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POSTAL RATE COMMISSION  
OFFICE OF THE SECRETARY

PRESIDING OFFICER'S  
RULING NO. R2001-1/12

UNITED STATES OF AMERICA  
POSTAL RATE COMMISSION  
WASHINGTON, DC 20268-0001

Postal Rate and Fee Changes

Docket No. R2001-1

PRESIDING OFFICER'S RULING ON  
OCA MOTION TO COMPEL RESPONSES TO  
INTERROGATORIES OCA/USPS-60(a), (b), AND (e)

(Issued November 21, 2001)

On November 5, the Office of the Consumer Advocate (OCA) filed a motion<sup>1</sup> to compel responses to three subparts of an institutional interrogatory it directed to the Postal Service, OCA/USPS-60. The interrogatory refers to an attached copy of an article published in the December, 1998 issue of CONSUMER REPORTS; the portions of the interrogatory at issue request: (1) copies of all studies performed by the Postal Service since that month that include comparisons of Express Mail, Priority Mail and Parcel Post with similar services offered by Federal Express and United Parcel Service [OCA/USPS-60(a)]; (2) a statement by the Service of the outcome of a lawsuit reportedly brought against it by Federal Express [OCA/USPS-60(b)]; and (3) spreadsheet-compatible documentation indicating the number and nature of complaints lodged with the Service regarding the accuracy or truthfulness of its advertisements for Priority Mail and Express Mail services during FY 2000 and FY 2001 [OCA/USPS-60(e)]. The Service objected to responding to these subparts on the grounds of relevance, overbreadth, undue burden, proprietary interest, and commercial sensitivity.

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<sup>1</sup> Office of the Consumer Advocate Motion to Compel Production of Documents and Information Requested in OCA/USPS-60(a), (b), and (e), November 5, 2001.

In its Motion to Compel, OCA cites a portion of the Commission's Opinion<sup>2</sup> in Docket No. R2000-1 that found the high intrinsic value of service ascribed to Express Mail service to be "tempered" by indications that its actual performance often did not meet the delivery standards published by the Postal Service. OCA asserts that the interrogatory at issue, and others it has directed to the Service, are intended to follow up on the Commission's expression of concern by seeking information bearing on the efficiency, accuracy, and convenience of the Postal Service's offerings, as well as consumers' perceptions of their quality. Motion at 1-2.

According to OCA, the requested information bears directly on the issues of efficiency and accurate advertising the Commission found relevant to value of service in the cited portion of the R2000-1 decision. *Id.* at 4. Additionally, OCA argues that responsive information could bear on the level of contingency provision to be recommended by the Commission, and on the fairness and equity of the rate structure it recommends. *Id.* at 2, 4. In response to the Postal Service's objection on the ground of overbreadth, OCA argues that a request seeking presumably high-level studies evaluating three specific products over a period less than three years cannot reasonably be viewed as overbroad. However, OCA states its willingness to limit any compelled search to Postal Service national headquarters. *Id.* at 4. OCA also challenges the credibility of the Service's blanket claim of confidentiality. *Id.* at 5.

The Postal Service responded to OCA's motion in an Opposition<sup>3</sup> filed on November 13. Notwithstanding the cited Commission statement in the R2000-1 decision, the Service argues that reviewing the accuracy of Postal Service advertisements is not within the scope of the Commission's statutory authority, and that OCA "has failed to explain how responses to the specific questions it poses will enable the Commission to better carry out its functions." Postal Service Opposition at 2. The Service disputes that revealing the outcome of the suit brought against it by Federal

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<sup>2</sup> PRC Op. R2000-1, November 13, 2000, para. 5013.

<sup>3</sup> Opposition of the United States Postal Service to OCA Motion to Compel Production of Documents and Information Requested in OCA/USPS-60(a), (b), and (e), November 13, 2001.

Express several years ago would have any appreciable bearing on the value of Priority Mail service in the test year of this rate proceeding. *Id.* at 2-3. Similarly, the Service denies that a response reporting the complaints it has received from the public regarding the truth or accuracy of advertisements—as distinguished from actual service performance data for Express Mail, Priority Mail, and Parcel Post—would bear on the actual value of such services. *Id.* at 3. Finally, the Service claims that even if a search for the information sought in subpart (a) of the interrogatory were limited to high-level studies at Postal Service headquarters, the effort would be more burdensome and time-consuming than the limited relevance of the information would justify. Moreover, the Service asserts that even OCA's limited request for production of strategic analyses of competitors' products seeks proprietary analyses and reports that are commercially sensitive, and should not be released in a public proceeding in which the Service's competitors are significantly involved. *Id.* at 3-4.

