

DOCKET SECTION

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

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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

COMPLAINT ON POST E.C.S.

Docket No. C99-1

**RESPONSE OF THE UNITED STATES POSTAL SERVICE
TO P.O. RULING NO. C99-1/2 WITH RESPECT
TO PROTECTIVE CONDITIONS
(June 8, 1999)**

In Presiding Officer's Ruling No. C99-1/2, issued May 26, the Presiding Officer invited participants to submit preferred language for protective conditions, and to discuss the issue of whether more or less stringent protective conditions might be appropriate under special circumstances. The Postal Service hereby responds.

Initially, the Postal Service notes that, inasmuch as no necessity to provide any material under protective conditions has yet been identified in this proceeding, any discussion of protective conditions is in some sense premature. Certainly nothing included in these comments is intended to suggest that the Postal Service in general views protective conditions, no matter how strict, as a satisfactory alternative to maintaining complete confidentiality for privileged or sensitive material when such treatment is warranted. Particularly in the context of complaint cases initiated by competitors, great care must be focused on the responsibility to ensure that gaining access to otherwise confidential information does not become the primary motivation for the entire proceeding. The potential availability of protective conditions should not be allowed to distract from the heavy burden the party seeking disclosure should bear in terms of showing how the information sought relates to the very narrow issue in

contention in this proceeding (i.e., the "postal" or "nonpostal" nature of the service).

Keeping in mind that protective conditions do not constitute an effective "cure all" for legitimate concerns regarding the confidentiality of proprietary information, the Postal Service nonetheless has attached draft protective conditions and certifications that correspond to its earlier pleading on this topic. Specifically, on pages 7-10 of its response to the UPS motion for a protective order, the Postal Service explained in detail what refinements should be made to the documents employed for these purposes in other recent cases.¹ The Postal Service also explained its rationale for those refinements, and those explanations need not be repeated here. The attached documents, however, are specifically intended to reflect the suggestions made in the May 25 pleading.

The starting point for the attached documents is the corresponding documents attached to Presiding Officer's Ruling No. R97-1/62. Initially, references to Docket No. R97-1 were changed to Docket No. C99-1, and the "double postage rule advice" clarification from Ruling No. R97-1/93 was also incorporated into paragraph 1(b).²

¹ United States Postal Service Response to Motion of United Parcel Service for a Protective Order (May 25, 1999).

² Only minor, essentially nonsubstantive, editorial changes have been made in those portions of the protective conditions documents other than those discussed in the May 25 response. For example, in paragraph 1(b), the first clause has been amended to apply to individual participants, those persons who have intervened on their own behalf, as contrasted with companies or associations. (See Order No. 1249, June 3, 1999, granting intervention of Messrs. Popkin and Carlson.) This change is intended only as a clarification of what is believed to have been the original intent of the clause. Another proposal is to expand what has been renumbered as paragraph 3 to prohibit not only dissemination of restricted material, but also revealing its contents. Similar editorial changes are suggested in the first two

At pages 7-8, the Postal Service's May 25 Response noted that access should be limited to outside counsel and independent consultants. This was achieved by amending paragraph 1(b) to explicitly preclude access by persons who are employees of a participant.³

On pages 8-9, the May 25 Response identified the need for a "notice and possible objection" procedure. As was noted during discussion of similar matters in Docket No. R97-1, such a procedure is used by the GAO.⁴ It has also been proposed to be used by DOJ in federal court litigation,⁵ and by the FCC.⁶ In the

provisions of the initial Certification document. The only proposed change which appears in any way substantive is proposed elimination of the option in what has now been renumbered as paragraph 6(b) to "destroy" rather than "return to the Commission" any copies of the material at the termination of the proceeding, along with a conforming change to Item 4 of the Return Certification. Similarly, a sentence has been added to paragraph 6 noting the obligation, when copies are returned to the Commission, to mark those copies sufficiently to ensure that their protected status will be recognized.

³ Explicitly barring access to all employees of competitors, however, should under no circumstances be viewed as a substitute for (rather than a natural extension of) the "competitive decisionmaking" limitation. As quoted by the Postal Service in its May 25 Response (pages 5-6), the Presiding Officer in Docket No. MC97-5, in response to a Postal Service attempt to relax the "competitive decisionmaking" standard, observed that those limitations exist "to protect the most sensitive business information." And, as also noted by the Presiding Officer in Docket No. MC97-5, large organizations use both inside employees and outside professionals to aid in competitive decisionmaking, that standard must continue as an independent basis to exclude access to sensitive information.

