

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

RATE AND SERVICE CHANGES TO IMPLEMENT
BASELINE NEGOTIATED SERVICE AGREEMENT
WITH BANK OF AMERICA CORPORATION

Docket No. MC2007-1

**MOTION OF UNITED STATES POSTAL SERVICE FOR
LEAVE TO FILE CERTAIN DOCUMENTS AS PROVIDED IN THE POSTAL
SERVICE'S RESPONSE TO RULING OF THE PRESIDING OFFICER AT
HEARING ON JUNE 14, 2007 UNDER PROTECTIVE CONDITIONS**
(June 20, 2007)

The United States Postal Service hereby moves for leave to file certain documents on a voluntary basis as provided in the Postal Service's response to the ruling of the Presiding Officer at the hearing on June 14, 2007 under protective conditions. See Response of the United States Postal Service to Ruling of the Presiding Officer at Hearing on June 14, 2007 (filed on June 15). In that response, the undersigned counsel stated that by June 19, the Postal Service would file a motion to submit documents containing "information on improvements resulting from a Performance Improvement Plan (PIP) implemented in connection with the WFOV Cameras under protective conditions similar to, but more restrictive than, those in Presiding Officer's Ruling No. MC2007-1/4," with redactions for material unrelated to the accept rates of the WFOV Cameras.¹ Although this material is beyond the scope of the query raised

¹ Due to unanticipated problems with email messaging between the co-proponents the Postal Service was not able to meet its self-imposed time commitment but does not believe that any party has been prejudiced.

at the hearing, in the interest of promoting economy of Commission resources, the Postal Service proposes to voluntarily provide certain factual information contained within these documents to dispel the notion that the Postal Service possesses documents in the form suggested by APWU.^{2, 3}

The Postal Service's response filed on June 15 also stated that the undersigned counsel would continue to search for documents responsive to the ruling and would submit an update should any other documents be identified as responsive. Since the filing of the Postal Service's response, the undersigned counsel have obtained information that discusses improvements in accept rates of barcode readers equipped with WFOV Cameras. The Postal Service also moves for leave to file the applicable portion of this information under the protective conditions proposed below.

The portions of the documents that the Postal Service proposes to file are taken from briefings provided to the Board of Governors. They are prepared by Finance and are provided on a quarterly basis to a subcommittee of the USPS Board of Governors (the "Board"). Nearly all of these reports contain information on the status of Board approved projects and proposals for which Decision Analysis Reports ("DARs") have previously been prepared. Like the DARs filed under seal in library reference USPS-LR-3/MC2007-1, these investment reports contain commercially sensitive, predecisional and deliberative material that

² See Motion of American Postal Workers Union, AFL-CIO for An Order Compelling the Production of Documents and Information by the United States Postal Service (filed on June 15, 2007).

³ Further, by disclosing this information, the Postal Service does not intend waive its right to object to the disclosure of information or documents not identified in its response to the Presiding Officer's ruling.

merits protection from public disclosure in the instant proceeding. For example, these reports analyze and evaluate major procurements as well as the performance of vendors. The disclosure of this information could significantly undermine the bargaining position of the Postal Service and impede its ability to negotiate contracts with vendors that are in the best interest of the Postal Service and mailers generally. Further, the factual content that the Postal Service intends to provide is “inextricably intertwined” with the deliberative content, thereby revealing the selection of facts and hence merits protection within the scope of the deliberative process privilege. See *EPA v. Mink*, 410 U.S. 73, 90-93 (1973).

In Docket No. MC2002-2, the Presiding Officer granted protective conditions for a DAR associated with the PARS program. The Presiding Officer, citing information from the Postal Service’s pleading, indicated that DARs, by their nature, are predecisional and include commercially sensitive contents:

Decision Analysis Reports are internal management documents that play critical roles in the Postal Service’s investment and procurement decision-making processes. Typically, they contain highly sensitive information that, if disclosed, could impair a variety of important interests, including labor-management relations, competitive and other business relationships, confidentiality of valuable commercial information, and contract negotiations. Consequently, the Postal Service has always been extremely reluctant to make information contained in DARs publicly available. At a minimum, disclosure of such pre-decisional evaluations could inhibit the free exchange of advice and undermine the integrity and quality of the decision-making process. Furthermore, DARs commonly contain information that could damage Postal Service interests, even after the decisions that the DARs support have already been made.

