

RECEIVED

Dec 20 11 49 AM '01

POSTAL RATE AND FEE CHANGES  
OFFICE OF THE CONSUMER ADVOCATE

PRESIDING OFFICER'S  
RULING NO. R2001-1/26

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

Postal Rate and Fee Changes

Docket No. R2001-1

PRESIDING OFFICER'S RULING  
ON MOTION TO COMPEL PRODUCTION OF DOCUMENTS  
REQUESTED IN OCA/USPS-T36-1(a)

(Issued December 20, 2001)

On November 5, 2001, the Office of the Consumer Advocate (OCA) filed a motion to compel the Postal Service to produce one of the documents that the Service had identified as responsive to interrogatory OCA/USPS-T36-1(a).<sup>1</sup> This document is an Office of Inspector General (OIG) report entitled "Review of the Postal Service Delivery Confirmation Program at Selected Facilities" (OIG Report).

Interrogatory OCA/USPS-T36-1(a) requests the Postal Service to determine whether any audits, studies, or updates on special services have been performed, and to provide any reports prepared as a result of any such audit, study, or update.<sup>2</sup> Interrogatory OCA/USPS-T36-1(a) states:

OCA/USPS-T36-1. The following questions refer to a United States Postal Inspection Service Special Services report, Case No. 040-1241887-PA(2) dated May 18, 1999, filed in Docket No. R2000-1 as USPS-LR-I-200.

---

<sup>1</sup> Office of the Consumer Advocate Motion to Compel Production of Documents Requested in OCA/USPS-T-36-1(a), filed November 5, 2001 (Motion to Compel).

<sup>2</sup> Office of the Consumer Advocate Interrogatories to United States Postal Service Witness: Susan W. Mayo (OCA/USPS-T36-1-18), filed October 1, 2001.

(a) Since the May 18, 1999, audit, has the Postal Inspection Service or any other entity under Postal Service auspices performed any other audits, studies, or updates on any Postal Service special service? If so, please provide a copy of any report or other document prepared as a result of such audit, study, or update.

The Postal Service responded to this interrogatory by referencing previous responses to interrogatories DFC/USPS-1 and 2.<sup>3</sup> It also referenced a notice concerning DFC/USPS-1 and 2 that indicated the Postal Service initially reviewed an incomplete list of OIG reports, and therefore might have to update its initial response.<sup>4</sup> Subsequently, the Postal Service identified a responsive report, the OIG Report, and filed an objection to producing this report on the grounds of relevance and commercial sensitivity.<sup>5</sup>

The Postal Service Objection alleges that the OIG Report provides results of an audit of the delivery confirmation scanning procedures at five facilities that were reviewed because of allegations made on the OIG hotline concerning improper scanning procedures. The Postal Service asserts that "these problems likely have been corrected." Objection at 2. Nevertheless, the Service alleges that the volumes at issue are so small as to be irrelevant to the pricing of Delivery Confirmation.

Furthermore, the Postal Service alleges the OIG Report provides facility specific data for the facilities studied. The Postal Service objects to disclosure based on commercial sensitivity because of this facility specific data. The report also concerns a service that is related to the Postal Service's competitive Priority Mail and Package Services products. The Postal Service expresses a concern that disclosure of the

---

<sup>3</sup> Response of United States Postal Service Witness Mayo to Interrogatories of the Office of the Consumer Advocate (OCA/USPS-T36-1-7, 9-11, 14, 15(b-c), 17(a-g), and 18), filed October 15, 2001. Response of United States Postal Service to Interrogatories of Douglas F. Carlson (DFC/USPS-1-13), filed October 11, 2001.

<sup>4</sup> Notice of United States Postal Service of Review of Responses to Interrogatories DFC/USPS-1 and 2, filed October 12, 2001.

<sup>5</sup> Partial Objection of the United States Postal Service to Interrogatory OCA/USPS-T36-1(a) of the Office of the Consumer Advocate, filed October 22, 2001 (Objection).

report might foster a misleading perception of the quality of the service, and allow Postal Service competitors to selectively use the report to tarnish the image of Delivery Confirmation and the underlying competitive mail products.