⁴ See "Emery's Response to UPS Motion to Compel Production of Information and Materials Requested in Interrogatories to Postal Service Witness Sharkey" (October 14, 1997) at 6-7 and Exhibit C.

⁵ See, for example, proposed protective orders in US v. Federation of Physicians and Dentists, Inc., CA 98-475 JJF (DDel), available on the internet at www.usdoj.gov/atr/cases/f2100/2166.htm, which specified a 4-day advance notice procedure, and in US v. Northwest Airlines, et al., CA No. 98-74611 (E.D.Mich, S.Div,

attached documents, the "notice and possible objection" procedure is incorporated primarily in an entirely new paragraph 2. It specifies an 8-day advance notice procedure, primarily because in this case, the potential need to coordinate with foreign postal administrations might make a shorter period ineffective.

Also relating to the "notice and possible objection" procedure is an additional entry in the initial Certification form, which requires persons seeking access to disclose previous work done for or with what conceivably could be other interested parties.⁷ The purpose of this disclosure requirement would be to attempt to provide a more informed basis on which the need for potential objections (or at least questions) could be evaluated, without attempting to elicit irrelevant information.

On page 9, the May 25 Response identified the need for the inclusion of a provision on sanctions. This has been achieved primarily with the addition of a new paragraph 12, which closely tracks the language of the May 25 Response. In order to allow referral to appropriate licensing authorities (if necessary), an additional entry has been added to the initial Certification to require identification of any relevant licensing authorities.

Judge Denise Hood), available at www.usdoj.gov/atr/cases/f2300/2353.htm, which specified a 10-day advance notice procedure.

⁶ See Protective Order DA 98-1362, In the Matter of the Application of BellSouth Corp., CC Docket No. 98-121 (July 9, 1998), available at www.fcc.gov/Bureaus/Common_Carrier/Orders/1998/da981362.html, which specifies a 5-day advance notice procedure.

⁷ The corresponding disclosure provisions in the GAO process, proposed by Emery in Docket No. R97-1, are much more onerous. They require identification of all clients within the last two years, and a brief description of the work conducted. They also elicit information on spouses and law partners.

On page 9, the May 25 Response called for a requirement that completed certifications by those seeking access be served on other parties. This has been incorporated in the new paragraph 2 on the "notice and possible objection" procedures, as well as in the introductory sentences preceding paragraph 1.

Finally, on pages 9-10, the May 25 Response stated that the protective conditions should "prohibit reproduction and limit access of the information to the offices of the Commission." These proposals are reflected in new paragraph 4. That paragraph, however, is not absolute, and allows the Presiding Officer, if requested, to decide whether these limitations need to be applied to specific documents.

It is in this context (i.e., when a party moves for relaxation of the provisions of paragraph 4) that the Postal Service sees some possibility for less stringent application of protective conditions. The Presiding Officer could make such determinations in view of the subject matter of the particular information at issue, whether it is voluminous or not, and the nature of the analysis likely to be applicable to such information (e.g., qualitative or quantitative).

The Postal Service once again cautions, however, against putting the cart before the horse. Protective conditions are fundamentally a second-order concern, which should not even enter the picture until a legitimate need for access is demonstrated in the context of the actual issues in contention. Complaint cases should not be allowed to evolve into fishing expeditions by competitors, merely on the assumption that protective conditions will adequately prevent the disclosure of sensitive information.

A copy of this document is being served today by facsimile on counsel for complainant United Parcel Service.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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June 8, 1999

STATEMENT OF COMPLIANCE WITH PROTECTIVE CONDITIONS

The following protective conditions limit access to materials provided in response to P.O. Ruling C99-1/xx. Individuals seeking to obtain access to such material must agree to comply with these conditions, complete the attached certifications, and serve the completed certifications upon counsel for the party submitting the confidential material.

