BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

Postal Rate and Fee Changes, 2001) Docket No. R2001-1

OFFICE OF THE CONSUMER ADVOCATE REJOINDER IN OPPOSITION TO UNITED STATES POSTAL SERVICE MOTION FOR PROTECTIVE CONDITIONS FOR RESULTS OF CONSUMER SATISFACTION SURVEYS (December 4, 2001)

The Office of the Consumer Advocate ("OCA") hereby files its rejoinder and further opposition to the Postal Service's motion for protective conditions for customer opinion surveys,[1] some of which the Service was ordered to produce in the Presiding Officer's Ruling of November 7, 2001.[2] The Postal Service filed a reply on November 28, 2001 to which were attached several affidavits, representing the only attempt at a factual showing in support of the motion.[3] Believing that the Postal Service has failed to make the factual showing required by applicable Commission and judicial precedent, OCA seeks denial of the motion for protective conditions.

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1 "[United States Postal Service] Motion for Protective Conditions for Results of Consumer Satisfaction Surveys," filed November 13, 2001 (hereinafter "USPS Motion").

2 POR No.R2001-1/7 (November 7, 2001) (hereinafter "POR 1/7").

3 "Reply of the United States Postal Service to the Office Of Consumer Advocate's Response to Motion for Protective Conditions for Results of Consumer Satisfaction Surveys," filed November 28, 2001 (hereinafter "USPS Reply"). Attached to the Reply were the affidavits of Max D. Larsen and Francis G. Smith (hereinafter" Larsen Aff." and "Smith Aff").

In POR 1/7, the Presiding Officer granted, in large part, OCA's motion to compel production of documents in response to OCA/USPS-7,[4] and ordered the Service to produce the survey results for specific questions and subparts of questions in two identified surveys for FY 2000 and FY 2001.[5] That ruling required the Service to detail the public harm that disclosure might entail.

The Postal Service filed a motion for protective conditions that encompassed not only the compliance ordered by the Presiding Officer in POR 1/7 but also related survey information contested in another motion to compel filed by OCA.[6] The Service stated its intent to produce information responsive to earlier versions of the two surveys already discussed (for FY 94 and FY 97).[7] The Service also stated that it would produce responses to analogous questions in two other surveys, its National Accounts Survey and its Premier Accounts Survey, for the four fiscal years FY 94, FY 97, FY 2000, and FY 2001. The Service sought protective conditions for the FY 94 and FY 97 information even though the survey forms and most of the results were "archived" and, therefore, the Service did not know what the questions were or what the responses had

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4 "Office of the Consumer Advocate Motion to Compel Production of Documents Requested in OCA/USPS-7," October 23, 2001

5 These surveys were the USPS Customer Satisfaction Survey (Residential) and USPS Business Customer Satisfaction Survey.

6 "Office of the Consumer Advocate Motion to Compel Production of Documents Requested in OCA/USPS-51-57," October 30, 2001.

7 In its Motion to Compel on OCA/USPS-51-57, OCA had agreed to a number of search and scope limitations, including a limitation to surveys for FY94, FY 97, FY 2000, and FY 2001.

been.[8] The Service now states that only material responsive to the residential survey can be located for FY 94.[9]

A. LEGAL STANDARD

The Commission has an established standard for assessing motions for protective conditions where the motion is contested and the ground for seeking protection is alleged competitive harm or protection of trade secrets. The Commission stated its policy as follows:

> Under long-established principles governing discovery in civil litigation and the Commission's formal hearings, evidentiary privileges are exceptions to the rule that proceedings are to be conducted in public view. With respect to the trade secret privilege, "disclosure rather than protection is the rule because of the overriding interest requiring that each party be empowered to obtain all evidence needed to prove his case." In regulatory proceedings, the privilege is entitled to still less weight because the public interest, as well as rights of private parties, is at stake. The trade secret privilege is a qualified privilege. Whether, and on what terms, protection is to be afforded is for the agency to determine by balancing the harm of disclosure against the party's need to prove his case and the public interest in just and accurate adjudication of disputes. Because of the strong public policy favoring public disclosure, the burden of establishing the applicability of an evidentiary privilege is on the party asserting it.[10]

The Commission's policy of public access to its administrative proceedings mirrors the more general policy of the federal judicial system that there is a "strong public interest in open proceedings."[11] It has been held by the courts that: "[t]he

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8 USPS Motion at 2.

