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POSTAL RATE COMMISSION  
OFFICE OF THE SECRETARY

PRESIDING OFFICER'S  
RULING NO. R2001-1/17

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

Postal Rate and Fee Changes

Docket No. R2001-1

PRESIDING OFFICER'S RULING DIRECTING THE PRODUCTION OF DATA  
SUBJECT TO PROTECTIVE CONDITIONS

(Issued December 7, 2001)

P.O. Ruling R2001-1/7 resolved motions practice concerning OCA/USPS-7 by directing the Postal Service to provide certain responses to two customer satisfaction surveys.<sup>1</sup> The Ruling also afforded the Postal Service an opportunity to seek protective conditions concerning the data to be produced. *Id.* at 3-4. Subsequently, the Postal Service moved for protective conditions to cover both the data subject to POR 7 as well as that requested in OCA/USPS-51-57, which also sought survey data collected by or on behalf of the Postal Service.<sup>2</sup> At the time that motion was filed, OCA/USPS-51-57 was the subject of additional motions practice between the participants. This Ruling addresses the issues raised by the latter set of interrogatories, including the application of protective conditions. In brief, it directs the Postal Service to provide certain survey results, consistent with POR 7, and grants the Postal Service's motion for protective conditions.

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<sup>1</sup> P.O. Ruling R2001-1/7 at 3, n.4 (POR 7).

<sup>2</sup> Motion for Protective Conditions for Results of Customer Satisfaction Surveys, November 13, 2001 at 1 (Postal Service Motion for Protective Conditions).

*Background.* In OCA/USPS-51-57, the Office of Consumer Advocate (OCA) seeks copies of studies and surveys, which broadly defined, address customer service issues. OCA/USPS-52 is illustrative; it seeks “all studies, customer surveys, employee surveys, and publicly available surveys in the possession of the Postal Service related to the measurement, review, and/or evaluation of the quality of Postal Service products and services.” The remaining interrogatories, which follow the same general format, seek survey results concerning consumer satisfaction, consumer preferences (for existing or potential products and services), window service, telephone assistance, and carrier delivery services.<sup>3</sup>

This set of interrogatories occasioned a spate of pleadings, beginning with the Postal Service’s objection.<sup>4</sup> As it had argued when objecting to OCA/USPS-7, the Postal Service contends that the information requested is irrelevant because it is not class specific and further that it is commercially sensitive. See Postal Service Objection *passim*. The Postal Service asserts that the interrogatories are overly broad principally because they seek data from 1990. *Id.* at 4-6, and 8-9. Lastly, the Postal Service objects to OCA/USPS-52, 53, and 54 arguing that review and copying of “any arguably relevant” surveys would be unduly burdensome. *Id.* at 9-10.<sup>5</sup>

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<sup>3</sup> See OCA/USPS-53, 54, 55, 56, and 57, respectively. OCA/USPS-51, citing an Associated Press report ranking Northern Virginia’s postal operations first in customer satisfaction nationwide, requests the survey results for the 85 districts covered nationwide since 1992. As a matter of convenience, the terms surveys and survey results are used herein to refer to the information requested by the OCA in these interrogatories.

<sup>4</sup> Objection of the United States Postal Service to the Office of the Consumer Advocate’s Interrogatories OCA/USPS-51-57 and Joint Motion for Protective Conditions, October 15, 2001 (Postal Service Objection). The Postal Service also reserved the right to claim privilege. *Id.* at 10. The Joint Motion sought protective conditions concerning certain information provided in response to OCA/USPS-53, to which the Postal Service had objected in part. P.O. Ruling R2001-1/3 granted the Joint Motion.

<sup>5</sup> The Postal Service estimates that there may be 1,136 studies within its Office of Market Intelligence and Segmentation alone, and further states that copying costs for 1,000 reports could cost as much as \$3,000. The Postal Service also suggests that reviewing these reports could uncover information that would be privileged from disclosure, as well as exposing the deliberative processes of postal management. *Id.* at 10.

