service's request for protective conditions.

The Postal Service framed what is essentially the first issue in the terms of "what are the standards by which the scope of permissible discovery on a large database should be evaluated." The relevance of a portion of the material requested was important to the Postal Service's discussion. Relevance is often not a black and white quantity, but a continuum from highly relevant to not relevant at all. Once some relevance is shown, the level of relevance can be weighed against other factors in considering a discovery dispute. If a discovery request has no relevance, the request may be rejected at that point.⁸

The issue of policy or law raised by the Postal Service can be restated as: how should an objection to discovery on a large database be analyzed where it is alleged that a portion of the database might not contain data relevant to the proceeding. Large databases, like other discoverable material, are analyzed on a case-by-case basis. In this instance, relevance was the deciding factor. In other situations, for instance, commercial sensitivity or burden might be the deciding factor. These are all "weighing" type decisions that are specific to the interrogatory in question and involve the judgement of the decision-maker. It is not the type of issue contemplated by Rule 32 for review. Therefore, this issue does not meet the first requirement of Rule 32(b)(1) for substantiating an appeal to the Commission.

The second part of the Rule 32(b)(1) test to be applied to this issue is "an immediate appeal from the ruling will materially advance the ultimate termination of the proceeding or subsequent review will be an inadequate remedy." While an immediate appeal may materially advance the resolution of this discovery request, it will not materially advance the resolution of this proceeding. Furthermore, subsequent review

⁸ Reasonable minds may differ as to the level of relevance assigned to a particular discovery request. It would require a showing that the presiding officer's opinion was without basis to successfully challenge this type of decision.

during Commission deliberation of this Complaint has not been shown to be an inadequate remedy.

The second issue that the presiding officer considered was whether it is appropriate to provide this material under protective conditions. This was the more difficult question because the competitive nature of the material was not the determining factor for applying protective conditions. The pending FOIA litigation and allegations of security issues weighed in more heavily. Intertwined with this issue were the Postal Service allegations of Carlson having ulterior motives for requesting this material.

The Postal Service frames this issue as “what are the conditions under which access to sensitive material should be allowed.”⁹ The Commission has a history of applying protective conditions where the competitive nature of the material is at issue. There is no apparent reason to reexamine the application of protective conditions under competitive circumstances on appeal at this time. However, there is not much guidance in applying protective conditions outside of a competitive situation as the case is in POR No. 10. It may benefit the Commission to examine this issue in the context of this appeal. This is arguably an important question of law or policy in which there is substantial ground for difference of opinion.

The second part of Rule 32(b)(1) requires that “an immediate appeal from the ruling will materially advance the ultimate termination of the proceeding or subsequent review will be an inadequate remedy.” Although it is unlikely that an immediate appeal from an adverse ruling would materially advance the ultimate termination of the proceeding, subsequent review is possibly an inadequate remedy because of the potential for irreversible harm once sensitive material is released.

The presiding officer finds sufficient basis to certify POR No. 10 for appeal to consider the issue of: when is it appropriate to apply protective conditions to a response to a discovery request where competitive issues are not the predominant factor in

⁹ The Postal Service adds modifiers to this issue by including the factors of ulterior motives and relevance. The ulterior motive of a participant possibly can be considered as a part of this question. However, relevance is a separate and distinct issue and was previously addressed in this ruling.

considering protective conditions. An analysis of this issue should include discussion of under what circumstances are protective conditions appropriate outside of the competitive situation. It should also include what the proponent of the protective conditions must show in order to successfully argue for protective conditions. In the alternative, it should discuss what the proponent must show to persuade a presiding officer that not even protective conditions would provide adequate protection of the material in question.

Request for additional information. The Postal Service shall provide responses to the following five sets of questions to aid in the Commission's review of POR No. 10. These answers are due October 1, 2001. All other participants may provide responsive pleadings by October 9, 2001.

