

DOCKET SECTION

PRESIDING OFFICER'S
RULING NO. R97-1/40

UNITED STATES OF AMERICA
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

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OFFICE OF THE SECRETARY

Postal Rate and Fee Changes

Docket No. R97-1

PRESIDING OFFICER'S RULING GRANTING IN PART OCA MOTIONS TO COMPEL RESPONSES TO OCA/USPS-T22-12, 20(B), 20(E)(IN PART), AND 20(G)

(October 7, 1997)

The Office of the Consumer Advocate has filed two motions to compel responses to interrogatories and discovery requests directed to Postal Service witness Treworgy, which bear on his estimates and projections of capital and program costs associated with the scanner infrastructure program that is integral to implementation of the Delivery Confirmation (DC) services proposed by the Service for Priority Mail and the Standard B subclasses in this case. In light of the relevance of some of the information requested, I shall grant OCA's motions in part. However, special conditions will apply to some of the discovery requests in view of the Postal Service's claims that some responsive material is commercially sensitive.

OCA/USPS-T22-12. On September 18, OCA moved to compel a response to this interrogatory, which asks the witness to update his Worksheets C-1 and C-2 to reflect the Postal Service's award of a \$ 218 million contract to Lockheed Martin Federal Systems for scanners. The Postal Service objected on the grounds that a response would reveal pre-decisional and commercially sensitive information, because "while the cost of certain scanners may have been determined in the initial contract award, other pieces of the contract are still being negotiated—and those pieces are

also implicated in updating Worksheets C-1 and C-2." United States Postal Service Objection to Interrogatory OCA/USPS-T22-12, September 12, 1997.

OCA filed its motion to compel a response to this interrogatory on September 18, arguing that ascertaining all capital and program costs associated with the Delivery Confirmation services is critical to determining the appropriate levels of their prices, and that currently-available information may be incomplete. OCA states that it does not want to jeopardize the Postal Service's position in ongoing negotiations, and suggests that directing the Service to file updates of the worksheets pursuant to protective conditions, when negotiations have been concluded, may serve as a "reasonable middle ground." OCA Motion to compel at 6-7.

In its Reply of September 30,¹ the Service challenges the direct relevance of the requested information and expands on its claims of commercial sensitivity. According to the Service, the \$ 218 million total contract price is not directly analogous to any figure in witness Treworgy's worksheets, and any attempt to re-work them to include an appropriate portion of the \$ 218 million will necessarily require disclosure of constituent estimates, which bear directly on contract negotiations with Lockheed Martin and other contractors, and thus "are acutely sensitive to the Postal Service negotiating positions." Reply at 4. Even with respect to actual cost data that may be finalized during this proceeding, the Service claims that the poor comparability of contract prices and witness Treworgy's estimated capital and program costs "would necessarily require major deconstruction and consequent revelation of commercially sensitive estimates." Id. at 4-5. (Footnote omitted.) Regarding the assignment of costs to delivery confirmation, the Service generally takes the position that "the best available information has been provided as part of USPS-T-22 and its supporting documentation,

¹ On September 25, 1997, the due date for the response to OCA's motion, the Postal Service filed a request for an extension of time to file its response until September 30, 1997. The Service's request was granted in Presiding Officer's Ruling No. R97-1/29, issued September 26, 1997.

and continued evaluation of non-comparable data serves only to confuse the record." Id. at 5-6.

I agree with the Postal Service regarding the highly sensitive character of the Service's internal projections of specific cost elements until those estimates have been reduced to known prices through contract negotiation. However, I cannot agree with the Postal Service's blanket argument against revising witness Treworgy's worksheets to incorporate final costs once they are known. As the Service concedes, actual cost data that becomes available from new procurements serve as a relevant "lens through which to look at Mr. Treworgy's estimates." Postal Service Reply of September 30 at 2. Moreover, the reported categories of Scanning Infrastructure Capital and Program Costs (USPS-T-22, Appendix C, Worksheet C-1) are sufficiently general (*e. g.*, "Information systems," "Carrier scanners," "Training," and "Miscellaneous") that revision of one category, or an element within a category, to reflect a known price would appear unlikely to compromise any other "deconstructed" estimate of contract price. Accordingly, I shall direct the Postal Service to provide updated versions of Worksheets C-1 and C-2 revised to reflect known contract prices, as such final cost data become available. This is a continuing obligation that shall continue to apply as long as the Postal Service is subject to discovery in this proceeding.

