

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

RECEIVED
DEC 7 4 39 PM '01
POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

POSTAL RATE AND FEE CHANGES, 2001

Docket No. R2001-1

OPPOSITION OF UNITED STATES POSTAL SERVICE TO MOTION OF
UNITED PARCEL SERVICE TO COMPEL PRODUCTION OF DOCUMENTS
REQUESTED IN INTERROGATORIES UPS/USPS-2(a) AND 2(b) OR, IN THE
ALTERNATIVE, MOTION FOR PROTECTIVE CONDITIONS FOR OIG AUDIT
REPORTS
(December 7, 2001)

The United States Postal Service hereby opposes the Motion of United Parcel Service to Compel Production of Documents Requested in Interrogatories UPS/USPS-2(a) and 2(b) ("UPS Motion"). The interrogatories in dispute requested that the Postal Service provide two OIG audit reports, one concerning the FedEx transportation agreement and one concerning excise taxes and third party ground handling costs under the FedEx transportation agreement. The Postal Service objected to providing the audits because the information contained therein is proprietary and irrelevant. The Postal Service believes that production of these reports should not be compelled.

UPS suggests that "release of this information into the public domain can be accommodated by appropriate redactions accompanied by a redaction or privilege log." UPS Motion at 1. The Postal Service points out that both of the requested reports are publicly available on the OIG website in heavily redacted form. Given UPS's position that "the requested information, consisting of Office of Inspector General audits regarding the Postal Service's estimates of transportation costs under the FedEx transportation contract, is highly relevant to

the determination of the accuracy of the Postal Service's cost estimates under that contract," UPS's offer rings hollow. *Id.* It is clear that even more lightly redacted versions, which redact all dollar figures and percentages in the audits, would not be acceptable to UPS.

As the Postal Service indicated in its earlier objection, both audits contain information that is proprietary. One example cited was an estimate of the costs to terminate the Postal Service's dedicated air transportation contracts. UPS indicates, correctly, that an earlier and different dispute over revealing certain information concerning these termination for convenience estimates was resolved subsequent to the Postal Service's objection on the OIG audits. The Postal Service thus assumes that UPS would have no objection to having the sections of the reports dealing with termination for convenience costs redacted. The problem, however, is that it might well be possible for UPS to "back into" the termination for convenience cost estimate if other cost numbers were left in the report.

As the Postal Service also pointed out in its objection, there is other information in the audits which is commercially sensitive. One such item is an earlier estimate of third party ground handling costs. Third party ground handling costs are included in the case. As witness Hatfield explains, "FY2002 projected costs for ground handling associated with the FedEx day turn network were taken from the actual ground handling contract awards." USPS-T-18, at 25. Moreover, witness Hatfield's testimony fully explains how these costs fit into the overall calculation of FedEx transportation costs. UPS has not shown why it

needs more information on these costs than has been provided. Early estimates are now moot since the case contains the actual costs.

Moreover, the audit section discussing third party ground handling costs gives a range of estimated average rates per pound for these costs derived from a comparison of lowest and highest bids. Obviously, this range gives some indication of the general amount of the lowest and highest bids. Making this information public may well affect performance under the contracts; it most certainly would be detrimental to the integrity of the bidding or negotiation process for similar, future contracts.

Also, as pointed out in the Postal Service's objection, one of the audits discusses the percentage of volume under the FedEx transportation contract that will be handled by third party ground handlers. The Postal Service had argued that the information could be used against the Postal Service by competing bidders for ground handling contracts, as well as by Postal Service competitors attempting to gain insight into volume flows. UPS dismisses the Postal Service's concerns with the statement that somehow the Postal Service could redact facility-specific information. UPS Motion at 8. UPS misses the point. The Postal Service did not argue that the information was facility-specific; it is not. Most of the cities being served by the FedEx networks are likely a matter of public knowledge. This information coupled with even an overall percent of volume to be handled by third party ground handlers could give insight into volume flows that would be detrimental to the Postal Service's competitive position.

Moreover, it should be noted that for purposes of developing cost distributions, witness Hatfield estimated the volumes of Express, Priority and First-Class Mail to be carried on the FedEx networks in FY2002 and FY2003. These volume estimates are contained in USPS-LR-J-94 (Table 305, lines 8 and 9), produced under protective conditions. In fact, that very information is some of the information that the Postal Service highlighted as commercially sensitive in its motion to have USPS-LR-J-94 placed under protective conditions. See Motion of United States Postal Service for Waiver and for Protective Conditions for Library References Concerning Costs Associated with the FedEx Transportation Agreement, September 24, 2001, at 2 and 4. The volume estimates themselves as well as the percent of that volume to be handled by third party ground handlers are both equally commercially sensitive and deserving of protection.

