

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Regulations to Establish Procedure
for According Appropriate Confidentiality

Docket No. RM2008-1

NOTICE OF FILING ILLUSTRATIVE PROTECTIVE CONDITIONS

(Issued September 18, 2008)

I. INTRODUCTION

In Order No. 96, the Commission proposed to implement 39 U.S.C. § 504(g) by adopting regulations applicable to confidentiality of materials submitted by the Postal Service to the Commission.¹ In the Order, the Commission indicated that it would publish examples of representative protective condition orders to allow for comments on those orders. *Id.* at 8. On reflection, the Commission concludes that one illustrative example will suffice as a general template since it is likely that individual protective orders will be tailored, as necessary, to fit the needs of each particular case. As discussed below, the illustrative protective order may be modified to suit the circumstances presented.

¹ PRC Order No. 96, Notice of Proposed Rulemaking to Establish a Procedure for According Appropriate Confidentiality, August 13, 2008 (Order No. 96).

An illustrative protective order is attached to this Notice.² A section-by-section analysis follows. As noted in Order No. 96, interested persons may comment on the form such protective conditions should take. See *id.* at 8.

II. SECTION-BY-SECTION ANALYSIS OF THE ILLUSTRATIVE PROTECTIVE ORDER

Below, the Commission provides a concise description of each section of the illustrative protective conditions order designed to assist commenters in understanding the scope and nature of each section of the illustrative conditions.

Preamble. The preamble identifies materials subject to the protective conditions and acknowledges that the Postal Service has asked for confidential treatment of those materials and that those materials are subject to protective conditions. It explains that all persons who seek access to the protected materials must certify to the Commission in writing that they will comply with the protective conditions.

Section 1. This section limits who may access the protected materials. This section may be tailored to fit the circumstances of each particular case. For example, it is probable that access to materials concerning competitive products will be more limited than access to materials concerning market dominant products. By statute, access is available to Commission employees. 39 U.S.C. § 504(g)(2)(B). The Commission's practice is to limit access to employees on a need-to-know basis. Other persons or entities³ and their employees or agents may also be granted access to the protected materials, if they agree to comply with the conditions of the protective order.

² Protective orders have been filed in several dockets and can be accessed at the Commission's website: www.prc.gov. See, e.g., Docket No. R2008-1, Order Establishing Protective Conditions, February 21, 2008; Docket No. MC2007-4, Order Granting Motion of the Bradford Group for Protective Order Regarding the Response of Witness Gustafson to Interrogatory of the Office of the Consumer Advocate, September 10, 2007; Docket No MC2007-1, Presiding Officer's Ruling Granting Motion for Protective Conditions, June 22, 2007; and Docket No R2006-1, Presiding Officer's Ruling Granting Motions to Adjust the Schedule of Appearances of Postal Service Witnesses, December 14, 2006.

³ See 39 C.F.R. § 3001.5(f).

Most often, persons involved in competitive decision-making will be excluded from access.

Section 2. This section states that even when a person has been granted access to protected materials under the protective order, that person may not disclose or distribute such materials to anyone not authorized to have access.

Section 3. This section limits the duration of access by an individual who has been granted access to the protected materials under the protective order. In many, but not all, instances, access terminates when the Commission issues a final order in a case. Also a specific individual's access terminates when his or her affiliation with an entity having been granted access to the protected materials ends. The entity on whose behalf an individual has obtained access must notify the Commission immediately upon such termination.

Section 4. This section establishes what must be done with copies of protected materials once the Commission determines that access to such materials is no longer warranted. In many, but not all, instances that will be following the issuance by the Commission of a final order. Upon the issuance of a final order, or other event that brings a matter before the Commission to a conclusion as determined by the Commission, individuals who have obtained copies of the protected materials must certify to the Commission that they destroyed such copies or returned them to the Commission.

Section 5. This section states that the protective conditions extend to any duplicates and excerpts of protected materials.

Section 6. This section imposes a duty of care on all persons granted access to protected materials to use the same reasonable degree of care they would use to protect their own proprietary business information to prevent unauthorized disclosure of the protected materials.

Section 7. This section clarifies that the protective conditions also apply to and revised, amended, or supplemental versions of the protected materials.

