BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268–0001

POSTAL RATE AND FEE CHANGES, 1997

Docket No. R97–1

RESTATEMENT OF OBJECTION BY THE UNITED STATES POSTAL SERVICE AND MOTION TO STRIKE THE TRANSCRIPTION, ACCEPTANCE INTO EVIDENCE, AND QUESTIONING OF WITNESS PORRAS CONCERNING, THE PURPORTED STRATEGY DOCUMENT FOUND WITHIN ELECTRONIC VERSION OF EXHIBITS VOLUNTARILY PROVIDED TO THE COMMISSION

The United States Postal Service hereby restates its objection made orally during rebuttal hearings on the testimony of Postal Service rebuttal witness Porras on March 19. Tr. 35/18728. The Postal Service also moves that the document transcribed at Tr. 35/18730, as well as the related questioning of the witness by the Chairman (Tr. 35/18720 line 3, through page 18726, and Tr. 35/18727, line 24 through page 18730), be stricken from the transcript and the evidentiary record. No foundation has been laid for its admission. Moreover, the document is subject to protection under the work product privilege, and its use in this proceeding would be inconsistent with the Postal Service's due process interests and principles guiding conduct in litigation.

I. NO FOUNDATION HAS BEEN LAID FOR ADMISSION OF THE PROFFERED DOCUMENT.

In order for a piece of evidence to be of probative value, there must be proof that it is what its proponent says it is. *United States v. Dean*, 989 F.2d 1205, 1210 n.7 (D.C. Cir. 1993); *United States v. Blackwell*, 694 F.2d 1325, 1329 (D.C. Cir. 1982). Written evidence must accordingly be authenticated by evidence sufficient to

support a finding that the document is what proponent claims it to be. *Id*; Fed. R. Evid. 901(a). *Coughlin v. Capitol Cement Co.*, 571 F.2d 290, 307 (5th Cir. 1978) (citing *Grey v. First Nat'l Bank*, 393 F.2d 371, 386 (5th Cir.), *cert. denied*, 393 U.S. 961 (1968)). Such support can be established through testimony of a witness with knowledge. *Dean*, 989 F.2d at 1210 n.7; Fed. R. Evid. 901(b)(1).

Here, the authenticity of the document was not established by the testimony of witness Porras or any other means. Nor was it submitted by any other party authorized to or capable of authenticating it. In the absence of such testimony or other corroborating evidence, no foundation, let alone any proper foundation, was laid for the admission of the document into the record.

The document in question, despite the title and designation given by the Presiding Officer,[1] is quite obviously not part of the electronic version of Exhibits B and C of witness Porras's testimony. A comparison of the electronic file (exh11b&c.xls) and the written exhibits shows that Exhibit B is found on sheet 1 of the electronic file and Exhibit C is found on sheet 2. The document at issue, although found on sheet 3 of the electronic file, is in no way linked to or referenced in sheets 1 and 2, which form the complete electronic version of Exhibits B and C to witness Porras's testimony. It is quite clear that it was not intentionally submitted as part of the electronic version of those exhibits, which was, incidentally, provided as a courtesy to the Commission and the participants. Even if the circumstances of the

[1] The Presiding Officer marked the document as "Presiding Officer's Cross-Examination Exhibit No. 1." Tr. 35/18720.

transmission were to have created the appearance or any reasonable expectation that the Postal Service had deliberately filed the document with the Commission, the Postal Service stated at the time it was disclosed in hearings (Tr. 35/18725) and states now that it never entertained such intent.

That the document at issue was not part of the electronic version of the exhibits, but rather something entirely different, was clearly understood by the Presiding Officer. He repeated, several times, during his questioning of the witness about the document, that "this is a strategy document." Tr. 35/18721 line 14; *see* 35/18722 lines 4–5, 18725 lines 5–6. Indeed, the document contained the label, "Docket R97–1 Revenue Requirement Updating Strategy for Rebuttal Testimony." Tr. 35/18730.