A separate motion for late acceptance was filed with the Objection.<sup>6</sup> The Objection was filed late, but as soon as possible after discovery of the responsive report. The motion for late acceptance is granted.

OCA's Motion to Compel challenges the Postal Service's relevance and commercial sensitivity arguments. OCA argues that this interrogatory supplements other efforts examining the efficiency, accuracy, convenience, and consumer perception of the Postal Service. OCA alleges that this is relevant to a number of issues before the Commission, and in particular, relevant to the level of the contingency. It also argues that the interrogatory is relevant to the examination of the value of a Postal Service product. OCA concludes that "[p]lainly, a study showing a possible failure to capture Delivery Confirmation data due to improper use of scanning equipment (and any similar responsive studies that have not been identified) is relevant and a proper subject of discovery." OCA also counters the Postal Service's commercial sensitivity argument by arguing that the Postal Service is confusing "embarrassing" with "commercial sensitivity."

On November 13, 2001, the Postal Service filed a response in opposition to the Motion to Compel.<sup>7</sup> The Service questions the relevance of the OIG Report by stating, "the report focuses on operational problems at a few delivery units, which would not be expected to have a significant impact on nationwide customer satisfaction." The Service reiterates its commercial sensitivity argument in objecting to disclosure of facility specific data. It also restates its argument that Delivery Confirmation practices

---

<sup>6</sup> Motion for Late Acceptance of Partial Objection of the United States Postal Service to Interrogatory OCA/USPS-T36-1(a) of the Office of the Consumer Advocate, filed October 22, 2001.

<sup>7</sup> Opposition of United States Postal Service to Motion of the Office of the Consumer Advocate to Compel Production of Documents Requested in OCA/USPS-T36-1(a), filed November 13, 2001 (Opposition).

at particular facilities directly concerns competitive products such as Priority Mail and Package Services, and thus, the material is commercially sensitive.

The Postal Service quotes or references sections of the OIG Report in opposition to the Motion to Compel. OCA has filed a motion to compel production of the quoted or referenced documents relied upon by the Postal Service.<sup>8</sup> Alternatively, OCA requests the Presiding Officer to disregard the specific arguments presented. OCA also requests for leave to reply, assuming the Postal Service provides the requested material.<sup>9</sup>

The Postal Service opposes the motion to produce the supporting documentation and the motion for leave to reply.<sup>10</sup> The Postal Service prefers that its Opposition to the Motion to Compel be considered without the quote in question, and suggests a possible way to rewrite the affected paragraph.

OCA's alternative motion, that consideration be given to the Postal Service's Opposition by disregarding unsupported relied upon or quoted material, shall be granted. The Postal Service has indicated that this is the preferred approach. The Postal Service's suggested paragraph will be substituted for the paragraph quoting the Postal Service's Vice President for Delivery. The Presiding Officer will also disregard the additional references to the OIG Report appearing on pages 3 and 4. The argument that the facility specific information contained within the OIG Report might be commercially sensitive shall be evaluated based on the existing Postal Service pleadings. Therefore, the motion for production of documents relied on is denied, and the motion for leave to reply is moot.

---

<sup>8</sup> Office of the Consumer Advocate Motion for (1) Production of Documents Relied on in the Postal Service's Opposition to OCA Motion to Compel Production of Documents Requested in OCA/USPS-T36-1(a) and (2) Leave to File a Reply to Opposition of the Postal Service, filed November 28, 2001.

<sup>9</sup> The Postal Service Opposition also references the OIG Report on pages 3 and 4. OCA did not specifically address either reference in its motion. However, both references potentially suffer the same type of supporting documentation problem as indicated in the OCA's motion.

<sup>10</sup> Response of the United States Postal Service to Office of the Consumer Advocate Motion for (1) Production of Documents Relied on in the Postal Service's Opposition to OCA Motion to Compel Production of Documents Requested in OCA/USPS-T36-1(a) and (2) Leave to File a Reply to Opposition of the Postal Service, filed December 5, 2001.

*Analysis.* Discovery is allowed that “appears reasonably calculated to lead to the discovery of admissible evidence.” Rules 26(a) and 27(a). Examination of this standard frequently turns on the relevance of the material requested, and must be reviewed in the context of the type of proceeding, in this case an omnibus rate case, and in the context of the purpose of the discovery question. However, the material requested need not be relevant in and of itself. It only has to lead to the discovery of admissible evidence that is relevant in the proceeding.

