

DOCKET SECTION

BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, DC 20268

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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

POSTAL RATE AND FEE CHANGES, 1997

Docket No. R97-1

EMERY'S INFORMAL EXPRESSION ON RELEASE
OF PROPRIETARY AND CONFIDENTIAL
INFORMATION TO UPS
September 26, 1997

In order to safeguard the confidentiality of its proprietary business information, Emery Worldwide, One Lagoon Drive, Suite 400, Redwood City, California 94065, supports the Postal Service's objections to UPS's eighth set of interrogatories to witness Sharkey (UPS/USPS-T33-43 through 58). Emery files this memorandum pursuant to Commission Rule 20b.

BACKGROUND

On September 11, 1997, United Parcel Service served its eighth set of interrogatories and requests for production of documents to Postal Service witness Sharkey. The discovery requests seek confidential and proprietary information developed by Emery in connection with a Postal Service contract for the processing and transportation of Priority Mail ("the PMPC contract"). Specifically, they ask detailed questions about elements of cost, volumes, and pricing used in the PMPC contract. Revealing this information would be tantamount to revealing Emery's costs and pricing strategies and would give UPS — a direct competitor of both Emery and the Postal Service — an unfair competitive advantage.

The UPS interrogatories follow the Postal Service's earlier production of a redacted copy of the PMPC contract to UPS under the Freedom of Information Act. In accordance with FOIA, the Postal Service redacted the confidential and proprietary business information from the documents provided to UPS because releasing the information would have caused substantial harm to the competitive position of both the Postal Service and Emery. See, e.g., National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974). Because the Freedom of Information Act sets forth its own procedures for appealing a decision to withhold documents, this proceeding is not the proper forum to challenge the Postal Service's redactions.

In an attempt to provide UPS information relevant to this proceeding without compromising proprietary information developed by the Postal Service and Emery, the Postal Service has offered to provide responses to the UPS discovery requests under a protective order that restricts access to attorneys and consultants not involved in their clients' competitive decision-making.¹ The proposed protective order is essentially identical to the one used by federal courts and other administrative agencies when a company seeks access to confidential or proprietary information developed by a competitor. Emery supports the Postal Service's position and objects to providing UPS or any other competitor with its confidential and proprietary business information without the security of such a protective order.

¹ For the Commission's convenience, a copy of the proposed protective order is attached as Exhibit A. Exhibits B, C, and D are applications for access to protected materials by outside counsel, in-house counsel, and experts or consultants, respectively.

ARGUMENT

A company that seeks to review a competitor's trade secrets or confidential and proprietary business information can do so only under very limited circumstances. Under the Freedom of Information Act, such information cannot be reviewed at all. See, e.g., National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974). When it must be disclosed in litigation, courts and administrative agencies routinely enter a protective order that precludes access by anyone who could use it to gain an unfair competitive advantage. The typical protective order used by the General Accounting Office, federal district courts, the Court of Federal Claims, and the General Services Administration Board of Contract Appeals contain three important restrictions on access to proprietary information:

- *Limited Access.* Proprietary information is restricted to attorneys and consultants that are not involved in making competitive decisions for any party that may gain from access to the information. Non-attorney employees of the requesting party cannot see it at all.
- *Discretion over Access.* The body issuing the protective order retains discretion whether to allow a person access to protected materials. Each person who seeks access must submit an affidavit stating that they do not engage in competitive decision-making for any company that could gain a competitive advantage from the information. Other interested parties have an opportunity to challenge any particular person's access to the information.
- *Document Controls.* Protected material must be labeled. It may be transmitted only in labeled and sealed envelopes. Parties receive only one copy of protected documents and must return or destroy them soon after the matter is concluded.

By keeping confidential and proprietary information away from those involved in competitive decision-making, these protections help ensure that trade secrets and confidential and proprietary business information developed by one company will not be released — even inadvertently — to competitors. In turn, it limits the risk that the requesting party will gain an unfair competitive advantage by seeing its competitors' proprietary information.

