DOCKET SECTION

BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, DC 20268-0001

Docket No. R97-1

Postal Rate And Fee Changes, 1997

OPPOSITION OF ALLIANCE OF NONPROFIT MAILERS TO MOTION OF UNITED STATES POSTAL SERVICE TO STRIKE POSTAL SERVICE STRATEGY DOCUMENT AND RELATED QUESTIONING

The Alliance of Nonprofit Mailers ("ANM") hereby replies to the March 24 "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" ("Motion to Strike"). The motion should be denied.

The Postal Service's eagerness to suppress its internal strategy memorandum is understandable. The memorandum reveals that one or more knowledgeable individuals involved in defending the Postal Service's proposed revenue requirement (1) were aware—before the Service filed its rebuttal testimony—that the proposed revenue requirement was overstated, and (2) sought to conceal that fact from the Commission and the public. Specifically, the memorandum acknowledged that a "complete revenue requirement update would be time consuming and *would probably result in a further reduction in test year costs.*" 35 Tr. 18730 (emphasis added). Moreover, "there is also risk in exposing the [Postal Service's] rebuttal witness to cross examination *which could result in even more impetus for updating and*

reducing the revenue requirement." *Id.* (emphasis added). To counter evidence that the Postal Service's costs have declined since the outset of the rate case, the memorandum proposed, *inter alia*, that the Postal Service provide a selective updating of its cost accounts in rebuttal testimony to create the impression that cost increases had offset the cost decreases ("[p]rovide updated information on cost increases *to offset the decreases* included under number 1"). *Id.* In the context of the Postal Service's later rebuttal testimony defending the Service's original revenue requirement, the memorandum is a classic smoking gun.

The Postal Service contends that the memorandum and related transcript pages should be stricken on three grounds: (1) lack of foundation for the document; (2) work product "privilege"; and (3) due process and litigation ethics. These contentions are without merit.

I. THE POSTAL SERVICE HAS SUPPLIED THE FOUNDATION FOR ADMITTING THE STRATEGY MEMORANDUM INTO EVIDENCE.

The Motion to Strike, while asserting that the "authenticity of the document was not established," leaves two critical facts undisputed. First, the Postal Service does not deny that it was the source of the document. There is no suggestion that the document was planted in the Commission's files by the Commission or a third party.

Second, the Service does not dispute that the document was created by an employee or agent concerning a matter within the scope of his or her employment. The Postal Service's silence about the author's identity is a telling admission, for the document on its face was created by a highly knowledgeable insider. Moreover, the Postal Service's assertion of the work product doctrine is, by definition, an admission that the document was prepared by or for "an attorney or other representative" of the Postal Service "concerning the litigation." Motion to Strike at 3-4 (citing Fed. R. Civ. P. Rule 26(b)(3) and other authority).

Under the circumstances, it is irrelevant whether Mr. Porras, the Postal Service's rebuttal witness on the revenue requirement issue, had seen the document before Chairman Gleiman entered it into evidence. *Cf.* Motion to Strike at 3 & n. 2. A statement by a "party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship," constitutes an admission by a party-opponent, and may be offered into evidence against the party without a sponsoring witness. Fed. R. Evid. Rule 801(d)(2)(D).[1]

II. THE WORK PRODUCT RULE DOES NOT WARRANT SUPPRESSION OF THE STRATEGY MEMORANDUM.

The Postal Service's second ground for suppressing the striking memorandum from the record—the work product doctrine—is also misplaced. First, the Postal Service has failed to provide enough information for the Commission to make an informed evaluation of the claim. Second, the strategy memorandum falls within the "fraud" exception to the Work Product Rule. Third, the Postal Service has waived the protection of the work product rule by disclosing the memorandum to the Commission, by failing to prevent the further public dissemination of the document even after learning that the memorandum was available on the Commisison's public docket, and by putting in issue the subject of the memorandum through other testimony. Finally, even if the work product rule applied, it would be outweighed by the parties' need for the information in the strategy memorandum.

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[1] Whether the Postal Service intended to include the memorandum in the electronic exhibits to the testimony of Mr. Porras, or even authorized the creation of the memorandum in the first place, are irrelevant under Rule 801(d)(2)(D). *See id.*, Advisory Committee Note to 801(d)(2)(D) (rule codified trend of decisions rejecting requirement that principal specifically authorize agent to make damaging statement); *Nekolny v. Painter*, 653 F.2d 1164, 1171-72 (7th Cir. 1981); *Skaw v. United States*, 740 F.2d 932, 936-38 (Fed. Cir. 1984); *EEOC v. Watergate At Landmark Condominium*, 24 F.3d 635, 640 (4th Cir. 1994).