P.O. Ruling No. MC2002-2/12 (issued December 10, 2002). The same principles that supported the issuance of protective conditions for the DAR in Docket No.

MC2002-2 and the DARs in the instant proceeding apply with equal force to these investment reports. These reports contain information on improvements in barcode reader accept rates resulting from (1) the deployment of Wide Field of View (WFOV) Cameras, and (2) a Performance Improvement Plan (PIP) implemented in connection with the WFOV Cameras that is used to inform the Board about the status of large scale procurements of automation equipment. The public disclosure of this information could reveal the thought processes and analytical methods of the Postal Service, thereby undermining its position with suppliers. Public knowledge of the analytical reasoning, and authorized expenses pertaining to the procurement could adversely affect the Postal Service's ability to successfully negotiate and award a favorable contract in future procurements.

To ensure that these reports are only used to facilitate the development of the record in the instant proceeding, the Postal Service is willing to provide these reports under the Protective Conditions established in Presiding Officer's Ruling No. MC2007-1/4 with the following modification: access to these reports shall not be provided to any person within the organization of a participant who has involvement in negotiating, or setting policy on, purchasing contracts with the USPS related to automation equipment.⁴ The Postal Service accordingly requests the Presiding Officer issue a ruling providing for the filing of the above-

⁴ Although there are no suppliers actively participating in the instant proceeding currently, the Postal Service is requesting that the Commission adopt these further restrictions to preserve the Postal Service's position, in the event that a Postal Service supplier is granted leave to intervene late, and also to preserve the Postal Service's position in future proceedings.

described reports in accordance with the proposed, attached protective conditions.

WHEREFORE, the Postal Service respectfully requests that the Presiding Officer rule that the attached conditions apply to the responsive portions of the documents upon submission. The undersigned counsel have sent a courtesy copy of this motion to counsel for AWPU by email.

UNITED STATES POSTAL SERVICE

By its attorneys:

Anthony F. Alverno
Chief Counsel, Customer Programs

Frank R. Heselton
Matthew J. Connolly
Susan M. Duchek

475 L'Enfant Plaza, S.W.
Washington, D.C. 20260-1135
(202) 268-8582; Fax -5418

STATEMENT OF COMPLIANCE WITH PROTECTIVE CONDITIONS

The following protective conditions limit access to materials provided in Docket No. MC2007-1 by the Postal Service in response to Presiding Officer's Ruling No. MC2007-1/X (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. MC2007-1, 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. MC2007-1, 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. Additionally, no person within the organization of a participant who has involvement in negotiating, or setting policy on, purchasing contracts with the USPS related to automation equipment shall be granted access to these materials.
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. MC2007-1;

- (b) the date on which that participant formally withdraws from Docket No. MC2007-1; or
 - (c) the last date on which the person who obtains access is under contract or retained or otherwise affiliated with the Docket No. MC2007-1 participant on whose behalf that person obtains. 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 and 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. MC2007-1, 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. MC2007-1.

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. MC2007-1 participant or other person seeking access to these materials by requesting access, consents to these or such of the 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. MC2007-1 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 pendency of the subpoena or order to allow the designating party time to object to that production or seek a protective order.

CERTIFICATION

The undersigned represents that:

Access to materials provided in Docket No. MC2007-1 by the Postal Service in response to Presiding Officer's Ruling No. MC2007-1/~~X~~ (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. MC2007-1. 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. MC2007-1 by the Postal Service in response to Presiding Officer's Ruling No. R2007-I/X (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 those 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. MC2007-1
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 _____