In response, the OCA filed a motion to compel production of the information requested in OCA/USPS-51-57.<sup>6</sup> The OCA, however, proposes to limit the scope of the information it seeks to the following:<sup>7</sup>

- ◆ national studies and survey results for FY 1994, FY1997, FY 2000, and FY 2001;
- ◆ FY 2000 studies and survey results involving "a geographic area of more than one state or the whole states of Texas or California." (OCA Motion to Compel at 2)
- ◆ specific questions to the two surveys previously provided by the Postal Service in response to OCA/USPS-53.<sup>8</sup>

The OCA contests the Postal Service's claims, arguing that its generalized privilege objections are inadequate, and that its assertions of confidentiality fail to identify "even the general classes of responsive material." *Id.* at 2. The OCA also challenges the Postal Service's claims that the material requested is irrelevant, citing Rules 26 and 27 (that discovery be reasonably calculated to lead to admissible evidence), and reiterating arguments previously submitted by the OCA in its motion to compel a response to OCA/USPS-7 (*e.g.*, that customer satisfaction bears on the contingency). *Id.* at 4-7. The OCA then reviews each interrogatory asserting that the data sought concern customer perceptions of the Postal Service and, thus, are relevant to the appropriate

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<sup>6</sup> Office of the Consumer Advocate Motion to Compel Production of Documents Requested in OCA/USPS-51-57, October 30, 2001 (OCA Motion to Compel). Concurrently, the OCA filed a motion to accept its motion to compel out-of-time. See Office of the Consumer Advocate Motion for Late Acceptance of Motion to Compel Production of Documents Requested in OCA/USPS-51-57, October 30, 2001. This latter motion is granted.

<sup>7</sup> *Id.* at 2-3. In addition, the OCA, as a general matter, restricts any search requirements to Postal Service headquarter files. *Ibid.*

<sup>8</sup> The OCA's list of questions is somewhat unclear. It refers to "subparts 1 a-j & n of Question 1" and "10 subparts (i) of Questions 12-15." *Id.* at 10; see also *id.* at 14 which includes two references to question 1. Based on a review of the two surveys, it appears that the two references to question 1 are inadvertent, and that the phrase "10 subparts i of Questions 12-15" should read "10, subparts I of Questions 12-14" reflecting an upper case I and that question 15 does not appear to contain a subpart I. Thus, the enumerated questions appear to include: 1A-J, and N; 3; 5-8; 10; 12-14, subpart I; 17-18a; 21-22; 26b; 26d; 27b; 27c, and 27d; and 32-32a.

the size of the contingency. See, e.g., *id.* at 9. As a variant of this argument, the OCA contends that certain Postal Service operations, namely, window service, telephone assistance, and delivery services, represent critical interfaces with the public and, thus, are important determinants on whether customers utilize the Postal Service or an alternate supplier. *Id.* at 12-13.

The Postal Service opposes the OCA's motion citing, as it had in its objection, lack of relevance, commercial sensitivity, overbreadth, deliberative process privilege, and burden.<sup>9</sup> Although reiterating its position that non-class specific survey results are irrelevant to this proceeding, the Postal Service indicates its willingness to provide, subject to protective conditions, "the available responses to all survey questions paralleling the questions listed in [P.O. Ruling R2001-1/7], from the following [four] surveys:"<sup>10</sup>

- ◆ Postal Service Business Customer Satisfaction Survey for FY 1994 and FY 1997;
- ◆ Postal Service Customer Satisfaction Survey (Residential) for FY 1994 and FY 1997;
- ◆ National Account Survey for FY 1994, FY 1997, FY 2000, and FY 2001; and
- ◆ Premier Account Survey for FY 1994, FY 1997, FY 2000, and FY 2001.<sup>11</sup>

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<sup>9</sup> Opposition of the United States Postal Service to the Office of Consumer Advocate's Motion to Compel Production of Documents Requested [in] OCA/USPS-51-57, November 9, 2001 at 1 (Postal Service Opposition). Concurrently, the Postal Service filed an Uncontested Motion for Late Acceptance of Opposition of the United States Postal Service to the Office of Consumer Advocate's Motion to Compel Production of Documents Requested on OCA/USPS-51-57, November 9, 2001. The Uncontested Motion is granted.