9 USPS Reply at 3 note 4.

10 POR No, 97-1/62 issued November 17, 1997, at 8 *quoting* Commission Order No. 1025, issued August 17, 1994, at 13-14.

11 *Glenmede Trust Co. v. Thompson*, 56 F. 3d 476, 484 (3d Cir. 1995). *Also, Trans Pacific Ins. Co. v. Trans-Pacific Ins. Co.*, 136 F.R.D. 385, 391 (E.D. Pa. 1991).

public's right of access to court proceedings and documents is well-established."[12] The important public benefits derived from public scrutiny are to: (1) promote respect for the rule of law, (2) provide a check on the activities of adjudicators and litigants, and (3) promote greater accuracy in fact finding.[13] Although this principle evolved first in the sphere of criminal case law, it applies equally to civil proceedings (and, by extension, to federal administrative proceedings) because "publicity is just as important there."[14]

As a result of the strong public policy to maintain openness and accessibility to judicial (and quasi-judicial) proceedings, a heavy burden must be borne by any party attempting to restrict public access to Commission documents. Both in civil proceedings conducted under the Federal Rules of Civil Procedure and in administrative proceedings[15] protective orders will be issued only upon demonstration of a "*clearly defined and very serious injury.*"[16]

In a recent ruling, Presiding Officer Goldway reaffirmed this governing principle in Commission proceedings – "the requirement that hearings on postal matters be open and accessible to the public."[17] Curtailing this principle by imposition of "protective

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12 *Grove Fresh Distributors v. Everfresh Juice Co.*, 24 F. 3d 893, 897 (7th Cir. 1994).

13 *Id.*

14 *Id.*

15 In *United States v. International Business Machines Corp.*, 67 F.R.D. 39, 46 (S.D.N.Y. 1975) (hereinafter "IBM"), the District Court applied the Federal Trade Commission test for issuance of a protective order, *i.e.*, that records will be protected from public disclosure in cases that "result in a clearly defined, serious injury to the person or corporation whose records are involved."

16 *Id.*

17 POR C2001-1/13, issued September 19, 2001, at 6. *Also*, Commission Order No. 1331, issued November 27, 2001 at 10; Commission Order No. 1025, issued August 17, 1994, Docket No. R94-1, at 12. Proceedings of the Federal Communications Commission are likewise governed by this principle: "public interest considerations favor[] openness in [FCC] licensing proceedings." *In the Matter of*

conditions is extraordinary relief . . . ."[18] It is clear that a participant endeavoring to restrict another participant's use of relevant information has the burden of proving that such a restriction is warranted. The showing that must be made by the proponent of such restrictions is one of "specific competitive harm," and the even more onerous showing of a "likelihood of substantial competitive injury."[19]

As the Commission recently emphasized, protective conditions are not a cost free alternative.[20] There is an overriding public policy, imposed by the Administrative Procedure Act, in favor of decisions based on public records. "[Commission] decisions must reflect a record generally open to the public."[21] Thus, the mere fact that participants will have access to information subject to protective conditions does not automatically mean that such conditions should be imposed. The party seeking protection must meet the stringent test defined by the Commission in order to overcome

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Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission: Notice of Inquiry," 11 FCCR at 2477 (1996), cited in *Bartholdi Cable Co. v. FCC*, 114 F. 3d 274, 281 (D.C. Cir. 1997). The Federal Trade Commission strongly favors public access to its proceedings, as well. *H.P. Hood & Sons*, Inc., 58 F.T.C. 1184, 1186 (1961), cited in *IBM*, 67 F.R.D. at 46.