Although they are also intended to limit disclosure of confidential information, the Postal Rate Commission protective conditions do not specifically deal with cases where a company seeks confidential and proprietary information developed by its competitors. In such cases, it is appropriate to ensure that no unfair competitive advantage develops from disclosure of the confidential information. A protective order addressing this risk should contain the following safeguards: (1) the order should *limit access* to attorneys and experts not involved in their clients' competitive decision-making; (2) the order should *reserve discretion* to the Commission to control access to protected materials; and (3) the order should impose *document handling requirements*. Using the protective order proposed by the Postal Service — the one universally adopted by courts and administrative bodies in this situation — will allow the Commission to accomplish each of these goals and to ensure that appropriate confidentiality is maintained.

Caselaw supports the propriety of withholding confidential and proprietary business information from competitors. The Freedom of Information act specifically exempts such information from disclosure. See, e.g., National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974) (commercial and financial information need not be disclosed if disclosure will cause substantial harm to the producer's competitive position). In the litigation context, courts and administrative agencies have uniformly supported the withholding of

proprietary information from competitive decision-makers. Attorneys can have access to a proprietary information developed by a client's competitor only upon approval of their certification that they are not involved in making the client's competitive decisions. See, e.g., U.S. Steel Corp. v. United States, 730 F.2d 1465, 1468 (Fed. Cir. 1984); Matsushita Electric Industrial Co. v. United States, 929 F.2d 1577, 1579-80 (Fed. Cir. 1991). In other words, the attorney or outside consultant cannot be involved in pricing, product design, marketing strategies, or proposal preparation.

In this case, release of the information requested in the UPS interrogatories without an appropriate protective order would cause substantial harm to the competitive position of both the Postal Service and Emery. Information responsive to UPS interrogatories T33-45 and T33-47, for example, would reveal Emery's costs and pricing strategies for a variety of geographic city-pairs and regions. UPS could use this information to evaluate its own ability to compete on certain routes and effectively "cherry-pick" the Emery routes that will be most profitable. UPS could adjust its business to focus on Emery's profitable routes and leave Emery to struggle with the less profitable ones. That kind of unfair competitive advantage is exactly what the protective order must prevent. If pricing information about the PMPC contract is relevant to the rate proceeding, UPS should not be allowed to use it to gain a competitive advantage outside the proceeding. The only fair way to reveal such information is to enter a protective order that ensures it is not provided to UPS competitive decision-makers.

CONCLUSION

Emery supports the Postal Service's objections to UPS's eighth set of interrogatories to witness Sharkey and the use of a protective to prevent the disclosure of confidential and

proprietary information to UPS competitive decision-makers. The proposed order provides adequate protection from unauthorized disclosure and is commonly used in preventing the disclosure of proprietary information. Emery requests that the Commission enter the proposed protective order and consider applications for access to protected material by those attorneys and outside consultants who certify that they are not involved in competitive decision-making on behalf of any company that may gain a competitive advantage from the protected material.

DATED this 26th day of September 1997.

Respectfully submitted,

EMERY WORLDWIDE

By Counsel

WICKWIRE GAVIN, P.C.

8100 Boone Boulevard, Suite 700

Vienna, Virginia 22182

(703) 790-8750

By:

Brian Waagner for

David P. Hendel

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. The document was mailed by first-class, postage-prepaid mail this 26th day of September 1997.

Brian Waagner for

David P. Hendel

BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, DC 20268

POSTAL RATE AND FEE CHANGES, 1997

Docket No. R97-1

PROTECTIVE ORDER
September 26, 1997

This protective order limits disclosure of certain materials and information submitted in the above-captioned proceeding, so that no party obtaining access to materials protected under this order will gain a competitive advantage as a result of the disclosure. Materials to which parties gain access under this order are to be used only for the subject proceeding, absent express prior authorization from the Postal Rate Commission. Such authorization must be requested in writing, with notice to all parties.

1. This protective order applies to all materials that are identified by any party as protected, unless the Postal Rate Commission specifically provides otherwise.
2. Protected material of any kind may be provided only to the Postal Rate Commission and to individuals authorized by this order, and must be in a sealed parcel containing the legend "**PROTECTED MATERIALS ENCLOSED**," conspicuously placed on the outside of the parcel containing the protected information. The first page of each document containing protected material is to be clearly marked as follows:

**PROTECTED MATERIAL
TO BE DISCLOSED ONLY IN ACCORDANCE WITH
POSTAL RATE COMMISSION PROTECTIVE ORDER**

The party claiming protection must clearly identify the specific portion of the material for which it is claiming protection. Wherever such protection is claimed for a pleading or other document containing references to protected material, the party filing the pleading or document shall submit a proposed redacted version for public release when the protected version is filed.