Question 1. The presiding officer accepted the Postal Service proposal for protective conditions because it significantly reduced the Service's concerns over mail and carrier safety by limiting the audience that would view this material. It also distanced the Commission from FOIA litigation occurring in federal court that eventually might resolve the issue of public disclosure of the same material. Any potential that unrestricted release of this material could cause the Postal Service competitive harm was not a concern in accepting the Postal Service's protective conditions proposal.¹⁰

Accepting a proposal for protective conditions is extraordinary relief that is contrary to the requirement that hearings on postal matters be open and accessible to the public. The Postal Service is requested to address in responsive pleadings its position on under what circumstances is it appropriate to apply protective conditions where the material is not competitive in nature. This should address the balance that must exist with keeping hearings open and accessible to the public. This should also address what the minimal showing should be for a proponent of protective conditions to successfully persuade a presiding officer to allow protective conditions.

Question 2. The Postal Service alleges that Carlson may have ulterior motives for requesting access to the CBMS database, or in some way may be abusing the

¹⁰ Argument was not provided that would persuade the presiding officer that the Postal Service would suffer competitive harm by release of this material.

discovery process to gather information that would otherwise not be available to him. It will aid the Commission's analysis if the Postal Service could provide more insight into these allegations by responding to the following questions.

For release of information under protective conditions, the Postal Service shall specify any known prior instances where Carlson has abused the privilege of receiving material under protective conditions by disclosure of that information or otherwise. The Postal Service shall also explain any known security risk that Carlson presents by gaining access to this material under protective conditions.

To foster evaluation of the compromise solution developed after reconsideration in POR No. 10, the Postal Service shall provide any specific evidence that indicates Carlson seeks the requested information for purposes unrelated to this Complaint, and a description of what those purposes are. Additionally, the Postal Service shall specify and explain any potential competitive conflict that exists between the Postal Service and Carlson or any personal or financial gain that Carlson may acquire by knowledge of this material.

For material that is not provided under protective conditions, the Postal Service shall address the issue of preventing a member of the public, including a business entity, from using public material for whatever purpose that person desires. In this situation, the Postal Service should address any reason to consider Carlson any differently from the remainder of the public.

Question 3. The presiding officer fashioned a compromise solution for release of a subset of the database not under protective conditions. The reasoning for doing this was to provide Carlson with a majority of the information sought in a method acceptable to him (not under protective conditions), to keep the hearing process as open to the public as possible, and to address the Postal Service's security concerns. The Postal Service stated in its Motion, at 22, that "the Postal Service is not prepared even to address the security aspects of the alternative solution." In analyzing the appropriateness of the compromise solution, the Commission may need to examine the Postal Service security concerns with the compromise solution. The presiding officer requests that the Postal Service provide responsive pleadings that address its security

concerns with the compromise solution. This analysis should include affidavits as necessary from the appropriate security personnel, the Postal Inspection Service, that explain the potential security concerns arising from the potential release of the more limited information identified in POR No. 10.

The Postal Service has on several occasions referenced the Postal Inspection Service as a source of information for the Postal Service's security concerns. Given the possibility that the Commission will also review applying protective conditions to the complete database, the Postal Service should provide copies of any and all existing documentation from the Postal Inspection Service that formed the basis of the Service's initial argument that public release of the complete database involves a security risk.

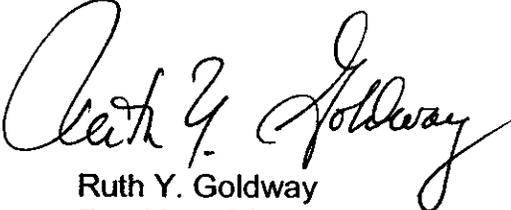
Question 4. The compromise solution was developed following reconsideration of POR No. 6, and first appeared in POR No. 10. While every effort was made to take into consideration the positions of the participants that were presented in the previous pleadings, the presiding officer recognizes that the participants did not have the opportunity to comment on the specific compromise. The Postal Service is invited to discuss why the compromise could be detrimental to the interests of the Postal Service, or otherwise be contrary to public interest.

Question 5. Please provide the status of the related FOIA proceedings, and any estimate as to when those proceedings might be brought to a conclusion.

RULING

1. The Douglas F. Carlson Motion for Extension of Time to Respond to Postal Service Motion for Certification of Appeal, filed September 4, 2001, is granted.
2. The appeal of Presiding Officer's Ruling No. C2001-1/10 is certified to the Commission consistent with this ruling.

3. The Postal Service shall provide the supplemental pleadings requested by this Ruling by October 1, 2001. Other participants may provide responsive pleadings by October 9, 2001.



Ruth Y. Goldway
Presiding Officer