OCA/USPS-60(a). I shall grant OCA's motion with respect to this subpart of the interrogatory, but with qualifications. First, as OCA argues, the requested analyses comparing Express Mail, Priority Mail and Parcel Post and their counterparts offered by Federal Express and United Parcel Service are potentially relevant to determining the value of the respective postal services, in that such studies presumably would describe the respective features of the Postal Service's services and those of competing products offered by the private competitors. Moreover, the factual information in such studies would bear directly on a statutory factor the Commission is directed to consider in ratemaking: "the available alternative means of sending and receiving letters and other mail matter at reasonable costs." 39 U.S.C. § 3622(b)(5).

In view of the potential relevance of studies responsive to the OCA request, I do not find a search for recent analyses produced within the last three years—and confined to the national headquarters, as OCA suggests—overbroad or likely to impose undue burdens on the Postal Service. Should the Service encounter unusual obstacles or delay in conducting its search, it may apply for additional relief at that time.

It is to be expected, however, that such analyses will likely contain confidential and commercially sensitive information that merits protection from potential competitive harm. In Docket No. R97-1, an association of private delivery service competitors sought to compel production of a study of the alternate delivery market commissioned by the Postal Service. Over the Postal Service's objection, the Presiding Officer in that docket found the factual content of the requested study to be relevant, and directed the Service to produce it.<sup>4</sup> However, in view of the Service's credible claim of potential competitive harm, he exempted from disclosure the Service's "analysis and interpretation" of the study, as well as any "recommendations" made by the analysts who produced it.<sup>5</sup> He also directed that release of the study's factual materials be subject to protective conditions, which were clarified and amended at the Postal Service's request in a subsequent ruling.<sup>6</sup>

Similarly, in view of the nature of the competitive product comparisons OCA seeks, I find the Postal Service's claims of proprietary content and potential competitive harm from public release to be credible in this instance. Accordingly, while I shall direct the Service to produce the factual content of all responsive studies, it may withhold content that analyzes, interprets, or makes recommendations on the bases of those facts. In addition, I shall direct that the materials produced by the Postal Service be subject to the protective conditions applied to other potentially sensitive information in this proceeding.<sup>7</sup>

OCA/USPS-60(b). Similarly, I find that there is sufficient potential relevance to justify directing the Postal Service to produce a concise statement of the outcome of the suit brought against it by Federal Express regarding the Service's advertising practices. If the suit proceeded to judgment, the court's findings of fact could be based on

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<sup>4</sup> Docket No. R97-1, Presiding Officer's Ruling Granting in Part Motion of Association of Alternate Postal Systems to Compel Response to Interrogatory AAPS/USPS-6, October 15, 1997.

<sup>5</sup> Id. at 5-6.

<sup>6</sup> Docket No. R97-1, Presiding Officer's Ruling on Postal Service Motion for Clarification and Reconsideration of Presiding Officer's Ruling No. R97-1/46, October 23, 1997.

<sup>7</sup> See Presiding Officer's Ruling No. R2001-1/2, October 12, 2001; Presiding Officer's Ruling No. R2001-1/3, October 23, 2001; and Presiding Officer's Ruling No. R2001-1/5, October 31, 2001.

evidence comparing advertised and actual performance of Postal Service products such as Priority Mail, which would be relevant in this proceeding. On the other hand, if the suit was dismissed either on the merits or by mutual agreement of the parties, the grounds underlying the outcome could shed light on the Postal Service's past or prospective advertising practices. In either case, a description of the outcome of the litigation could illuminate the Postal Service's practices since the Commission's expression of concern in the R2000-1 decision. Therefore, I shall direct the Postal Service to produce a response.

OCA/USPS-60(c). Finally, I find this subpart's request for a count of advertising-related complaints regarding Priority Mail and Express Mail for FY 2000 and FY 2001 to be sufficiently relevant to warrant directing the Postal Service to prepare the requested response. Section 3622(b)(2) directs the Commission to consider the value of mail service to the recipient as well as to the sender, and explicitly includes such service features as "collection, mode of transportation, and priority of delivery." Complaints regarding the accuracy or truthfulness of advertising claims of service performance are likely to constitute, at worst, oblique indications of actual service performance. As I found with respect to the Postal Service Customer Satisfaction Surveys at issue in Ruling No. 7, such "questions of a more general nature" may "have a sufficient nexus to issues in this proceeding to justify production of the related responses."<sup>8</sup> In this instance, the volume of complaints—presumably filed by senders or recipients disappointed by experiences of actual service performance—could yield admissible evidence that may either corroborate or conflict with the Postal Service's proffered evidence on service standards. Consequently, I shall grant the OCA's motion with respect to this subpart. However, to avoid the potential burdens of a systemwide search of Postal Service files, the Service may confine its search to records within its Office of Consumer Advocate.

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<sup>8</sup> Presiding Officer's Ruling No. R2001-1/7, November 7, 2001, at 3.

