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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

PRESIDING OFFICER'S
RULING NO. R2001-1/22

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

Postal Rate and Fee Changes

Docket No. R2001-1

PRESIDING OFFICER'S RULING
CONCERNING UPS/USPS-2(a) AND 2(b)

(Issued December 18, 2001)

United Parcel Service (UPS) requests that the Postal Service be compelled to provide two Office of Inspector General (OIG) audit reports concerning cost estimates under the FedEx transportation agreement.¹ The two reports, requested in UPS/USPS-2(a) and 2(b), respectively, are identified as follows: Interim Audit Results of FedEx Transportation Agreement (1st letter), issued 6/26/01, Final Report No. TR-LA-01-001, Project No. 01NR008TR000; and Interim Audit Results on Excise Taxes and Third Party Ground Handling Costs Under FedEx Transportation Agreement (2nd letter), issued 8/8/01, Final Report No. TR-MA-01-002, Project No. 01NR008TR001. The Postal Service objects to providing the reports, arguing that they contain proprietary and irrelevant information.² Alternatively, the Postal Service requests that, if it is directed to produce the reports, such information be produced subject to protective conditions.³ As discussed below, UPS's motion to compel is granted as is the Postal Service's motion for protective conditions.

¹ Motion of United Parcel Service to Compel Production of Documents Requested in Interrogatories UPS/USPS-2(a) and 2(b), November 27, 2001 (UPS Motion).

² Objection of United States Postal Service to Interrogatories of United Parcel Service (UPS/USPS-2(a) and 2(b)), November 13, 2001 (Postal Service Objection).

³ 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 (Postal Service Opposition).

Background. The Postal Service objects to providing the audit reports on two grounds. First, it asserts that the reports contain proprietary information, including cost estimates to terminate the Postal Service's dedicated transportation contracts and estimated third party ground handling costs. Postal Service Objection at 1. In addition to indicating that estimates of these costs are included in its direct case, the Postal Service contends that revealing the earlier estimates could adversely effect it, e.g., that disclosure could have a detrimental effect on ongoing negotiations with air carriers. *Id.* at 1-2. Second, the Postal Service asserts that the material requested is irrelevant. In support, the Postal Service argues that, although it used most of OIG's recommendations, the cost savings estimates it projects are a product of "changes coming out of the OIG process as well as the more recent information that became available." *Id.* at 2. This, according to the Postal Service, makes the audit reports superfluous.

UPS argues that the reports are relevant because they bear on the accuracy of the Postal Service's cost estimates under the FedEx transportation agreement on which, in part, the Postal Service's proposed rates for Express Mail, Priority Mail, and First-Class Mail are based. UPS Motion at 1. UPS notes that witness Hatfield calculates the rollforward adjustment associated with the FedEx agreement, which witness Patelunas uses to develop the rollforward subsequently used by witness Tayman to estimate the test year revenue requirement. *Id.* at 3. In addition, UPS argues that the attributable cost levels for Express Mail and Priority Mail are strongly influenced by these cost estimates. *Id.* at 3-4.⁴

UPS also addresses Postal Service claims that the information sought is irrelevant or unnecessary. For example, UPS contends that Postal Service's selective adoption of the audits' recommendations establishes the relevance of all the recommendations since those not accepted may reveal "criticisms or concerns about the Postal Service's analysis of the impact of the FedEx contract." *Id.* at 5. Further,

⁴ UPS advances generally similar arguments in support of its claim that third party ground handling costs and excise tax amounts are relevant. See *id.* at 6-7.

UPS dismisses the Postal Service's suggestion that a review of the audits is made unnecessary because the information is stale, arguing that the availability of more recent information does not mean that the data in the reports should be ignored. Finally, UPS argues that the Postal Service's claims that the information is proprietary can be addressed through "appropriate redactions accompanied by a redaction or privilege log." *Id.* at 1; *see also id.* at 7-8.