18 *Id.*

19 POR MC95-1/17, issued June 12, 1995, at 3. In the cited ruling, the Presiding Officer stressed that a showing of this magnitude is required by courts as well as administrative adjudicators, and that officials presiding in hearings under sections 556 and 557 of title 5 of the Administrative Procedure Act are even more exacting than those who must rule on requests made under the Freedom of Information Act. (n. 3 of Ruling 17)

20 Commission Opinion No.1331 at 20. The Postal Service contends that OCA will not be inhibited by the imposition of protective conditions in the use of the survey data. USPS Reply at 5. In fact, the opposite is true – OCA will be hobbled in all of its future uses of these data. Tedious, time-consuming procedures attend the imposition of protective conditions. All portions of OCA testimony that refer to the survey results would have to be detached from the rest of testimony. (This could be true of several pieces of OCA testimony that may cite the survey for varying reasons). In turn, the Postal Service, if it wished to explore or challenge OCA testimony using these data, would have to submit interrogatories confidentially, which the OCA would be obliged to answer confidentially. The Commission, in turn, if it wished to reduce the level of the contingency or moderate cost coverages for particular classes or services based upon the survey data, would have to issue those portions of its opinion under seal. The cost of imposing these measures is high indeed.

21 *Id.*

the presumption that the Commission should act on a record that is comprehensible and available to the public.[22]

B. ABSENCE OF COMPETITVE HARM

"Like all privilege claims, the trade secret privilege must be supported by precise and certain reasons for non-disclosure, applied with particularity to the records in question."[23] The arguments and testimonial support submitted by the Postal Service in its November 28 Reply fall far short of the showing required either by the Commission or the courts.

Initially, it is important to note that the Postal Service resisted discovery of the FY 94 and FY 97 information without even having anyone review the documents.[24] The Service opposed discovery and filled a motion for protective conditions while admitting that it had no idea what the questions were or what the responses had been because the information was "archived" and had not been retrieved.[25] Now the Service must admit that most of the 1994 data either no longer exists or is unavailable[26] OCA believes that the current filings and affidavits must be analyzed with considerable

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22 In a recent order Presiding Officer Goldway rejected an argument that EXFC statistics (expressed as percentages of on-time delivery) "spoke for themselves." She noted that the bare figures would mean little to the mailing public and stated that the Postal Service should provide a narrative explanation of why the EXFC on-time percentages were, in the Postal Service's opinion, reflective of "reliable and consistent" service. POR C2001-3/6, issued November 29, 2001 at 5-6. This reflects the Commission's continuing concern that the mailing public has access to sufficient information to understand the Commission's actions and the reasons for those actions.

23 Commission Order No. 1025 at 12.

24 "Opposition of the United States Postal Service to the Office of Consumer Advocate's Interrogatories OCA/USPS-51-57," filed November 9, 2001.

25 USPS Motion at 2.

26 USPS Reply at 3 note 4.

skepticism, given the cavalier attitude betrayed by the Service's prior conduct. Presumably, a participant should not oppose discovery and assert the trade secrets privilege without even bothering to look at the documents or ascertain whether they exist or can be located.

In a similar vein, it is completely implausible to assert, as the Postal Service does, that the survey responses collected from residential and business customers (including large customers with postal accounts) constitute trade secrets. Customer attitudes and opinions toward postal services fall far outside any common understanding of what constitutes a "trade secret."[27] In the *IBM* case, at 45, the District Court observed that *in camera* proceedings to protect trade secrets typically are limited to "secret processes, secret formulae, or secret designs." The collection of customer service attitudes toward postal services and practices is so unlike that definition that no serious argument could be made that such survey material constitutes a trade secret.

Likewise, the Gallup organization's random sampling of residential and small/large businesses is outside the conventional definition of "confidential business information," given by the Postal Service as the second prong of its argument (Reply at 3). The only survey information of the four surveys at issue that is arguably of a type commonly viewed as commercial information is that collected in the National Account and Premier Account surveys, which presumably began with the Postal Service's lists of customer accounts. However, even this data should not be protected because,

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[27] Even if the Postal Service could establish that the survey information constituted trade secrets, the Commission gives the privilege less weight " because the public interest . . . is at stake." Order No. 1025 at 13.

regardless of which survey information is considered, release of any of it into the public domain will be harmless.[28]