**RULING**

1. The Office of the Consumer Advocate Motion to Compel Production of Documents and Information Requested in OCA/USPS-60(a), (b), and (e), filed November 5, 2001, is granted, under the conditions specified in the body of this ruling.
2. The attached protective conditions govern access to materials provided by the Postal Service in response to Interrogatory OCA/USPS-60(a).

  
George Omas  
Presiding Officer

## STATEMENT OF COMPLIANCE WITH PROTECTIVE CONDITIONS

The following protective conditions limit access to materials provided in Docket No. R2001-1 by the Postal Service in response to Presiding Officer's Ruling No. R2001-1/12 (hereinafter, "these materials"). Individuals seeking to obtain access to these materials 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. R2001-1, 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. R2001-1, 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 the earlier of:
  - (a) the date on which the Postal Rate Commission issues its recommended decision or otherwise closes Docket No. R2001-1;
  - (b) the date on which that participant formally withdraws from Docket No. R2001-1; or

- (c) the last date on which the person who obtains access is under contract or retained or otherwise affiliated with the Docket No. R2001-1 participant on whose behalf that person obtains. 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. R2001-1, 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. R2001-1.
- 8. The duty of nondisclosure of anyone obtaining access to these materials is continuing, terminable only by specific order of the Commission, or as specified in paragraphs 10 through 15, below.
- 9. Any Docket No. R2001-1 participant or other person seeking access to these materials by requesting access, consents to these or such other conditions as the Commission may approve.



10. The Postal Service shall clearly mark the following legend on each page, or portion thereof, that the Service seeks to protect under this agreement: "Confidential-Subject To Protective Conditions In Docket No. R2001-1 Before The Postal Rate Commission" or other markings that are reasonably calculated to alert custodians of the material to its confidential or proprietary nature. Except with the prior written consent of the Postal Service, or as hereinafter provided, no protected information may be disclosed to any person.
11. Any written materials — including but not limited to discovery requests and responses, requests for admission and responses, deposition transcripts and exhibits, pleadings, motions, affidavits, written testimony and briefs — that quote, summarize, or contain materials protected under these protective conditions are also covered by the same protective conditions and certification requirements, and shall be filed with the Commission only under seal. Documents submitted to the Commission as confidential shall remain sealed while in the Secretary's office or such other place as the Commission may designate so long as they retain their status as stamped confidential documents.
12. Any oral testimony, argument or other statements that quote, summarize or otherwise disclose materials protected under these protective conditions shall be received only in hearing sessions limited to Postal Service representatives and other persons who have complied with the terms of the protective order and have signed the attached certifications. The transcript pages containing such protected testimony shall be filed under seal and treated as protected materials under paragraph 11.
13. Notwithstanding the foregoing, protected material covered by paragraphs 11 or 12 may be disclosed to the following persons without their execution of a compliance certificate. Such disclosure shall not exceed the extent necessary to assist in prosecuting this proceeding or any appeals or reconsideration thereof.
  - (a) Members of the Commission.
  - (b) Court reporters, stenographers, or persons operating audio or video recording equipment for such court reporters or stenographers at hearings or depositions.
  - (c) Any other person designated by the Commission in the interest of justice, upon such terms as the Commission may deem proper.

- (d) Reviewing courts and their staffs. Any person seeking to disclose protected information to a reviewing court shall make a good faith effort to obtain protective conditions at least as effective as those set forth in this document. Moreover, the protective conditions set forth herein shall remain in effect throughout any subsequent review unless overridden by the action of a reviewing court.
- 14. A participant may apply to the Commission for a ruling that documents, categories of documents, or deposition transcripts, stamped or designated as confidential, are not entitled to such status and protection. The Postal Service or other person that designated the document or testimony as confidential shall be given notice of the application and an opportunity to respond. To revoke confidential status, the proponent of declassification must show by a preponderance of the evidence that public disclosure of the materials is consistent with the standards of the Freedom of Information Act, 5 U.S.C. 9552(b)(1)-(9), and Commission precedent.
- 15. Subpoena by Courts or Other Agencies. If a court or other administrative agency subpoenas or orders production of confidential information which a participant has obtained under the terms of this protective order, the target of the subpoena or order shall promptly (within two business days) notify the Postal Service (or other person who designated the document as confidential) of the pendency of the subpoena or order to allow the designating party time to object to that production or seek a protective order.
- 16. Each person desiring to obtain access to these materials must file a notice with the Postal Rate Commission listing name, title and position at least one day in advance of the day that the person signs a certification at the Commission's docket section in order to receive a copy of the materials. A copy of the notice must also be served in advance on the Postal Service.

**CERTIFICATION**

The undersigned represents that:

Access to materials provided in Docket No. R2001-1 by the Postal Service in response to Presiding Officer's Ruling No. R2001-1/12 (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. R2001-1. 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. R2001-1 by the Postal Service in response to Presiding Officer's Ruling No. R2001-1/12 (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. R2001-1.
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

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Firm

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Title

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Representing

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Signature

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Date

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