<sup>10</sup> *Id.* at 2 (footnote omitted).

<sup>11</sup> Previously, the Postal Service attached copies of the Business Customer Satisfaction Survey and the Customer Satisfaction Survey (Residential) to its objection to OCA/USPS-7. See Partial Objection of the United States Postal Service to the Office of the Consumer Advocate's Interrogatory OCA/USPS-7 and Joint Motion for Protective Conditions, October 9, 2001. OCA/USPS-7 is the subject of P.O. Ruling R2001-1/3 and P.O. Ruling R2001-1/7. Likewise, the Postal Service provided copies of the National Account Survey and the Premier Account Survey, along with certain survey results, in response to OCA/USPS-53 and P.O. Ruling R2001-1/3. See Response of United States Postal Service to Interrogatories of Office of Consumer Advocate (OCA/USPS-51-57), October 19, 2001, and Supplemental Response of United States Postal Service to Interrogatory of the Office of Consumer Advocate (OCA/USPS-53), October 31, 2001.

The Postal Service, which opposes production of its market research, states that the survey materials it is willing to produce comprise all responsive information in its possession except for (a) commercially sensitive market research, (b) data from the American Customer Satisfaction Index, and (c) publicly available data.<sup>12</sup>

The Postal Service objects to disclosing market research data, particularly as relates to OCA/USPS-54, citing commercial sensitivity and burden.<sup>13</sup> The Postal Service advances several arguments in support of its position. First, it argues that it may withhold the data pursuant to 39 U.S.C. § 410(c)(2). *Id.* at 3-4. Second, citing *Reliance Insurance Company v. Barron's*, 428 F. Supp. 200 (S.D.N.Y. 1977), the Postal Service contends that its market research satisfies the criteria against disclosure. *Id.* at 3-4. Third, it asserts that the market research data are not relevant to the OCA's inquiry since the survey results "are not intended to measure changes in customer perceptions over time." *Id.* at 4. Encapsulating its position on commercial sensitivity, the Postal Service argues that "[a]ny reasonable business enterprise would consider its strictly internal market research information to be proprietary and confidential, and would make every effort to protect it from public disclosure." *Id.* at 6-7. The Postal Service concludes its discussion on this issue by singling out its continuing objection to OCA/USPS-54 contending that the material requested is irrelevant, commercially sensitivity, and subject to the deliberative process privilege. *Id.* at 7.

Lastly, the Postal Service contends that, notwithstanding the reduced scope of the OCA's requests, production of the 381 surveys that may be responsive would be unjustifiably burdensome. The Postal Service estimates its compliance costs at approximately \$6,000 and asserts that even listing the 381 surveys "would strain [its] resources." *Id.* at 7.

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<sup>12</sup> Postal Service Opposition at 2. The American Customer Satisfaction Index is the subject of OCA/USPS-64 and 65, which remain pending subject to additional motions practice. Further, the Postal Service indicates it will amend its response to OCA/USPS-53 to identify publicly available customer satisfaction data.

<sup>13</sup> *Id.* at 3.

The issues raised by this set of interrogatories are interrelated with those attending OCA/USPS-7, which was addressed in POR 7. In brief, that Ruling directed the Postal Service to provide survey results to certain questions in the Residential and Business Surveys.<sup>14</sup> The Ruling afforded the Postal Service an opportunity to seek protective conditions concerning the survey results to be provided. *Id.* at 4. In response, the Postal Service filed a motion for protective conditions, requesting, *inter alia*, that the protective conditions be applicable to the surveys at issue in OCA/USPS-7 and OCA/USPS-51-57.<sup>15</sup> Aside from summary claims that the survey results to be provided are "highly commercially sensitive," the Postal Service relies principally on 39 U.S.C. § 410(c)(2) and *Reliance Insurance Co. v. Barron's*, 428 F. Supp. 200 (S.D. NY 1977) for the proposition that protective conditions are warranted.<sup>16</sup> In a subsequent pleading, the Postal Service sought to buttress its motion by, *inter alia*, submitting two affidavits that address the confidential nature of the survey results and the potential harm to the Postal Service if such data are publicly disseminated.<sup>17</sup>

The OCA opposes the Postal Service's motion for protective conditions as deficient in two major respects.<sup>18</sup> First, it argues that the Postal Service's blanket claim of commercial sensitivity cannot be sustained. In support, the OCA cites the Postal Service's request for protective conditions for archived FY 1994 and FY 1997 survey results "whose contents are unknown," and its failure to distinguish between results reported for competitive services and those subject to its monopoly. *Id.* at 3-5. Further,

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<sup>14</sup> POR 7 at 3, n.4.