Section 8. This section states that a person's duty not to disclose protected materials does not terminate unless the Commission orders it or other superseding circumstances necessitate it.

Section 9. This section provides that any person who has been granted access to the protected materials is considered to have consented to the specific protective conditions as they may be subsequently be modified.

Section 10. This section states that the Postal Service must clearly identify any protected materials, or parts thereof, to alert the custodian of their confidential nature.

Section 11. This section makes it clear that any written materials that quote or contain protected materials are covered by the same protective conditions and must be filed under seal.

Section 12. This section lays out who may have access to protected materials without actually executing the protective order. These include commissioners, court reporters, stenographers, or persons operating audio or video recording equipment for such court reporters or stenographers at hearings or depositions; or any person specifically designated by the Commission and reviewing courts and their staffs. This section requires, however, that a person seeking to disclose protected information to a reviewing court must make a good faith effort to obtain protective conditions at least as effective as those required by the Commission.

Section 13. This section allows a person to apply to the Commission for a ruling that the designated protected materials are not entitled to such protection. The Postal Service must be given notice of such an application and be provided with an opportunity to respond. Determinations on whether to revoke confidential status will be made in accordance with Commission regulations for the treatment of confidential materials.

Section 14. If a court or other administrative agency requires the production of protected materials from a person having been granted access, that person must, within 2 business days, notify the Postal Service to allow it to object or seek a protective order.

Certification. The protective conditions require that all persons granted access certify that they have read and understood the protective conditions, and further that they will maintain the protected materials in strict confidence and will comply with all protective conditions as specified.

Steven W. Williams
Secretary

STATEMENT OF COMPLIANCE WITH PROTECTIVE CONDITIONS

The Postal Service has filed non-public materials identified as _____. The Postal Service requests confidential treatment of the materials (hereinafter “these materials”).

The following protective conditions limit access to these materials identified as _____ by the Postal Service. Each person seeking to obtain access to these materials must agree to comply with these conditions, complete the attached certifications, and provide the completed certifications to the Commission and counsel for the Postal Service.

1. Access to these materials is limited to:
 - (a) An employee of the Postal Regulatory Commission with a need-to-know; or
 - (b) A person, as defined in rule 5(f), 39 C.F.R. § 3001.5(f), or an individual employed by such person, or acting as agent, consultant, contractor, affiliated person, or other representative of such person for purposes related to the matter identified as _____. 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.
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 person’s access shall be the earlier of:
 - (a) The date on which the Postal Regulatory Commission issues an order determining that access to these materials is no longer warranted.

- (b) The last date on which the individual who obtains access is under contract or retained or otherwise affiliated with the person on whose behalf access was authorized. The person on whose behalf the individual obtains access shall immediately notify the Postal Regulatory Commission and Postal Service counsel of the termination of any such business or consulting arrangement or retainer or affiliation.

4. Immediately after the Commission issues an order determining that access to these materials is no longer warranted, a person (and any individual working on behalf of that person) 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 each person 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 these materials provided in the matter identified as _____.

8. The duty of nondisclosure of each person obtaining access to these materials is continuing, terminable only by specific order of the Commission, or as specified in paragraphs 10 through 14, below.

9. Each person granted access to these materials consents to these or such other conditions as the Commission may approve.

10. The Postal Service shall clearly mark each page, or portion thereof, that it seeks to protect under this agreement in a manner 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 that quote 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. Notwithstanding the foregoing, protected material covered by paragraph 11 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.

13. A person 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 shall be given notice of the application and an opportunity to respond. Determinations on whether to revoke confidential status will be made in accordance with Commission regulations for the treatment of confidential materials.
14. If a court or other administrative agency subpoenas or orders production of confidential information which a person has obtained under the terms of this protective order, the target of the subpoena or order shall promptly (within 2 business days) notify the Postal Service of the pendency of the subpoena or order to allow it time to object to that production or seek a protective order.

CERTIFICATION

The undersigned represents that:

Access to these materials provided in the matter identified as _____ by the Postal Service 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 the matter identified as _____. 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 these materials in strict confidence in accordance with all of the protective conditions set out above.

Name _____

Firm _____

Title _____

Representing _____

Signature _____

Date _____