OCA/USPS-T22-20(B), (E) AND (G). These sections of OCA's interrogatory request the production of three categories of documents bearing on the scanner-related capital and program costs estimated in witness Treworgy's testimony. Section B asks the witness to provide all documents he consulted or generated relating to his development of capital and program costs for the scanner infrastructure program that have not been submitted previously in this proceeding. The Postal Service objected that divulging the detailed information required to respond to this request would seriously compromise the ongoing procurement process.

In its Motion to Compel, OCA argues that the requested information would shed light on witness Treworgy's estimates of the significant levels of capital infrastructure costs associated with delivery confirmation services; that the information does not

necessarily merit an automatic privilege on the ground of commercial sensitivity, especially since it is unclear how disclosure would compromise contract negotiations; and that OCA recommends adoption of protective conditions if it appears that the negotiating position of the Postal Service would be compromised by outright disclosure. In its Reply, the Postal Service reiterates its argument that a response would require disclosure of its internal capital and program cost estimates for the scanner infrastructure while additional negotiations with Lockheed Martin and other vendors are ongoing, and thereby compromise the Service's negotiating position.

I shall direct the Postal Service to respond to this discovery request, but to do so under protective conditions.² It is important to bear in mind that OCA has not requested all documents in the Postal Service's possession that bear on scanner infrastructure capital and program costs, but only those consulted or generated by witness Treworgy in arriving at his projections of those costs. Some of the documents responsive to this request are likely to involve the Service's pre-negotiation assessments of price levels, and for this reason protective conditions shall apply to the documents provided. Inasmuch as neither Lockheed Martin nor any other known contractor is a party to this proceeding, protective conditions would appear to be fully adequate to avoid compromising the Postal Service's position in ongoing negotiations.

Section E asks whether there were any attachments to the marketing department report provided in response to OCA/USPS-T22-2(c)—which the Service filed as its library reference H-247—when the material was first distributed within the Postal Service, and if so to “provide them to the extent they have not been submitted to this docket.” The Postal Service provided a portion of the attachment relating to program cash flow projections in the test year and prior years, but objected to providing any additional material on the ground that it was either irrelevant to this case or privileged because it contains estimates and projections that are currently the subject of procurement actions. In its Motion to Compel, OCA argues that the Service should at

² The protective conditions are set out in Attachment A to this ruling.

least be required to describe the documents (or portions thereof) is it withholding, state with particularity which privilege is being invoked, and discuss why it should apply. In its Reply, the Service argues that cash flow analyses for periods beyond the test year are completely irrelevant to issues in this case, and that other material attached to the report is privileged because it contains estimates and projections that are now the subject of ongoing procurement actions.

Inasmuch as the marketing department report—filed in redacted form as Library Reference H-247—“presented the business case for delivery confirmation to the Board of Governors[,]” as the Postal Service represents at page 7 of its Reply, I can accept the plausibility of claims of commercial sensitivity with respect to some of the attached material that was redacted. I can also accept that information bearing exclusively on periods beyond the test year are too attenuated in their relevance to compel their production in this case. However, without knowing the nature of specific components of the attachment, the blanket claim of privilege made by the Service has not been adequately justified. Consequently, in order to make more particular findings, I shall direct the Postal Service to produce a detailed index of the attached material, as OCA has suggested. A detailed justification for each claim of privilege or protection shall accompany the index.³

Section G asks for the production of “all documents relating to return on investment of the proposed delivery confirmation.” The Service produced some material as part of its response to section E of the interrogatory, but objected to providing any other documents on the grounds of privilege and/or relevance. In its Motion to Compel, OCA concedes that return on investment is not an issue *per se* in this proceeding, but argues that the Service’s analysis could shed light on the Service’s

³ As OCA observes, this approach is consistent with the practice of federal courts under Federal Rule of Civil Procedure 26(b)(5), which requires a party claiming privilege to “make the claim expressly and ... describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.” Fed. R. Civ. P. 26(b)(5).

capital investment and its treatment for costing purposes, including whether the Service has employed an appropriate depreciation method for the capital equipment it is acquiring to implement Delivery Confirmation services. OCA asks that the Service be required to describe the responsive documents withheld, and to specify its claims of privilege, so that questions regarding release of responsive information can be resolved by permitting examination under protective conditions. In its Reply, the Postal Service reiterates its earlier claim of irrelevance; reasserts its claim of privilege with regard to information it has not produced; and argues that the correctness of the depreciation method chosen can be explored directly "without any need to uncover the exquisitely sensitive Postal Service estimates of cost that are still subject to the procurement process." Postal Service Reply at 8.