<sup>15</sup> Postal Service Motion for Protective Conditions, *supra*, November 13, 2001 at 1.

<sup>16</sup> *Id.* at 3, and 4-5. As noted above, the Postal Service cited the same authorities in its opposition to the OCA's motion to compel. There, however, the authorities were offered in support of the conclusion that the data should not be disclosed. See Postal Service's Opposition at 3-5.

<sup>17</sup> See Reply of the United States Postal Service to the Office of Consumer Advocate's Response to Motion for Protective Conditions for Results of [Customer] Satisfaction Surveys, November 26, 2001 (Postal Service Reply).

<sup>18</sup> Office of the Consumer Advocate Response to the United States Postal Service Motion for Protective Conditions for Results of [Customer] Satisfaction Surveys, November 19, 2001 (OCA Response).

the OCA contends that the data requested reflect only opinions, not work product or analyses, and that the Postal Service has failed to address how their release could cause the Service any competitive harm. *Id.* at 5.

Second, the OCA contends that the Postal Service has not satisfied its burden of proof. Among other things, the OCA asserts that 39 U.S.C. § 410(c) is inapplicable to discovery in Commission proceedings, that case law cited by the Postal Service “actually supports the OCA’s position,” and that the Postal Service has failed to provide any evidence of harm from public disclosure. *Id.* at 5-9. The OCA expands on these points in its further pleading responding to the Postal Service’s Reply.<sup>19</sup> The OCA’s comprehensive rejoinder addresses the legal standards governing protective conditions and asserts that the Postal Service has failed to demonstrate sufficient competitive harm to bar public dissemination of the data. *Id.* at 3-14.

*Discussion.* As noted, POR 7 directs the Postal Service to produce certain survey results requested in OCA/USPS-7. See P.O. Ruling R2001-1/7 at 3, n.4. Thus, the only issue outstanding concerning that interrogatory is whether the results are to be produced under protective conditions. In addition to that inquiry, however, OCA/USPS-51-57 present a threshold issue, namely, whether, consistent with the Commission’s rules, the discovery requests are “reasonably calculated to lead to the discovery of admissible evidence.” 39 C.F.R. § § 3001.26(a).

As noted above, both the OCA and the Postal Service propose to narrow the scope of the data to be provided. For example, the OCA proposes limitations on the years and search requirements, whereas the Postal Service indicates a willingness to provide available survey results that parallel those it has been ordered to provide in POR 7. See OCA Motion to Compel, *supra*, at 2-3, and Postal Service Opposition, *supra*, at 1-3. These pragmatic limitations are welcomed, recognizing, at a minimum, the interrelationship of these issues with the resolution of OCA/USPS-7. In particular,

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<sup>19</sup> Office of Consumer Advocate Rejoinder in Opposition to United States Postal Service Motion for Protective Conditions for Results of [Customer] Satisfaction Surveys, December 4, 2001 (OCA Rejoinder).

the Postal Service's agreement to provide survey results similar to those previously ordered produced effectively obviates the need to consider whether that information, limited to the surveys identified, satisfies the Commission's rules. This is not to suggest, however, that the probative value of any testimony that might be filed has been established. With the threshold question largely resolved, the next inquiry is whether the "compromises" suggested are appropriate for each interrogatory being contested. Each is addressed below.