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) an individual participant in Postal Rate Commission Docket No. C99-1; or a person (not an employee of a participant) acting as outside counsel, agent, consultant, contractor, affiliated person, or other representative of such participant for purposes related to the litigation of Docket No. C99-1; shall be granted access to materials provided in response to P.O. Ruling C99-1/xx. 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 this material. "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, provided that counsel for a party with access to materials provided in response to this ruling may continue to give legal advice concerning the lawfulness of proposed prices under the double postage rule, so long as counsel does not participate in designing or determining the prices actually proposed. Counsel may not reveal or in any way use information derived from protected material under this ruling in any client matters or counseling.
2. Counsel for a person fully meeting the qualifications set forth in paragraph 1(b) above shall serve by hand delivery or facsimile a copy of that person's completed certification on counsel for the party who has provided the material to which the person wishes to be granted access. The person shall not be granted access until the eighth day after such service has been made. The party providing the material, or any other interested party, shall have until that time the opportunity to object to access being granted to such person, by filing an objection with the Commission and serving opposing counsel by hand delivery or by facsimile. If such an objection is filed, access shall not be granted until the Presiding Officer rules on whether the objecting party has presented sufficient grounds to deny access.
3. No person granted access to materials provided in response to P.O. Ruling C99-1/xx is permitted to disseminate those materials in whole or in part (or

reveal the contents of those materials in whole or in part) to any person not authorized to obtain access under these conditions.

4. Absent a ruling from the Presiding Officer that special circumstances have been shown to exist with respect to a specific document or documents, access to material governed by these protective conditions will be granted only through inspection of the material on the premises of the Postal Rate Commission, and no copies of the material are authorized to be taken from those premises.
5. 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. C99-1; or
 - (b) the date on which that participant formally withdraws from Docket No. C99-1; or
 - (c) the last date on which the person who obtains access is under contract or retained or otherwise affiliated with the Docket No. C99-1 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. C99-1 of the termination of any such business and consulting arrangement or retainer or affiliation which occurs before the closing of the evidentiary record.
6. Immediately after the Commission issues its recommended decision in Docket No. C99-1, 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 C99-1/xx 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) have been returned to the Commission.

When any such copies are returned to the Commission, due care shall be taken in packaging and marking the materials to ensure that they are identified as materials which have been provided under protective conditions, and that they are thus not likely to be inadvertently intermingled with other materials not subject to these protective conditions.

7. The duties of any persons obtaining access to materials provided in response to P.O. Ruling C99-1/xx 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.

8. All persons who obtain access to materials provided in response to P.O. Ruling C99-1/xx 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.
9. These conditions shall apply to any revised, amended, or supplemental versions of materials provided in response to P.O. Ruling C99-1/xx filed in Docket No. C99-1.
10. The duty of nondisclosure of anyone obtaining access to materials provided in response to P.O. Ruling C99-1/xx is continuing, terminable only by specific order of the Commission.
11. Any Docket No. C99-1 participant or other person seeking access to materials provided in response to P.O. Ruling C99-1/xx, by requesting access, consents to these or such other conditions as the Commission may approve.
12. Persons violating the duty of nondisclosure established by these protective conditions may be liable for sanctions, whether acting deliberately, negligently, or inadvertently. Violations by those acting on behalf of the Complainant may provide grounds for dismissal of the Complaint with prejudice. Other possible sanctions include disqualification from further proceedings in the instant docket or in future Commission dockets, collateral estoppel in the event of dismissal, or any other sanctions that the Presiding Officer may deem appropriate. For licensed professionals, sanctions may include referral to the compliance office of the licensing authority.

CERTIFICATION

The undersigned represents that:

I understand that access to materials provided in response to P.O. Ruling C99-1/xx in Docket No. C99-1 has been authorized by the Commission only in accord with specific protective conditions.

Any copies obtained will be marked on every page with my name.

I agree to use the information only for purposes of analyzing matters at issue in Docket No. C99-1.

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 the materials obtained from the Commission in accordance with all of the protective conditions set out above.

Name _____

Firm _____

Title _____

Representing _____

Signature _____

Date _____

All Authorities by which Licensed to Engage in Professional Activities (if applicable) _____

Entities (other than the one identified above as my client in this proceeding) by which I have been employed, or for which I have provided services, in the period of the last two years, that 1) compete directly or indirectly with the US Postal Service or any foreign postal administration, or 2) that have an interest in any of the types of commercial activities (including those provided to the Postal Service under contract) which might relate to this proceeding, or 3) serve as broader umbrella organizations (e.g., trade associations) for entities described in 1) or 2): _____

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 C99-1/xx, on behalf of myself and/or the party which I represent (as indicated below), 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 in strict confidence the materials obtained from the Commission 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. C99-1.
3. I have returned the information to the Postal Rate Commission.
4. I have surrendered to the Postal Rate Commission all copies of the information which I obtained or which have been made from that information.

Name _____

Firm _____

Title _____

Representing _____

Signature _____

Date _____

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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