OCA argues that the OIG Report addresses the value of service for Delivery Confirmation. The Postal Service counters this argument by stating that this report represents problems at only five facilities, affecting a small volume, and that corrective action is either underway or already complete to resolve the identified problems. Value of service is one of the factors to consider in setting rates. An ongoing problem, or even the perception of a problem, that can be associated with a service can be related to the value of service factor. The problems revealed at a limited number of facilities can be potentially indicative of problems occurring throughout the system. The OIG Report might reveal only minor problems that have been resolved, or it might reveal a systemic problem. Without examining the report, this determination cannot be made. Therefore, if the OIG Report itself is not relevant, it at least may lead to the discovery of admissible evidence, and thus is discoverable in this proceeding.

OCA further argues that this interrogatory relates to the contingency issue, and is thus relevant. Potential problems with Delivery Confirmation appear far removed from consideration of the contingency. Without further development of this argument, it is not persuasive.

The Postal Service argues that the OIG Report is commercially sensitive because of the potential for misuse by its competitors. A potentially embarrassing report that highlights problems with a service is not necessarily commercially sensitive. However, there may be instances where the disclosure of a problem with a service, even though the problem has since been resolved, may unfairly tarnish the perception

of the product, and thus cause irreparable harm to the future of that product. This might justify disclosure under some form of protective conditions.

The Postal Service argues that because a peripheral service, such as Delivery Confirmation, is associated with a competitive product, such as Priority Mail or Package Services, this makes information regarding the peripheral service commercially sensitive. Setting such a broad standard would encompass just about anything associated with competitive services, and thus prevent its disclosure. Without further support for this argument, it is not persuasive.

The Postal Service argues that the OIG Report contains facility specific information, and thus as has been the practice, should not be released. Because the OIG Report contains facility specific information, and accepting that there is at least a potential for unfairly tarnishing the perception of Delivery Confirmation, protective conditions are appropriate for the Postal Service's response. The facility specific information, however, also appears to be a good candidate for protection by redaction, or presentation in another form that would conceal the facility specific data.

In conclusion, the OIG Report is relevant, or at least will likely lead to admissible evidence in this proceeding, and thus is the proper subject of discovery. The potential for competitive harm by release of this material in an unprotected manner is apparent from the Postal Service's pleadings. Thus, the response to this interrogatory shall be provided under standard protective conditions per the attachment to this ruling on or before January 8, 2002. The OIG Report also appears to be a candidate for protection by redacting the sensitive information. The Postal Service shall identify the types of sensitive information contained in the OIG Report, and report to the Commission on or before January 8, 2002, on the feasibility of redacting the sensitive material so that a response to this interrogatory can be provided free of protective conditions.

RULING

1. The motion for late acceptance requested in Motion for Late Acceptance of Partial Objection of the United States Postal Service to Interrogatory OCA/USPS-T36-1(a) of the Office of the Consumer Advocate, filed October 22, 2001, is granted.
2. The Office of the Consumer Advocate Motion to Compel Production of Documents Requested in OCA/USPS-T-36-1(a), filed November 5, 2001, is granted. However, the Postal Service may provide a response under the protective conditions that are attached to this ruling. The Postal Service shall provide a response on or before January 8, 2002.
3. The Postal Service shall identify the types of sensitive information contained in the OIG Report, and report to the Commission on or before January 8, 2002, on the feasibility of redacting the sensitive material so that a response to this interrogatory can be provided free of protective conditions.
4. The Office of the Consumer Advocate Motion for (1) Production of Documents Relied on in the Postal Service's Opposition to OCA Motion to Compel Production of Documents Requested in OCA/USPS-T36-1(a) and (2) Leave to File a Reply to Opposition of the Postal Service, filed November 28, 2001, is denied as to the production of documents, and moot as for leave to reply. However, the Postal Service's Opposition shall be modified as noted in this ruling.



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. R2001-1/26 (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. R2001-1/26 (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. R2001-1/26 (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 \_\_\_\_\_