*OCA/USPS-51.* Citing an Associated Press report ranking Northern Virginia postal operations highest in customer satisfaction of 85 districts surveyed, the OCA requests copies and summaries of the survey for a period, as modified, beginning in FY 1994. The Postal Service indicates that the survey responsive to this interrogatory is the Residential Survey, the results of which it has been directed to produce, in part, in POR 7.<sup>20</sup> Further, the Postal Service states that it has data from the Residential Surveys for all years in question.<sup>21</sup> Consequently, the Postal Service should provide the FY 1994 and FY 1997 Residential Survey results for the same questions covered by POR 7.<sup>22</sup> If the questions in the older surveys are not the same as in the more recent surveys, the Postal Service should provide survey results for those questions that most nearly approximate the latter.

*OCA/USPS-52 and 53.* These interrogatories seek, respectively, survey results concerning the quality of and consumer satisfaction with Postal Service products and services. The Postal Service indicates that the survey data it has agreed to provide comprise all the information in its possession responsive to OCA/USPS-51-57, except for commercially sensitive market research data, results from the American Customer

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<sup>20</sup> See Postal Service Objection, *supra*, at 3, and P.O. Ruling R2001-1/7 at 3, n.4.

<sup>21</sup> See Postal Service's Reply at 3, n.4.

<sup>22</sup> See POR 7 at 3, n.4. Available information concerning the FY 2000 and FY 2001 is being produced pursuant to OCA/USPS-7.



Satisfaction Index, and publicly available information.<sup>23</sup> Nothing in the record suggests this is not the case. Accordingly, except as discussed below concerning OCA/USPS-53, the Postal Service's proposed compromise is accepted for the years for which data are available.<sup>24</sup>

With respect to OCA/USPS-53, the OCA, noting that the Postal Service previously agreed to provide certain survey results from the National Account and Premier Account Surveys, argues that the results of numerous other questions are relevant and thus should be produced. OCA Motion to Compel at 10. In its compromise, the Postal Service proposes to provide survey results that parallel those it has been ordered to produce in POR 7. Postal Service Reply at 2. Based on a review of the surveys and of the questions enumerated by the OCA, the Postal Service is directed to produce the survey results for the following questions:<sup>25</sup> 1A, B, and N; 3; 5; 8; 10; 12I; 13I; 14I; 17; 18; 28; and 31-32.

*OCA/USPS-54.* This interrogatory seeks survey results measuring consumer preferences and needs regarding "existing or potential Postal Service products and services." The OCA and the Postal Service refer to the subject of this interrogatory, consumer preferences and needs, in different terms. The OCA employs the phrase "customer satisfaction," asserting a "more relevant" request than one designed to identify "data on customer satisfaction with existing [and potential new] services" would be "difficult to imagine." OCA Motion to Compel at 11. For its part, the Postal Service characterizes the OCA's data request, taken as a whole, but in particular OCA/USPS-54, as encompassing market research. Postal Service Opposition at 3-4, 7.

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<sup>23</sup> Postal Service Opposition at 2. As noted above, the American Customer Satisfaction Index data are at issue in OCA/USPS-64 and 65. As part of its response to OCA/USPS-53, the Postal Service agrees to identify all publicly available customer satisfaction data. *Id.* at 3, n.2.

<sup>24</sup> See Postal Service Opposition at 2. In a subsequent pleading, the Postal Service states that "FY94 Business, National Accounts and Premier surveys are not available." Postal Service Reply at 3, n.4.

<sup>25</sup> To the extent the earlier National Account and Premier Account Surveys are different from copies of those surveys previously provided, the Postal Service should provide the results for questions that most closely approximate those it has been directed to provide.

Customer satisfaction issues are addressed in OCA/USPS-53. Even assuming that “consumer preferences” were intended instead of “customer satisfaction,” the OCA’s assertion is not persuasive. To the extent that customer preferences for existing services are at issue, they may be reflected in estimated demand elasticities. *See, e.g.,* Direct Testimony of Thomas Thress, USPS-T-8 at 90 *et seq.* and 132 *et seq.* If the OCA believes they are flawed, it needs to explore that issue directly. In any event, the bare assertion of relevance is insufficient to compel production of whatever data may satisfy the broad phrase “customer preferences or needs” regarding existing services. Nor is there any apparent basis to consider the demand for new services without any indication of their test year availability or effect on test year operations.