3. Only individuals admitted under this protective order by the Postal Rate Commission and support staff (paralegal, clerical, and administrative personnel) who are employed or supervised by individuals admitted under the protective order who are not involved in competitive decision-making for a party to the proceeding or for any firm that might gain a competitive advantage from access to the protected material disclosed under this order shall have access to information covered by this protective order. Individuals admitted under the protective order shall advise such support staff, before providing them access to protected material, of their obligations under the protective order.

4. Each party included under this protective order shall receive a single copy of the protected material and shall not duplicate that material, except as incidental to its incorporation into a submission to the Postal Rate Commission or as otherwise agreed to by the parties, with the concurrence of the Postal Rate Commission.

5. When any party sends or receives documents in connection with this proceeding that are not designated as protected — including proposed redacted versions of protected documents — the party shall refrain from releasing the documents to anyone not admitted under this order, including clients, until the end of the second working day following receipt of the documents by all parties. This practice permits parties to identify documents that should have been marked protected before the documents are disclosed to individuals not admitted under the protective order.

6. Each individual covered under this protective order shall take all necessary precautions to prevent disclosure of protected materials, including but not limited to physically securing, safeguarding, and restricting access to the protected materials. The confidentiality of protected material shall be maintained in perpetuity.

7. Within 20 working days after the disposition of this proceeding, all protected materials furnished to individuals admitted under this order, including all copies of such materials, shall be: (1) returned to the party that produced them; or (2) with the prior written agreement of the party that produced the protected material, destroyed and certified as destroyed to the party that produced them; or (3) with the prior written agreement of the party that produced the protected material, retained under the terms of this protective order for such period as may be permitted by the party that produced them. Within the same 20-day period, protected pleadings (including copies in archival files and computer backup files) and written transcripts of conferences and hearings shall be destroyed, and the destruction certified to the Postal Rate Commission and the other parties, unless the parties agree otherwise. In the absence of such agreement and for good cause shown, the period for retention of the protected material under this paragraph may be extended by order of the Postal Rate Commission. Any individual retaining material received under this protective order beyond the 20-day period without the authorization of the Postal Rate Commission or the prior written agreement of the party that produced the material is in violation of the protective order.

8. Any violation of the terms of this protective order may result in the imposition of sanctions as the Postal Rate Commission deems appropriate, including but not limited to referral of the violation to appropriate bar associations or other disciplinary bodies, and restricting the practice of counsel before the Postal Rate Commission. A party whose protected information is improperly disclosed shall be entitled to all remedies under law or equity, including breach of contract.

ENTERED this ____ day of September 1997.

Presiding Officer

BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, DC 20268

POSTAL RATE AND FEE CHANGES, 1997

Docket No. R97-1

APPLICATION FOR ACCESS TO MATERIALS
UNDER PROTECTIVE ORDER (OUTSIDE COUNSEL)
September 26, 1997

1. I, _____, hereby apply for access to protected materials covered by the protective order issued in connection with this proceeding.

2. I am an attorney with the law firm of _____ and have been retained to represent _____, a party to this proceeding.

3. I am a member of the bar(s) of _____; my bar membership number(s) is/are _____.

4. My professional relationship with the party I represent in this proceeding and its personnel is strictly one of legal counsel. I am not involved in competitive decision-making as discussed in U.S. Steel Corp. v. United States, 730 F.2d 1465 (Fed. Circ. 1984), for or on behalf of the party I represent, any entity that is an interested party to this proceeding, or any other firm that might gain a competitive advantage from access to the material disclosed under the protective order. I do not provide advice or participate in any decisions of such parties in matters involving similar or corresponding information about a competitor. This means that I do not, for example, provide advice concerning or participate in decisions about marketing or advertising strategies, product research and development, product design, or competitive structuring and composition of bids, offers, or proposals with respect to which the use of protected material could provide a competitive advantage.



5. I identify here (by writing "none" or listing names and relevant circumstances) those attorneys in my firm who, to the best of my knowledge, cannot make the representations set forth in the preceding paragraph:

6. I identify here (by writing "none" or listing names, position, and responsibilities) any member of my immediate family who is an officer or holds a management position with an interested party in the proceeding or with any other firm that might gain a competitive advantage from access to the material disclosed under the protective order:

7. I identify here (by writing "none" or identifying the name of the forum, case number, date, and circumstances) instances in which I have been denied admission to a protective order, or had admission revoked, or been found to have violated a protective order issued by an administrative or judicial tribunal:

8. I identify here (by writing "none" or listing the proceeding name and file number) any pending application for admission to a protective order issued by the Postal Rate Commission.