A. The Postal Service Has Failed To Provide The Information Needed To Invoke The Work Product Rule.

The Commission need not even reach the merits of the Postal Service's claim of work product protection because the Service has failed to provide enough information for an informed evaluation of the claim. A party claiming protection of material as privileged or protected under the work product rule bears the burden of proving that protection is warranted. *In Re Megan-Racine Associates, Inc.*, 189 B.R. 562, 575 (Bkrtcy. N.D.N.Y. 1995). The Postal Service has failed to make the necessary threshold showing. In particular, it has not disclosed (1) the preparer of the document, (2) his or her position, (3) whether he or she was acting in an attorney-client relationship with the Postal Service, (4) the names and positions of the individuals who received the document, or relied upon information in the document, directly or indirectly. Without this information, it is impossible for the Commission to credit the Service's conclusion that the elements of Rule 26(b)(3) have been satisfied. *Cf.* Id. (describing requisite showing); *Dorf & Stanton Communications v. Molson Breweries*, 100 F.3d 919, 923 (Fed. Cir. 1996).

B. The Memorandum Falls Within The "Fraud" Exception To The Work Product Rule.

Even if the Postal Service's work product claim were properly before the Commission, the content of the strategy memorandum disqualifies it from protection. The work product rule, like the attorney-client privilege, does not apply to communications which were intended to further a future or ongoing misrepresentation. The exception arises from the fundamental purpose of the attorney-client privilege and work product rules, which are intended to protect communications made for securing legal assistance or preparing for litigation, "and not for the

purpose of committing a crime or tort." *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357 (D. Mass. 1950). In recent years, courts have extended the doctrine to communications made in furtherance of misleading or unethical conduct that falls short of a crime or tort. *Moody v. IRS*, 654 F.2d 795, 798-800 (D.C. Cir. 1981) (memo to file describing an *ex parte* meetings with judge); *Chapman & Cole v. Itel Container International B.V.*, 865 F.2d 676, 686 (5th Cir. 1989) (taping of telephone conversation in violation of ABA's Model Rules of Professional Conduct); *Haigh v. Matsushita Electric Corp.*, 676 F. Supp. 1332, 1357-59 (E.D. Va. 1987); *Irving Trust Co. v. Gomez*, 100 F.R.D. 273, 277 (S.D.N.Y. 1983) (exception applies to communications in furtherance of deceptive scheme even if the conduct "does not fall within the parameters of a crime" or "fraud or any other intentional tort"); *Diamond v. Stratton*, 95 F.R.D. 503 (SDNY 1982).

ANM does not allege, and is not asking the Commission to find, that the Postal Service's conduct constitutes a crime or tort. Nevertheless, the strategy memorandum, coupled with the Postal Service's later filing of rebuttal testimony that the Commission should make no downward adjustment to the revenue requirement, is at least *prima facie* evidence of a scheme to mislead the Commission by filing testimony supporting an inflated revenue requirement. Under the circumstances, application of the work product doctrine to shield the strategy memorandum would be inappropriate here. *See* Rule 11(e), 39 C.F.R. § 3001.11(e) (effect of subscription of documents filed with Commission); ABA Model Rules of Professional Conduct § 3.3 (duty of candor to tribunal).

C. The Postal Service Has Waived Any Protection Under The Work Product Rule.

Even if the strategy memorandum were otherwise entitled to protection from disclosure under the work product rule, the Postal Service has waived such protection in three separate ways: by producing the document (even if inadvertently) to the Commission; by failing to prevent further public dissemination of the document after learning of its release; and by putting the subject matter of the document in issue in the case.

(1)

The Postal Service's claim that "inadvertent disclosure of the document does not constitute waiver of its privileged status" (Motion to Strike at 4) is less than fully accurate. The courts have split into at least three camps on this issue. Although some courts have held that involuntary disclosure does not waive a privilege, many other courts, including the D.C. Circuit, have held that any disclosure, no matter how inadvertent, is an automatic waiver. *See* Wright, Miller & Marcus, Federal Practice and Procedure: Civil 2d § 2016.2 at 241 n. 17 (citing precedent); *In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989); *Wichita Land & Cattle Co. v. American Fed. Bank*, 148 F.R.D. 456, 457 (D.D.C. 1992). As the D.C. Circuit reasoned in *Sealed Case*, 877 F.2d at 980:

> The courts will grant no greater protection to those who assert the privilege than their own precautions warrant. We therefore agree with those courts which have held that the privilege is lost 'even if disclosure is inadvertent.' In other words, if a client wishes to preserve the privilege, it must treat the confidentiality of the attorney-client communications like jewels—if not crown jewels.

Still other courts take a middle ground, evaluating claims of waiver by disclosure on a case-by-case basis. Wright, Miller & Marcus, *supra*, at 242-46 (citing precedent).

At least three factors weigh heavily in favor of disclosure here. First, the Postal Service has made no showing that it established any systematic mechanism for screening the Porras workpapers for privileged items. *Cf.* Wright, Miller & Marcus, *supra*, at 243 n. 20 (citing precedent).

Second, the strategy memorandum has been disclosed to all participants in the case, entered into evidence, and released to the public at large. *Cf. FDIC v. Marine Midland Realty Credit Corp.*, 138 F.R.D. 479, 483 (E.D. Va. 1991). To resort to the legal fiction now that the document does not exist would undermine public confidence in the Commission's fact-finding processes. As a distinguished scholar has written, the "'now you see it, now you don't approach creates a risk of undermining the appearance of justice." Marcus, "The Perils of Privilege: Waiver and the Litigator," 84 Mich.L.Rev. 1605, 1636 (1986). Opposing litigants

> would know of the existence of the contrary evidence but still be unable to use it, a result that not only suppresses the truth but threatens to make justice a mockery. That cost may be justified where the privileged material is stolen, but not where the opposing party received it innocently.