In opposing UPS's motion, the Postal Service reiterates its objection that the reports contain proprietary and irrelevant information.⁵ At the outset, however, the Postal Service rejects the suggestion that redaction is a workable alternative. *Id.* at 1-3. Among other things, the Postal Service contends that notwithstanding any redactions UPS may be able to "back into" termination for convenience cost estimates, an issue previously resolved by the parties. *Id.* at 2. In addition, the Postal Service takes issue with UPS's assumption regarding its objection that information concerning volumes processed by third party ground handlers could enable competitors to gain insight into mail flows. *Id.* at 3

Concerning the reports, the Postal Service contends that UPS has failed to demonstrate a need for information concerning either third party ground handlers or excise taxes beyond that already included in witness Hatfield's testimony. *Id.* at 3-4. Thus, for example, the Postal Service argues that since Hatfield's testimony includes the costs for ground handling taken from actual contract awards the "earlier estimates are moot." *Id.* at 3-4. Similarly, citing Hatfield's testimony, it claims that "all of the information" necessary to address the issue of excise taxes is already in the record. *Id.* at 4.

In addition, the Postal Service expresses its concern that UPS (and others) misapprehend "the role of OIG audit reports with respect to rate proceedings and the role of the Commission with respect to Postal Service management." *Id.* at 5. The

⁵ See Postal Service Opposition, *supra*. The Postal Service sought an extension of time to respond to UPS's motion. See Motion of United States Postal Service for Extension of Time to Respond to Motion of United Parcel Service to Compel Production of Documents Requested in Interrogatories UPS/USPS-2(a) and 2(b), December 4, 2001. The motion for extension of time is granted.

Postal Service concludes that discovery disputes concerning "sensitive OIG information" may have a deleterious effect on the OIG process. *Id.* at 6. Further, responding to UPS's statement concerning OIG's recommendations, the Postal Service states that the Commission has no role regarding the appropriateness of OIG's recommendations or Postal Service management's decisions regarding them. *Ibid.*

Alternatively, the Postal Service requests that, if the Presiding Officer directs it to provide the audit reports, the information be produced under the same protective conditions governing access to library references USPS-LR-J-94 AND USPS-LR-J-99, which also concern the FedEx transportation agreement. *Id.* at 6-7.⁶ In support, the Postal Service notes that no participant opposed granting protective conditions for those library references.

Discussion. The issue of relevance will be addressed first since if the information is found to be irrelevant there will be no need to address whether it is also proprietary. The Postal Service's contentions that the information requested is irrelevant are not persuasive. First, it attempts to impose a burden of proof on UPS that is at odds with the Rules of Practice. UPS is not required to show "why it needs more information on these costs than has been provided." Postal Service Opposition at 2-3; *see also id.* at 5. Under the Commission's rules, the standard is that information requested "appears reasonably calculated to lead to the discovery of admissible evidence[.]" 39 C.F.R. § 3001.26(a). As UPS notes, the costs of the FedEx transportation agreement directly effect the costs of Express Mail, First-Class Mail, and Priority Mail service, and thus are reflected in the rates for those services, as well as in the Postal Service's test year revenue requirement.

Second, the Postal Service implicitly concedes the relevance of costs at issue, but contends that data used by witness Hatfield essentially render the OIG reports moot. This claim is neither self-evident nor sufficient to deny access to information that bears directly issues before the Commission. The details of the reports are unknown.

⁶ See P.O. Ruling R2001-1/5. The Postal Service reserves the right to delete or redact information unrelated to its estimates of transportation costs under the FedEx transportation agreement. *Id.* at 7, n1.

They may, for example, support the Postal Service's cost estimates, raise questions about their reasonableness, or perhaps neither. Regardless, UPS has satisfactorily demonstrated the potential relevance of the reports to entitle it an opportunity to review them.