The Postal Service also fails to make distinctions among the survey questions themselves. Blanket assertions of privilege, such as those made by the Postal Service in its Opposition and Reply, are insufficient to establish competitive harm with the specificity required by the Commission.[29] The vague descriptions contained in the Postal Service's Reply[30] do not approach the standard that must be met to convince the Commission that a privilege obtains: "evidentiary privileges . . . must be supported by a showing that disclosure is likely to cause substantial harm or a specific kind under specific facts and circumstances."[31] When a wide array of services is addressed in a survey (such as those at issue in the instant dispute), each survey question and postal market at issue must be examined and addressed individually, since the commercial sensitivity of the data clearly depends on "which market . . . is involved," "whether a

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[28] The Service offers no explanation of why older data from FY 94 or FY 97 should be protected. This is especially striking since the only available FY 94 data is for the residential survey

[29] The Commission will reject "conclusive" or "speculative" claims of harm. Order No. 1025 at 14, citing *Hercules, Inc. v. Marsh*, 839 F. 2d 1027, 1030 (4th Cir. 1988).

[30] OCA was able to find only one example at page 7 of the Reply. The Service made a loosely reasoned suggestion that postal customer satisfaction with local offices could lead to commercial mail receiving agencies shifting their marketing strategy. This "illustration" (the Postal Service's term) is so speculative and hypothetical that it forces the reader to conclude that the Postal Service was unable to conceive of any plausible predictions of harm, not to mention actual examples of how postal competitors had used information presented in Commission proceedings to the disadvantage of the Postal Service.

[31] Order No. 1025 at 18. In *Trans Pacific Ins. Co. v. Trans-Pacific Ins. Co.*, 136 F.R.D. 385, 391 (E.D. Pa. 1991), [citing *Cipollone v. Liggett Group, Inc.*, 785. F. 2d 1108, 1121 (3d Cir. 1986), *cert. denied*, 484 U.S. 976 (1987)], the District Court for the Eastern District of Pennsylvania held that: "[b]road allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy [Federal Rule of Civil Procedure 26(c)]." Other federal courts share this view, *e.g.*, *Brittain v. Stroh Brewery Co.*, 136 F.R.D. 408, 412 (M.D.N.C. 1991): "The party must make a particular request and a specific demonstration of facts in support of the request as opposed to conclusory or speculative statements about the need for a protective order and the harm which would be suffered without one; and *Gen'l Dynamics Corp. v. Selb Mfg. Co.*, 481 F. 2d 1204, 1212 (8th Cir.1973), *cert. denied* 414 U.S. 1162 (1974).

service has close substitutes," "whether participants in that market are many or few," "whether the Postal Service is a dominant or minor player," etc. According to Order No. 1025 at 19, '[s]uch facts are central to the question of commercial sensitivity. They must be shown rather than presumed.." The Commission will not credit a blanket assertion such as that made by the Postal Service in its Motion and Reply. *Id.*

An examination of the particular customer responses compelled by POR R2001-1/7 reveals that the Postal Service has failed to allege *any* competitive harm, let alone the "substantial harm of a specific kind under specific facts and circumstances." The Presiding Officer directs the Postal Service to furnish customer evaluations of delivery of mail to the correct address, delivery of mail in good condition, the security of mail, and overall quality of mail delivery service among the Question 1 responses for the Residential Customer survey. How could responses to these questions – whether "excellent," "very good," "good," "fair" or "poor" – undermine the Postal Service's competitive position? If the Postal Service receives high marks from its customers, this is likely to deter new entrants who might wish to compete with the Postal Service. Current competitive services might strive to improve their delivery so as to increase customer satisfaction with their services. On the other hand, if the Postal Service receives poor scores and the public learns of this, it may very well lead to pressure from the public to improve the delivery and security of mail.