I agree with the Postal Service that return on investment information is not intrinsically relevant to issues that must be resolved in this proceeding. However, as OCA has argued, such information could lead to the production of admissible evidence by illuminating other issues, including the appropriate depreciation schedule of capital assets for costing purposes. Consequently, as OCA suggests, I shall direct the Postal Service to provide a detailed description of the documentary material withheld, together with a justification for each claim of privilege made for any portion of the material.

RULING

1. The Office of the Consumer Advocate Motion to Compel Response to Interrogatory OCA/USPS-T22-12, filed September 18, 1997, and the Office of the Consumer Advocate Motion to Compel Responses to Interrogatories OCA/USPS-T22-20(b), (e)(in part), and (g), filed September 24, 1997, are granted in part, as specified and subject to the conditions prescribed in the body of this ruling.

2. The compelled material responsive to Interrogatory OCA/USPS-T22-12 shall be provided as it becomes available, through January 13, 1997.

3. The compelled material responsive to Interrogatory OCA/USPS-T22-20(B), (E) and (G) shall be produced or described as directed in the body of this ruling, by October 17, 1997.

A handwritten signature in black ink, appearing to read 'Edward J. Gleiman', with a long horizontal flourish extending to the right.

Edward J. Gleiman
Presiding Officer

STATEMENT OF COMPLIANCE WITH PROTECTIVE CONDITIONS

The following protective conditions limit access to materials provided in response to P.O. Ruling R97-1/40. Individuals seeking to obtain access to that library reference must agree to comply with these conditions, and complete the attached certifications.

- (1) Only those persons who are either:
 - (a) employees of the Postal Rate Commission (including the Office of the Consumer Advocate) with a need-to-know; or
 - (b) participants in Postal Rate Commission Docket No. R97-1; or
 - (c) employed by such a participant, or acting as agent, consultant, contractor, affiliated person, or other representative of such participant for purposes related to the litigation of Docket No. R97-1; shall be granted access to materials provided in response to P.O. Ruling R97-1/40.
- (2) No person granted access to materials provided in response P.O. Ruling R97-1/40 is permitted to disseminate that library reference 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
 - (a) the date on which the Postal Rate Commission closes the evidentiary record in Docket No. R97-1; or
 - (b) the date on which that participant formally withdraws from Docket No. R97-1; or
 - (c) the last date on which the person who obtains access is under contract or retained or otherwise affiliated with the Docket No. R97-1 participant on whose behalf that person obtains access; whichever comes first. The participant immediately shall notify the Postal Rate Commission and United States Postal Service counsel in Docket No. R97-1 of the termination of any such business and consulting arrangement or retainer or affiliation which occurs before the closing of the evidentiary record.
- (4) Immediately after the Commission issues its recommended decision in Docket No. R97-1, a participant (and any person working on behalf of that

participant) who has obtained a copy of materials provided in response to P.O. Ruling R97-1/40 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 materials provided in response to P.O. Ruling R97-1/40 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 materials provided in response to P.O. Ruling R97-1/40 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 response to P.O. Ruling R97-1/40 filed in Docket No. R97-1.
- (8) The duty of nondisclosure of anyone obtaining access to materials provided in response to P.O. Ruling R97-1/40 is continuing, terminable only by specific order of the Commission.
- (9) Any Docket No. R97-1 participant or other person seeking access to materials provided in response to P.O. Ruling R97-1/40, by requesting access, consents to these or such other conditions as the Commission may approve.

CERTIFICATION

The undersigned represents that:

Access to materials provided in response to P.O. Ruling R97-1/40 in Docket No. R97-1 has been authorized by the Commission.

The copy obtained is marked on every page with my name.

I agree to use the information only for purposes of analyzing matters at issue in Docket No. R97-1.

I will maintain in strict confidence the information obtained from the Commission in accordance with the conditions as 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 with respect to information received in accordance with Presiding Officer's Ruling I, on behalf of myself and/or the party which I represent (as indicated below), affirm as follows:

1. I have maintained in strict confidence the information provided by the Commission in accordance with Presiding Officer's Ruling.
2. I have used the information only for purposes of analyzing matters at issue in Docket No. R97-1.
3. I have returned the information to the Postal Rate Commission.
4. I have surrendered to the Postal Rate Commission/destroyed all copies of the information which I obtained or which have been made from that information.

Name _____

Firm _____

Title _____

Representing _____

Signature _____

Date _____