The Postal Service concerns over the consequences of discovery on the OIG process are exaggerated. The Commission will continue to fulfill its statutory responsibilities. Presumably, the OIG will continue to do so as well. That OIG reports may, on occasion, be subject to discovery disputes in Commission proceedings does not mean, as the Postal Service seems to suggest, that any such inquiry should be rejected. If warranted, relevant information can be made available subject to protective conditions or otherwise protected from public disclosure. Moreover, simply granting access to such information does not establish its probative value. Furthermore, under the procedural schedule, the Postal Service, as proponent of the rate change, has an opportunity to answer participants' direct cases.

The two OIG reports, which are available on the OIG website in heavily redacted form, address, *inter alia*, anticipated cost savings under the FedEx transportation agreement. The Postal Service provides examples to support its claim that the reports contain proprietary information. It cites as commercially sensitive estimated third party ground handling transportation costs, including the percentage of volume to be worked by third party ground handlers. Postal Service Opposition at 2-3. Ordinarily, information under private contracts would be deemed proprietary. Based on Postal Service representations as well as what little can be gleaned from the redacted reports, the information in the reports appears, under the circumstances, to be fairly characterized as proprietary.

UPS's suggestion that appropriate redactions would resolve the Postal Service's concerns about the public availability of the reports appears to be unworkable. While the suggestion may follow from the Postal Service's somewhat cryptic objection,⁷ redaction may, as the Postal Service points out, be an unsatisfactory tool under the

⁷ See Postal Service Objection at 1-2.

circumstances. See Postal Service Opposition at 2-3. Moreover, the Postal Service's unopposed motion for protective conditions provides an acceptable and more suitable alternative. The Postal Service supports its request by referencing the treatment accorded Library References USPS LR-J-94 and USPS LR-J-99. Postal Service Opposition at 6-7; see also *id.* at 4. The Postal Service's motion for protective conditions is granted. Substantially the same protective conditions as adopted in P.O. Ruling R2001-1/5 are adopted herein.

Recognizing the logistics involved, the Postal Service offers to fax or Express Mail separate copies of the instant reports to UPS's counsel. That, too, is an acceptable alternative.

Finally, the Postal Service indicates that it reserves the right to redact or delete other information, if any, in the reports unrelated to transportation cost estimates under the FedEx transportation agreement. *Id.* at 7, n.1. This reservation may be a simple precaution and go unexercised; it is, after all, couched in the prefatory phrase "[t]o the extent, however, that there is other information" *Id.* at 7. The reservation, however, is unadorned with either any justification or any description of materials that may be redacted or deleted. Hence, the reasonableness of the reservation, if exercised, cannot be determined. Consequently, if the reservation is exercised, the Postal Service is directed to submit the reports in redacted form as library references with access to such materials made available pursuant to the attached protective conditions. Concurrently, however, the Postal Service is directed to file the reports in unredacted form for *in camera* inspection by the Presiding Officer. The Postal Service should simultaneously may file and serve on the participants in this proceeding a supplemental pleading justifying the redactions or deletions. The reports, redacted or otherwise, and the supplemental pleading, if any, are due December 27, 2001.

RULING

1. The Motion of United Parcel Service to Compel Production of Documents Requested in Interrogatories UPS/USPS-2(a) and 2(b), filed November 27, 2001, is granted as discussed in the body of this Ruling.
2. The Motion of United States Postal Service for Extension of Time to Respond to Motion of United Parcel Service to Compel Production of Documents Requested in Interrogatories UPS/USPS-2(a) and 2(b), filed December 4, 2001, is granted
3. The Postal Service's Alternative Motion for Protective Conditions for OIG Audit Reports, filed December 7, 2001, is granted.
4. The attached protective conditions govern access to materials provided in response to this Ruling.
5. Consistent with the discussion above, the OIG reports that are subject to this Ruling are to be filed with the Commission on or before December 27, 2001


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. R2001-1/22 (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. R2001-1/22 (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. R2001-1/22 (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 _____