The witness testified that he had never seen this document.[2] There was no authentication of this document on the record; accordingly, no foundation for admission of this document into evidence was established, and it should be stricken *from the record, as should the questioning related to it.*

II. THE PROFFERED DOCUMENT IS SUBJECT TO PROTECTION BY THE WORK PRODUCT PRIVILEGE.

The work product privilege "protect[s] against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Fed. R. Civ. P. 26(b)(3). Thus, protected work product includes information or materials gathered or

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[2]The witness stated, "I've not seen this before," Tr. 35/18720, although he testified that he had indeed reviewed his exhibits. *Id.*

assembled by a lawyer and other representatives of a party. *Westhemeco, Ltd. v. New Hampshire Ins. Co.*, 82 F.R.D. 702, 708 (S.D.N.Y. 1979); *United States v. Chatham City Corp.*, 72 F.R.D. 640, 642 (S.D. Ga. 1976) ("The technical distinction between materials prepared by the attorney and those obtained by a claim agent or other representative of the party from whom discovery is sought has been eliminated."). Indeed, "it lies in favor of the party, its lawyers and agents." *Westhemeco*, 82 F.R.D. at 708. The critical question is whether the mental impressions were documented, by either a lawyer or nonlawyer, in anticipation of litigation. *See id.*

This document was clearly subject to protection within the work product privilege. This document was never intended by the Postal Service to be filed as evidence or as documentation having any status whatsoever in Docket No. R97-1. Rather, it is labeled as a strategy document, and, from its title and contents, obviously prepared in anticipation of litigation in this docket.

That the document was inadvertently disclosed does not constitute waiver of its privileged status. The preferred view is that inadvertent disclosure of privileged materials does not give rise to waiver. *See* 3 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence*, § 511.09 (Joseph M. McLaughlin, ed., Matthew Bender 2d ed. 1997); *Transamerica Computer Co. v. International Bus. Mach. Corp.*, 573 F.2d 646, 650-52 (9th Cir. 1978) (privilege waived only if privilege holder voluntarily discloses communication); *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 116 F.R.D. 46, 50-52 (M.D.N.C. 1987)

(limited inadvertent disclosure will not necessarily result in waiver); *Georgetown Manor, Inc. v. Ethan Allen, Inc.*, 753 F. Supp. 936, 938-39 (S.D. Fla. 1991) (inadvertent production is antithesis of concept of waiver so that mere inadvertent production by attorney does not waive client's privilege); *Mendenhall v. Barber-Greene Co.*, 531 F. Supp. 951, 955 (N.D. Ill. 1982).

III. THE COMMISSION'S USE OR RELIANCE UPON THE DOCUMENT WOULD BE INCONSISTENT WITH DUE PROCESS AND PRINCIPLES GUIDING CONDUCT IN LITIGATION.

This is a case of inadvertent disclosure of privileged work product communications. A document does not need to marked as confidential material in order to be privileged, if the document appears on its face to be confidential. ABA Formal Opinion 92–368. Disclosure is deemed inadvertent, if it appears that the document was not intended to be sent to the receiving party. *Id.* In fact, in the context of litigation, retention and use of such inadvertently disclosed material would be considered improper.[3]

As indicated above, the Presiding Officer clearly understood that this appeared to be a litigation strategy document, which is privileged. Moreover, the circumstances made clear that it was not intended for the Commission or participants, but rather was inadvertently provided as part of the electronic version of Exhibits B and C. In

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[3] "A lawyer who receives materials that on their face appear to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear that they were not intended for the receiving lawyer, should refrain from examining the materials, notify the sending lawyer, and abide the instructions of the lawyer who sent them." ABA Formal Opinion 92–368.

the interest of due process and consistent with the ABA opinion, the appropriate practice would have been to notify Postal Service counsel at the time a responsible agent of the Commission became aware of the inadvertent disclosure of the document clearly labeled "strategy for rebuttal testimony." Had the Commission proceeded with this course, the Postal Service would certainly have requested return of the document. Surely, if the Commission had stood in the shoes of opposing counsel, its disclosure and use of the document without first consulting Postal Service counsel would have been inconsistent with the principles guiding conduct in litigation.

CONCLUSION

Accordingly, the Postal Service strongly objects to the admission of the document as evidence in this proceeding and moves that it and any discussion of it during the testimony of Postal Service rebuttal witness Porras be stricken from the record.

Respectfully submitted,

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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.

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March 24, 1998