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BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, DC 20268

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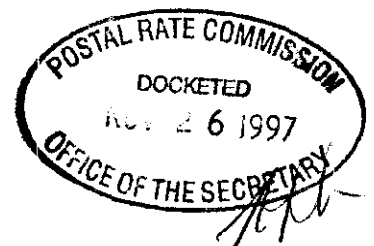
POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

POSTAL RATE AND FEE CHANGES, 1997

Docket No. R97-1

EMERY'S REQUEST FOR CLARIFICATION OF
PRESIDING OFFICER'S RULING NO. R97-1/62
November 26, 1997

Emery Worldwide, One Lagoon Drive, Suite 400, Redwood City, CA 94065, requests that the Postal Rate Commission clarify the procedures for gaining access to materials protected under Presiding Officer's Ruling No. R97-1/62. Under the terms of the protective conditions, anyone who certifies that he is "eligible to receive access to materials under paragraph 1 of the protective conditions" will apparently have automatic and immediate access to the protected materials. There is no express requirement that individuals seeking such access notify the Postal Service or Emery. Accordingly, Emery requests that the Rate Commission specifically require any person seeking access to information protected under Ruling R97-1/62 to file an application with the Commission and serve it on the Postal Service and Emery five days before receiving access. This short notice period would allow Emery and the Postal Service an opportunity to object to an application *before* protected information is inappropriately released. Such a notice period would not prejudice UPS or delay the proceedings. The Rate Commission would need to rule on only those applications for which there is an objection.



ARGUMENT

By imposing protective conditions, the Rate Commission has recognized not only the potential harm that could result from releasing it to Emery's competitors, but the need to take precautionary measures to limit the possibility of such a release. Under the protective conditions, however, the only practical limitation on access is a brief self-certification that the person seeking access is not involved in competitive decision-making. Even with this certification, there can be differing interpretations of what constitutes "competitive decision-making." Without an opportunity for oversight by the Postal Service, Emery, and the Rate Commission, such a self-certification cannot adequately prevent the inadvertent or inappropriate disclosure of protected information.

I. Self-certification is insufficient to preclude unauthorized access to Emery's proprietary information.

Under the protective conditions applicable to the Priority Mail Contract, a person seeking access to Emery's confidential and proprietary business information would complete a certification that he is "eligible to receive access to materials under paragraph 1 of the protective conditions." (See Ruling R97-1/62 (Attachment A, at 3).) Upon delivery of a completed certification, the person would have *automatic* and *immediate* access to the confidential portions of the Priority Mail Contract. The certification apparently requires no action by the Rate Commission and permits no opportunity for others to object. The protective conditions do not even expressly require the certification form to be served on the Postal Service or Emery before an applicant receives access. Thus neither Emery nor the Postal Service would have an opportunity to object to a person's access before they receive the protected material.

A short notice period would minimize the possibility that a person would obtain access to protected material based on an incorrect interpretation of the “competitive decision-making” requirement or an interpretation narrower than that of the Rate Commission. There can be differing views as to what activity constitutes competitive decision-making. See, e.g., U.S. Steel Corp. v. United States, 730 F.2d 1465, 1468-69 (Fed. Cir. 1984) (access to protected material requires factual inquiry into nature of activities). Without notice to Emery and the Postal Service, an applicant who narrowly construes the term to exclude certain activities would nevertheless gain automatic and immediate access to the protected material. There would be no opportunity even for the Rate Commission to determine whether access should be granted. A short notice period would, if an objection were raised, allow the matter to be resolved before protected material is inappropriately released. Without such notice, the harm that the protective conditions are intended to avoid would already have occurred.

II. The benefits of a short notice period outweigh its costs.

A short notice period during which the Postal Service, Emery, and the Rate Commission would have an opportunity to consider a person’s certification would limit the opportunities for inadvertent or inappropriate access. The costs of such an application period, if any, would be minimal. A short delay in gaining access to the protected information is only a minor inconvenience. It would involve no additional costs and affect no substantive rights. The application form need not be substantively changed from the current Rate Commission certification form. (See Ruling R97-1/62 (Attachment A, at 3).) A short notice period would not burden the Rate Commission because in most cases applications would be granted automatically. The Rate Commission would need to evaluate only those applications for which there is an

objection. Indeed, the costs of evaluating the propriety of access by particular individuals would fall principally on Emery, the entity principally concerned about the improper release of its proprietary information.

CONCLUSION

Emery requests that the Rate Commission clarify its protective conditions announced in Presiding Officer's Ruling R97-1/62 so that anyone seeking access to the information responsive to UPS/USPS Interrogatories T33-45(e)-(h), (m)-(p), -47(e)-(h), (m)-(p), and 50, be required to file and serve an application for access to protected material five days before receiving access. During that five-day period, the Postal Service and Emery would have an opportunity to object to a particular person's access in time to prevent an inadvertent or inappropriate release. Assuming there is no objection, the person would then have access to the protected materials in accordance with the Rate Commission protective conditions.

DATED this 26th day of November 1997.

Respectfully submitted,

EMERY WORLDWIDE AIRLINES, INC.

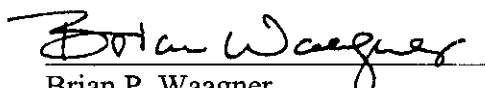
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CERTIFICATE OF SERVICE

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 28th day of November 1997.


Brian P. Waagner