By the same token, however, the Postal Service’s various contentions are not entirely satisfactory. When initially objecting to this set of interrogatories, the Postal Service raised the issue of market research only with respect to OCA/USPS-54. Postal Service Objection at 7-8. Since that interrogatory seeks data regarding consumer preferences and needs, the link to market research is intuitively understandable. The Postal Service, however, appears to expand the concept markedly in its opposition to the OCA’s motion to compel. A fair reading of that pleading suggests that for purposes of claiming commercial sensitivity, the Postal Service characterizes the entire set of interrogatories, with emphasis on OCA/USPS-54, as seeking market research. Postal Service Opposition at 3, 7. There is no basis from the pleadings to determine whether that characterization reasonably reflects the contents of the surveys. On the one hand, to the extent the surveys concern, for example, an analysis of competitive services or potential new products, the characterization would appear to be accurate. On the other hand, if the survey entails, say, quality of service issues the characterization may not be entirely apt.

The Postal Service identifies “381 surveys that are possibly responsive to the OCA’s discovery request.” *Id.* at 3. Whether these surveys have a sufficient nexus to issues in this proceeding cannot be determined in a vacuum. The Postal Service, however, objects to producing or even listing these surveys on the basis of burden. *Id.*

at 7. The latter claim is not credible. Simply listing the surveys, along with a brief description of the contents, should not unduly burden the Postal Service. This list may be submitted pursuant to the same protective conditions ordered herein. This approach fairly balances the Postal Service's concerns with commercial sensitivity while providing a means to determine the legitimate bounds of the Postal Service's assertions.<sup>26</sup>

Therefore, the Postal Service is directed to submit a list of these surveys, providing a brief, but adequate, description of their contents, by December 18, 2001.

*OCA/USPS-55, 56, and 57.* These interrogatories request, respectively, survey results concerning window service, telephone assistance, and delivery service. In support of its motion to compel, the OCA argues that these services represent critical interfaces with the public and thus bear directly on customers' choice to utilize the Postal Service or an alternative. See OCA Motion to Compel at 12-13. Whether these services, standing alone, provide sufficient support for the OCA's conclusion need not be decided. First, myriad factors affect customer choice, e.g., convenience, price, and income levels. Since the results to be provided not only address overall performance of the Postal Service, but also indicia of collection and delivery services, the OCA will have whatever information may be available to formulate its testimony.<sup>27</sup> Second, the Postal Service's unchallenged statement that the survey results it has agreed to provide represent all responsive information is largely dispositive, rendering further inquiry unnecessary. Accordingly, the Postal Service need only provide survey results to the questions it has been directed to answer.

*Protective Conditions.* POR 7 directed the Postal Service to provide certain survey results requested by the OCA, while affording the Postal Service an opportunity to seek protective conditions for those data. The Postal Service availed itself of that opportunity, requesting that the protective conditions be extended to its response to OCA/USPS-51-57. As the proponent of the protective conditions, the Postal Service,

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<sup>26</sup> The OCA expressed a concern about the responsiveness of the documents to be provided by the Postal Service. OCA Motion to Compel at 3.

<sup>27</sup> Collection and delivery are among the factors considered in 39 U.S.C. § 3622(b)(2).

which had objected to disclosure on various grounds including commercial sensitivity, has the burden of demonstrating that the information to be produced is confidential and that public disclosure will cause it serious harm, e.g. competitive disadvantage. See, e.g., *Miles v. Boeing Co.* 154 F.R.D. 112, 114 (E.D. Pa. 1994); *Brittain v. Stroh Brewery Co.*, 136 F.R.D. 408, 415 (M.D.N.C. 1991).

The Postal Service recognizes its burden, citing the standards used by the court in *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.*, 529 F. Supp. 866 (E.D. Pa. 1981). See Postal Service Reply at 5. The court in *Zenith Radio*, which involved a protective order issued under Rule 26(c)(7) of the Federal Rules of Civil Procedure, employed a three-pronged analysis, briefly summarized as follows: (1) whether the data sought are commercial information which should be protected; (2) whether disclosure would cause a cognizable harm warranting a protective order; and (3) whether the proponent demonstrated good cause for issuance of the protective order.