Id.; *see also* Washington Post (March 22, 1998) at A14 (describing strategy memorandum at issue).

Third, there is an overriding issue of fairness. "It is seldom 'fundamentally unfair' to allow the truth to be made public," and "it would not be fair to reward" the producing party's "carelessness with a protective order." *FDIC v. Marine Midland Realty*, *supra*, 138 F.R.D. at 483. This consideration applies with particular weight here, for an inflated revenue requirement is ultimately borne by virtually every consumer and business in the United States.

(2)

While the Postal Service objected to introduction of the document into evidence, and has moved to strike it from the record, the Postal Service does not

appear to have taken any to preserve the alleged confidentiality of the document The Postal Service did not ask the Presiding Officer or the Commission to return or seal the electronic file containing the memorandum was incorporated; or ask the Presiding Officer or the Commission to hold any discussion of the document *in camera* and seal the transcript until the Postal Service's objection could be heard and resolved. In short, the Postal Service did not attempt to prevent further release of the document after learning of its inadvertent disclosure. *See FDIC v. Marine Midland Realty Credit Corp*, 138 F.R.D. 479, 483 (E.D. Va 1991).

(3)

Beyond disclosure of the document itself, the Service has waived the work product rule by electing to put in issue the "goals and intentions"—i.e., state of mind—of Postal Service management in continuing to defend its original revenue requirement proposal. *See, e.g.*, 35 Tr. 18574-75, 18620-21 (Porras). The strategy memorandum betrays a very different state of mind among postal management than portrayed in its formal testimony. The Commission, in assessing credibility of the Service's claims, is entitled to consider its candid opinions as well. As Judge Learned Hand explained in a case involving the Fifth Amendment, "the privilege is to suppress the truth, but that does not mean that it is a privilege to garble it; . . . it should not furnish one side with what may be false evidence and deprive the other of the means of detecting the imposition." *United States v. St. Pierre*, 132 F.2d 837, 840 (2d Cir. 1942).

D. Even If The Work Product Rule Applied, It Would Be Outweighed By The Importance Of The Strategy Memorandum.

The work product rule is a qualified privilege, not an absolute one.[2] Material covered by the work product rule may nonetheless be disclosed if the "party seeking discovery has substantial need of the materials in the preparation of the party's case and that party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Fed. R. Civ. P. Rule 26(b)(3). The "substantial need" test is satisfied here. While the record contains considerable other evidence that the Postal Service's proposed revenue requirement is unsupported and overstated, the strategy document is likely to be the only one where a Postal Service representative admits to *knowing* that the revenue requirement has been overstated.

III. RELIANCE ON THE STRATEGY MEMORANDUM WOULD BE FULLY CONSISTENT WITH DUE PROCESS AND ETHICAL NORMS.

The Postal Service's third argument—that reliance on the document would violate "due process and principles guiding conduct in litigation"—is also without merit. The Service fails to explain why due process would be violated by giving

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[2] A number of scholars have argued that work product immunity "should be eliminated entirely," reasoning that it "is not needed to protect the adversary system or the legal profession," and that it "results in the suppression of relevant information and in the imposition of gigantic transaction costs on the parties and the judicial system." Thornburg, "Rethinking Work Product," 77 Va.L.Rev. 1515, 1517 (1991). *Accord*, Wells, "The Attorney Work-Product Doctrine and Carry-Over Immunity," 47 U.Pitt.L.Rev. 675, 683 (1986) (the work product rule "is largely designed to protect lawyers from themselves and their own unprofessionalism, rather than from their adversaries").

the document evidentiary status in a manner consistent with the Federal Rules of Evidence and Civil Procedure.

The Postal Service's reliance by analogy on ABA Formal Opinion 92-368 is also misplaced. The ABA opinion is not the law in this federal district, or any other jurisdiction where disclosure constitutes an automatic waiver of privilege (or as rebuttable evidence of waiver). *See id.*, Part I(B) (acknowledging that other commentators take contrary view); *In re United Mine Workers of America Employee Plans*, 156 F.R.D. 507, 511 (D.D.C. 1994) (expressly declining to follow Opinion 92-368).

In any event, the ABA opinion is by its terms inapposite here. Opinion 92-368 serves as a prophylactic measure to prevent prejudice to the party that has inadvertently disclosed an arguably privileged document to opposing counsel in discovery, until the privileged or non-privileged status of the document can be resolved. The document at issue here, however, has been disclosed not merely to opposing counsel, but to the tribunal itself and, through its public docket room, the entire world. For the reasons stated above, neither law nor precedent warrant suppression of the document from the public record.

CONCLUSION

For the foregoing reasons, the Postal Service's motion to strike should be denied.

Respectfully submitted,

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March 30, 1998

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document on all participants of record in this proceeding in accordance with section 12 of the Rules of Practice.

David M. Levy

March 30, 1998

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