9. I have read the protective order issued by the Postal Rate Commission in this proceeding, and I will comply in all respects with that protective order and will abide by its terms and conditions in handling any protected material filed or produced in connection with the proceeding.

10. I acknowledge that any violation of the terms of the protective order may result in the imposition of sanctions as the Postal Rate Commission deems appropriate, including but not limited to referral of the violation to appropriate bar associations or other disciplinary bodies, and restricting my practice before the Postal Rate Commission. I further acknowledge that a party whose protected information is improperly disclosed shall be entitled to all remedies under law or equity, including breach of contract.

CERTIFICATION

By my signature, I certify that, to the best of my knowledge, the representations set forth above (including any attached statements) are true and correct. I recognize that knowingly making a false statement on this application could render me liable to a \$10,000 fine or 5 years imprisonment, or both, pursuant to 18 U.S.C. § 1001.

Signature

Date

Typed Name and Title

Name and Address of Firm

BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, DC 20268

POSTAL RATE AND FEE CHANGES, 1997

Docket No. R97-1

APPLICATION FOR ACCESS TO MATERIALS
UNDER PROTECTIVE ORDER (IN-HOUSE COUNSEL)
September 26, 1997

1. I, _____, hereby apply for access to protected materials covered by the protective order issued in connection with this proceeding.

2. I am in-house counsel for _____, a party to this proceeding.

3. I am a member of the bar(s) of _____; my bar membership number(s) is/are _____.

4. My professional relationship with the party I represent in this proceeding and its personnel is strictly one of legal counsel. I am not involved in competitive decision-making as discussed in U.S. Steel Corp. v. United States, 730 F.2d 1465 (Fed. Circ. 1984), for or on behalf of the party I represent, any entity that is an interested party to this proceeding, or any other firm that might gain a competitive advantage from access to the material disclosed under the protective order. I do not provide advice or participate in any decisions of such parties in matters involving similar or corresponding information about a competitor. This means that I do not, for example, provide advice concerning or participate in decisions about marketing or advertising strategies, product research and development, product design, or competitive structuring and composition of bids, offers, or proposals with respect to which the use of protected material could provide a competitive advantage.

EXHIBIT

C

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5. I have attached a detailed narrative providing the following information:

- (a) my position and responsibilities as in-house counsel, including my role in providing advice in procurement-related matters;
- (b) the person(s) to whom I report, and their position(s) and responsibilities;
- (c) the number of in-house counsel at the office in which I work and their involvement, if any, in competitive decision making and in providing advice in procurement-related matters;
- (d) my relationship to the nearest person involved in competitive decision-making (both in terms of physical proximity and corporate structure); and
- (e) measures taken to isolate me from competitive decision-making and to protect against the inadvertent disclosure of protected material to persons not admitted under the protective order.

6. I identify here (by writing "none" or listing names, position, and responsibilities) any member of my immediate family who is an officer or holds a management position with an interested party in the proceeding or with any other firm that might gain a competitive advantage from access to the material disclosed under the protective order.

7. I identify here (by writing "none" or identifying the names of the forum, case number, date, and circumstances) instances in which I have been denied admission to a protective order, or had admission revoked, or been found to have violated a protected order issued by an administrative or judicial tribunal:

8. I identify here (by writing "none" or listing the name and file number) any pending application for admission to a protective order:

9. I have read the protective order issued by the Postal Rate Commission in this proceeding, and I will comply in all respects with that protective order and will abide by its terms and conditions in handling any protected material filed or produced in connection with the proceeding.

10. I acknowledge that any violation of the terms of the protective order may result in the imposition of sanctions as the Postal Rate Commission deems appropriate, including but not limited to referral of the violation to appropriate bar associations or other disciplinary bodies, and restricting my practice before the Postal Rate Commission. I further acknowledge that a party whose protected information is improperly disclosed shall be entitled to all remedies under law or equity, including breach of contract.