In support of its motion, the Postal Service submitted two affidavits, one from Max D. Larsen, a Managing Director of The Gallup Organization (Larsen Affidavit), and the other from Francina G. Smith, Vice President and Consumer Advocate for the Postal Service (Smith Affidavit). The affidavits provide helpful background information concerning the surveys. For example, both Larsen and Smith indicate: (a) that the survey results are not generally made publicly available, (b) that the results are used by managers to improve service, to address specific concerns, and to better understand the markets in which the Postal Service operates, and (c) that public dissemination of the results would disadvantage the Postal Service competitively. See Larsen Affidavit at 2; Larsen Affidavit at 2-4. The harm each envisions is twofold, namely, that competitors might gain access to data to target Postal Service markets, while not having to release comparable data about their own operations. Larsen Affidavit at 2; Smith Affidavit at 3.

Evidentiary privileges, such as commercial sensitivity, are the exception to the general rule that the Commission's proceedings be open to the public. Historically, the Commission has employed a balancing test to determine whether relevant material is to

be produced subject to protective conditions. Specifically, the Commission weighs the harm of public disclosure against the need of the participant seeking disclosure to prove its case. See PRC Order 1025, August 17, 1994 at 8; PRC Order 1283, January 28, 2000 at 3, and P.O. Ruling R97-1/62 at 8. Notwithstanding the commendable briefing of the issues done by the OCA, the survey results at issue present a close question that on balance favors issuing the protective conditions.

Several reasons support this finding. First, as evident from the affidavits, the survey data may be used myriad ways. Aside from any ratemaking implications,<sup>28</sup> the data plainly have commercial value in the markets in which the Postal Service operates. Second, the prevailing business practice, not unique to the Postal Service, is to withhold such data from public dissemination. Larsen Affidavit at 2; Smith Affidavit at 2-4. Thus, to compel the Postal Service to make the data publicly available puts the Postal Service at a competitive disadvantage. Moreover, the harm is compounded because similar data from alternate suppliers remain publicly unavailable.

The OCA argues that the Postal Service has not established the requisite competitive harm to warrant the protective conditions. OCA Rejoinder at 6-13. For example, it questions how various responses to the Residential Survey could “undermine the Postal Service’s competitive position[.]” *Id.* at 9. The issue, however, is not whether the results could “undermine” the Postal Service’s competitive position, but rather whether their public availability would cause it to suffer any competitive disadvantage. The Postal Service’s practice of limiting the public dissemination of such data is in accord with what are represented to be universal business practices. Given that, to require the Postal Service to make such data publicly available singles it out for exceptional treatment that perforce would expose it to competitive disadvantage.<sup>29</sup>

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<sup>28</sup> See P.O. Ruling R2001-1/7 at 2-3.

<sup>29</sup> The OCA suggests that the public might demand better service if it learned that the Postal Service received “poor scores.” *Ibid.* While that might occur, so too might the harm postulated by Larsen and Smith. If the issue turned solely on the Postal Service’s showing of competitive harm, perhaps the OCA’s arguments that the Postal Service’s assertions lack sufficient specificity may have been persuasive. On consideration, however, subjecting the Postal Service to singular treatment could not be reconciled with prevailing business practices.

Furthermore, producing the data under protective conditions does not deprive the OCA of the evidence it needs to make its case. To be sure, as the OCA notes, protective conditions are not without some costs. See OCA Rejoinder at 5, n. 20. Nevertheless, this inconvenience is insufficient to overcome the concern over the potential harm of public disclosure.

Finally, public disclosure, which is favored by the Commission, is subject to legitimate exceptions. While the case presented by the Postal Service may be less than compelling, it has, under these limited circumstances, sustained its burden. In sum, to compel production absent the protective conditions would achieve a largely gratuitous result, disadvantaging the Postal Service without any commensurate public benefit. In balancing the interests involved, the prudent course is to issue the protective conditions.<sup>30</sup>

Lastly, an observation concerning the Postal Service's arguments in support of protective conditions is appropriate. Citing 39 U.S.C. § 410(c)(2), the Postal Service contends that "[it] is entitled by law to protect from disclosure its highly sensitive market research, conducted in the ordinary course of business and not offered in support of any rate or classification proposal before the Commission." Postal Service Opposition at 3-4.<sup>31</sup> The Postal Service misreads the statute. Cf. P.O. Ruling R97-1/62 at 5-7.