Further proof that the Postal Service is not likely to suffer any competitive disadvantage by release of the survey results is found in the failure of Postal Service competitors to use more concrete measures of less-than-promised Postal performance. The Postal Service routinely supplies detailed statistics on how well/badly it meets the

service standards established for various classes of mail. For example, in the instant proceeding, the Postal Service furnished information to OCA confirming that the percentage of overnight First-Class Mail and overnight Priority Mail delivered on a timely basis has declined every year for the last three years.[32] This decline held true for two-day and three-day delivery of First Class and Priority as well.[33] To cite another example, in response to interrogatory OCA/USPS-103, the Postal Service provided the specific volumes of two-day Priority Mail that were mailed up to fifteen days late. This response indicated that in FY2001 it took up to *six* days for 98 percent of "two-day" Priority Mail to be delivered and it took up to *eight* days for 98 percent of "three-day" Priority Mail to be delivered. Such statistics can be damning for a competitive service such as Priority Mail, yet they were provided by the Postal Service without objection.

By contrast, the customer responses collected in the customer surveys at issue are one step removed from the actual performance statistics that the Postal Service typically releases without cavil. These survey responses are reflections of the actual service routinely provided by the Postal Service. Significantly, in its Reply, the Postal Service fails to cite a single example of misuse of the actual performance measures by a competitor, nor any use (even legitimate) in a competitor's advertisements. Information such as that provided in response to OCA interrogatory 100 has been sought by intervenors and furnished by the Postal Service for many

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32 USPS response to interrogatory OCA/USPS-100.

33 *Id.*

years,[34] nevertheless, the Postal Service is unable to unearth a single example of competitive harm

The Postal Service also contends in its Reply that "[g]enerating bad press" is not a suitable goal. It is OCA's view, contrasting sharply with the Postal Service's, that the ultimate goal of the Commission in conducting its proceedings is to recommend rates that (among other things) are fair and equitable, reflect the value of the services provided by the Postal Service, and other factors deemed appropriate by the Commission.[35] It is clear from the language Congress employed in crafting section 3622 of title 39 that the focus in the rate-setting mechanism is on the Postal Service's customers, not the protection of the Postal Service from public embarrassment or criticism.[36] It may very well be that on the road to improvement in postal service provided to the public, the Postal Service suffers such embarrassment or criticism.[37] It

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[34] For example, in Docket No. R2000-1, the Postal Service reported that nearly 30 million Priority Mail pieces were delivered from one to two days later than the two-three-day service standard for Priority Mail (response to interrogatory UPS/USPS-20, filed May 4, 2000); and that the on-time performance for Priority Mail was as low as 60.77 percent in one quarter of FY1998 (for the period FY1998-FY1999; Attachment B to the response to interrogatory APMU/USPS-T34-8, filed May 5, 2000). In Docket No. R97-1, the Postal Service reported on-time performance for Priority Mail as low as 65 percent for one quarter of FY1997 (witness Moden's response to interrogatory DMA/USPS-T4-31b, filed September 17, 1997); and that First-Class Mail EXFC scores were as low as 70.93 percent in FY1996 (response of witness Sharkey to interrogatory APMU/USPS-T33-6, filed September 26, 1997).

[35] 39 U.S.C. § 3622.

[36] In a case with notable parallels to the instant controversy, a District Court judge held that a protective order restricting use of material filed solely to the case before him was unwarranted. The defendant in the case argued that "the public may access and misinterpret the documents" submitted. The court, however, rejected this argument, stating that the defendant's fears about "possible embarrassment ('public exposure') and groundless litigation as a result of misinterpretation" were insufficient justification to limit public access to the documents. *Nicklasch v. JLG Industries, Inc.*, 193 F.R.D. 570, 573-74 (S.D. Indiana 1999).

[37] The Postal Service's introduction of the media coverage of the bioterrorism crisis is inapposite to the instant discussion in that the Postal Service was a helpless victim of the acts of terrorism. By contrast, the Postal Service has the ability to control the quality of services it provides to the public. Moreover, release of the information at issue here cannot conceivably have any impact on the harm inflicted by the bioterrorism crisis.