CERTIFICATION

By my signature, I certify that, to the best of my knowledge, the representations set forth above (including any attached statements) are true and correct. I recognize that knowingly making a false statement on this application could render me liable to a \$10,000 fine or 5 years imprisonment, or both, pursuant to 18 U.S.C. § 1001.

Signature

Date

Typed Name and Title

Name and Address of Firm

BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, DC 20268

POSTAL RATE AND FEE CHANGES, 1997

Docket No. R97-1

APPLICATION FOR ACCESS TO MATERIALS
UNDER PROTECTIVE ORDER (CONSULTANT)
September 26, 1997

1. I, _____, am a
consultant employed by _____, and
hereby apply for access to protected materials covered by the protective order issued in
connection with this proceeding.

2. I have been retained by _____ and
will, under the direction and control of that attorney, assist in the representation of
_____, a party to this proceeding.

3. I hereby certify that I am not involved in competitive decision making for
or on behalf of any party to this proceeding or any other firm that might gain a
competitive advantage from access to the material disclosed under the protective order.
Neither I nor my employer provides advice or participates in any decisions of such parties
in matters involving similar or corresponding information about a competitor. This
means, for example that neither I nor my employer provide advice concerning or
participate in decisions about marketing or advertising strategies, product research and
development, product design, or competitive structuring and composition of bids, offers,
or proposals with respect to which the use of protected materials could provide a
competitive advantage.

4. My professional relationship with the party for whom I am retained in this
proceeding and its personnel is strictly as a consultant on issues relevant to the
proceeding. Neither I, my spouse, nor any member of my immediate family holds office
or a management position in any company that is a party in this proceeding, or in any
competitor or potential competitor of a party.

EXHIBIT

D

ALL-STATE[®] INTERNATIONAL

5. I have attached the following information:
- (a) a current resume describing my education and employment experience to date;
 - (b) a list of all clients for whom I have performed work within the 2 years prior to the date of this application, and a brief description of the work performed;
 - (c) a list of all clients for whom my employer has performed work within the 2 years prior to the date of this application and for whom the use of protected material could provide a competitive advantage, and a brief description of the work performed;
 - (d) a statement of the services I am expected to perform in connection with this proceeding;
 - (e) a description of the financial interests which I, my spouse, and/or my family has in any entity that is an interested party in this proceeding of whose protected material will be reviewed; if none, I have so stated;
 - (f) a list identifying by name of forum, case number, date, and circumstances all instances in which I have been granted admission or denied admission to a protective order, or had a protective order admission revoked, or been found to have violated a protective order issued by an administrative or judicial forum; if none, I have so stated, and
 - (g) a statement of the professional associations to which I belong, including membership numbers.

6. For a period of 2 years from the date this application is granted, I will not engage or assist in the preparation of any proposal to be submitted to any agency of the

United States government for _____*
where I know or have reason to know that any party to the proceeding, or any successor entity, will be a competitor, subcontractor, or teaming member. *Describe subject at issue in the Postal Rate Commission proceeding.

7. For a period of 2 years from the date this application is granted, I will not engage or assist in the preparation of a proposal for submission to _____*
_____ for _____**, nor will I have any personal involvement in any such activity. *Name of contracting agency. **Describe subject at issue in the Postal Rate Commission proceeding.

8. I have read the protective order issued by the Postal Rate Commission in this proceeding, and I will comply in all respects with that protective order and will abide by its terms and conditions in handling any protected material filed or produced in connection with the proceeding.

9. I acknowledge that any violation of the terms of the protective order may result in the imposition of sanctions as the Postal Rate Commission deems appropriate, including but not limited to referral of the violation to appropriate disciplinary bodies or professional associations and restricting my practice before the Postal Rate Commission. I further acknowledge that a party whose protected information is improperly disclosed shall be entitled to all remedies under law or equity, including breach of contract.

CERTIFICATION

By my signature, I certify that, to the best of my knowledge, the representations set forth above (including any attached statements) are true and correct. I recognize that knowingly making a false statement on this application could render me liable to a \$10,000 fine or 5 years imprisonment, or both, pursuant to 18 U.S.C. § 1001.

Signature

Date

Typed Name and Title

Name and Address of Firm

ATTORNEY'S CERTIFICATION

The consultant named above has been retained by me to assist in the representation of _____ in this proceeding and will perform his/her duties in connection with this proceeding under my direction and control.

Signature

Date

Typed Name and Title

Name and Address of Firm