Section 410(c)(2) is inapplicable to formal proceedings before the Commission. The application of section 410(c)(2) is expressly limited by section 410(a), which reads, in part, "except as provided in this title." The production of information during formal Commission proceedings is authorized generally by 39 U.S.C. § 3624(a), which requires the Commission to provide an "opportunity for a hearing on the record under

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<sup>30</sup>Of necessity, this Ruling should be considered in context. Since neither the bulk of the survey results nor testimony, if any, incorporating them has yet to be submitted, it is premature to speculate on how the survey results may be used. This Ruling, however, does not preclude revisiting the issue should the participants conclude, based on a review of the data and on a consideration of such testimony, that protective conditions are no longer necessary. This observation is not designed to encourage that result. Rather, it simply recognizes that circumstances may change rendering the protective conditions unnecessary.

<sup>31</sup> See also Postal Service Motion for Protective Conditions at 4, and Postal Service Reply at 11.

sections 556 and 557 of title 5 . . .” These provisions entitle participants “to conduct such cross-examination as may be required for a full and true disclosure of the facts[.]” and in general “[a]ny oral or documentary evidence may be received,” with the exception of irrelevant, immaterial, or unduly repetitious evidence. 5 U.S.C. § 556(d).

In addition, 39 U.S.C. § 3624(b) provides that “the Commission may (without limitation) adopt rules which provide for . . . (3) discovery both from the Postal Service and the parties to the proceedings[.]” The Commission’s Rules of Practice, promulgated pursuant to this authority, authorize the Commission or Presiding Officer to compel an answer (or more responsive answer) “to an interrogatory to which an objection has been raised if the objection is found not to be valid[.]” 39 C.F.R. § 3001.26(e). Likewise, the Commission and Presiding Officer “may for good cause make any protective order[.]” 39 C.F.R. § 3001.26(g). In sum, given these statutory and regulatory sources of authority, there can be no serious question as to whether the Commission is authorized to direct the production of the data at issue in this dispute.<sup>32</sup>

### RULING

1. The Postal Service’s Motion for Protective Conditions, dated November 13, 2001, concerning its responses to OCA/USPS-7 and OCA/USPS-51-57 is granted.
2. The Postal Service is directed to provide the survey results, as set forth in the body of this Ruling, by no later than December 13, 2001.
3. The Postal Service shall file a list of the 381 surveys identified as possibly responsive to the OCA’s data request, providing a brief, but adequate, description

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<sup>32</sup> The Postal Service’s contention that the survey results constitute “trade secrets” is rejected. It offered no support for this position. Moreover, as the OCA notes, trade secrets typically involve “secret processes, secret formulae, or secret designs.” OCA Rejoinder at 7, citing *United States v. International Business Machines Corp.*, 67 F.R.D. 39, 45 (S.D.N.Y. 1975).

of their contents, by December 18, 2001. This list may be submitted subject to the protective conditions ordered herein.

4. The attached protective conditions govern access to materials provided in response to this Ruling.
5. The Office of the Consumer Advocate Motion for Late Acceptance of Motion to Compel Production of Documents Requested in OCA/USPS-51-57, October 30, 2001, is granted.
6. The Uncontested Motion for Late Acceptance of Opposition of the United States Postal Service to the Office of Consumer Advocate's Motion to Compel Production of Documents Requested [in] OCA/USPS-51-57, November 9, 2001, is granted.

  
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. R2001-1/17 (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 access. 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 or 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. § 552(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. R2001-1/17 (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

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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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**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. R2001-1/17 (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 these 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 \_\_\_\_\_

Firm \_\_\_\_\_

Title \_\_\_\_\_

Representing \_\_\_\_\_

Signature \_\_\_\_\_

Date \_\_\_\_\_