is OCA's earnest hope, however, that such temporary discomfort leads, eventually, to improved service for Postal Service customers. Taking the proper measures to improve or maintain high levels of performance are the best way for the Postal Service to stanch the erosion of volumes and revenues that witness Tayman complained of and cited as one of the reasons for the proposed contingency.[38] This is the best avenue to vigorous health for the Postal Service. Furthermore, the Commission appears to disagree implicitly with the Postal Service's position that the quality of postal services should not be held up to public scrutiny. For example, in Docket No. R2000-1, the Commission viewed the inadequate quality of Express Mail as a reason for "temper[ing]" its high value of service.[39] Equally, the Commission took into account Priority Mail's documented lapses in achieving delivery service standards and failure to meet the mailing public's expectations in its determination to moderate Priority Mail's contribution to institutional costs.[40]

Given the Commission's interest in incorporating quality of service into its analysis of the proper rate levels, the analysis of such issues in the current rate case will be enhanced by the type of information collected by the Postal Service in its customer surveys. Withholding the results of such surveys from the public tends to limit the level of public comment and input that can be generated on quality of service issues. Therefore, public dissemination of the survey results is beneficial in two important respects – (1) the Postal Service may be influenced to improve service if

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38 USPS-T-6 at 61.

39 PRC Op. R2000-1, para. 5013.

40 *Id.*, paras 5299-5304.

customers indicate dissatisfaction, and (2) the Commission may use the results to moderate the contingency and/or specific cost coverage levels for particular rates (or, possibly, sets of rates if such are affected adversely by poor service that cuts across several classes or services). These observations, though made in connection with Question 1 of the Residential Customer Survey, apply equally to all of the responses compelled by the Commission in POR R2001-1/7

The arguments that the Service does make support a conclusion that release of the answers will not result in competitive harm. The Service cites questions from the residential survey and argues: [m]ost of the questions are general in nature, not related to any one product or service, which means that it [sic] would cover mail that OCA considers "competitive as well as mail that it [41]considers "noncompetitive."[42] The Service offers no hint of how the release of statistics on such generalized questions could cause competitive harm.[43]

Again, the Service argues that another survey organization, thee American Quality Society, which publishes the American Consumer Satisfaction Index, "bars" the

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41 USPS Reply at 8.

42 USPS Reply at 10.

43 In trying vainly to buttress this weak argument, the Service distorts the record. The Service claims that, in opposing an OCA discovery request the Service did not distinguish between services that have direct competition and First Class Mail Products. USPS Reply at 10 note 10. The Service did make the argument, even it now tries to withdraw the admission against interest. *See* "Opposition of United States Postal Service to Motion to Compel Production of Documents Requested in OCA/USPS-T36-1(A)," filed November 13, 2001, at 4.

selective release of data. In fact, as OCA has just shown in another discovery dispute in this matter, the Society's "User Guidelines" are not mandatory. [44]

The affidavits filed by the Service simply do not address the issue of competitive harm in any useful way. For example, Mr. Larsen's affidavit simply makes a conclusory claim that virtually all of Gallup's clients would be put at a competitive disadvantage if survey data of any and all types were made public.[45] He likewise claims (para. 5) that the release of general statistical tabulations of results would somehow chill the willingness of consumers to provide honest responses. While this argument might have credibility if the identities and opinions of individual survey participants were at issue, that is not the case.

Likewise, the affidavit of Ms. Smith simply repeats again and again that the Service does not routinely make survey data available to the public. The Service confuses its internal business routines with a showing of competitive harm. When Ms. Smith does address the issue of possible harm, she provides a single paragraph [46] that suggests that the service will lose some unidentified "competitive advantage" and give rise to adverse comment in the press. She also suggests that survey responses could be used by competitors but does not identify specific questions or suggest what concrete use by a competitor would generate competitive harm. These are precisely the sort of generalized representations that the Commission declines to accept.

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[44] "Office of the Consumer Advocate Reply to Opposition of United States Postal Service to OCA Motion to Compel Production of Documents Requested in OCA/USPS-64(c), 65-73, 77-78." filed November 28, 2001, at 2.

[45] Larsen Aff. para. 4.

[46] Smith Aff. para. 7.

The motion for protective conditions should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing document upon all participants of record in this proceeding in accordance with Rule 12 of the rules of practice.

Stephanie Wallace

Washington, D.C. 20268-0001
December 4, 2001