With regard to excise taxes, whatever the OIG audits have to say about them is irrelevant. Costs for excise taxes have been included in the case. The calculation of excise taxes is guided by federal law, not by an OIG audit. This is not a suitable forum for examining the application of that law, but if UPS believes that the excise tax amounts included in the case are incorrect, it can certainly attempt to demonstrate this by reference to the law. Further, it certainly seems that all of the information that might be needed concerning excise tax payments is already available in the case. As witness Hatfield states:

In order to estimate excise tax payments under the FedEx scenario, two inputs were required: the excise tax rate and the percentage of FedEx non-fuel charges that are line haul. The Internal Revenue Service determines the excise tax rate. FedEx provided the Postal Service the percentage of their non-fuel charges that are line haul.

USPS-T-18, at 24. UPS has not made sufficient showing that it needs any other information concerning excise taxes.

In its objection, the Postal Service also stated that the audits were irrelevant because the recommendations had either been followed by Postal Service management or had been superseded by subsequent discussions with the OIG and by the availability of more recent information. The Postal Service maintained then, and still maintains, that the only pertinent cost information is already included in the case. UPS insists that “the areas of disagreement between the Postal Service and the OIG will yield the most useful information for the Commission.” UPS Motion at 5. UPS further claims that “[o]nly with this information can the Commission assess whether the recommendations that were followed were properly made.” *Id.* The Postal Service is deeply troubled by these comments as they seem to misapprehend both the role of OIG audit reports with respect to rate proceedings and the role of the Commission with respect to Postal Service management. And this misapprehension is not unique to UPS; it has seemed to pervade many of the requests for OIG information made by other participants.

There can be no doubt that an important function of the OIG is to independently analyze and audit various Postal Service projects and proposals. Integrally related to the analysis/audit function is the OIG's function of advising postal management as well as the Governors on the results of their audits. In many, if not most instances, the OIG and postal management have worked together on the audit in the sense of a back-and-forth discussion over OIG

findings and recommendations. There have been agreements and disagreements. This is part of the internal, organizational give and take that any prudent business should engage in. This is not a process that should be chilled or subverted if candid assessments and frank discussions are to continue. It is those very candid assessments and frank discussions that serve the mailing public's best interests. Ongoing discovery focus and legal skirmishing regarding sensitive OIG audit information can only serve to disrupt the OIG process and make it less fruitful for all concerned.

Further, it is not the role of the Commission to determine whether the OIG recommendations were "proper" or whether Postal Service management "properly" followed or declined to follow OIG recommendations. These are areas within the province of and best left to the determination of the OIG, Postal Service management and the Governors. See 13 Administrative Support Manual, at 46-64. It is only under such circumstances that management decisions will be refined and improvements made in postal operations and services.

In this particular instance, as the Postal Service initially indicated in its objection, this is precisely what occurred. The Postal Service made changes in its FedEx estimates following review of and discussions regarding the OIG recommendations, and better, more up-to-date information became available.

For all of the reasons outlined above, the Postal Service still believes that it should not have to produce the OIG audit reports. In the alternative, however, if the Commission determines that OIG audits pertaining to the FedEx agreement

must be produced, then the Postal Service moves that these reports be produced and only under the same protective conditions governing access to the FedEx materials supporting the Postal Service's calculation of the cost effects of the FedEx transportation agreement (USPS-LR-J-94 and 99). No participant opposed the granting of protective conditions for those library references and OIG audit reports should not be treated any differently. Accordingly, the Postal Service requests that the standard protective conditions used for other materials in these proceedings be enacted here. See Presiding Officer's Ruling No. R2001-1/2, issued October 12, 2001.¹

The Postal Service understands that at times it can be difficult for counsel or consultants based outside of the Washington, D.C. metropolitan area to make a special trip to obtain protected materials. Therefore, if protective conditions are granted and with the permission of the Commission, undersigned counsel is willing to fax or send via Express Mail to counsel for UPS separate copies of the OIG audit reports. The report will be sent with each page properly marked under paragraph 11 of the standard protective conditions, upon receipt of a signed, faxed certification from UPS counsel.

¹ To the extent, however, that there is other information not related to the Postal Service's estimates of transportation costs under the FedEx transportation agreement, the Postal Service reserves the right to delete or redact those portions, even though the remainder of the reports will be produced under protective conditions.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

Daniel J. Foucheaux, Jr.
Chief Counsel, Ratemaking



Susan M. Duchek

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all participants of record in this proceeding in accordance with section 12 of the Rules of Practice.



Susan M. Duchek

475 L'Enfant Plaza West, S.W.
Washington, D.C. 20260-1137
(202) 268-2990; Fax -5402
December 7, 2001