

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

REGULATIONS TO ESTABLISH PROCEDURE  
FOR ACCORDING APPROPRIATE  
CONFIDENTIALITY

Docket No. RM2008-1

**REPLY COMMENTS OF THE UNITED STATES POSTAL SERVICE**  
(October 10, 2008)

On September 25, 2008, seven sets of comments, in addition to those of the United States Postal Service,<sup>1</sup> were filed in response to Order No. 96, Notice of Proposed Rulemaking to Establish a Procedure for According Appropriate Confidentiality, issued by the Postal Regulatory Commission on August 13, 2008. The Postal Service finds itself in agreement with many of the comments filed by the other parties. The Postal Service's initial comments address certain issues with sufficient depth that certain parties' comments taking contrary positions do not warrant a rejoinder. Accordingly, the reply comments below focus on parties' comments that raise matters not fully addressed by the Postal Service earlier.

Matters of Statutory Interpretation

The Greeting Card Association (GCA) argues in favor of enhanced transparency in section III of its comments.<sup>2</sup> That entire section fails, however, to acknowledge that 39 U.S.C. § 504(g)(3)(A) specifies that the Commission must balance the interest in transparency against "the nature and extent of the likely

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<sup>1</sup> Docket No. RM2008-1, Initial Comments of the United States Postal Service (September 25, 2008). All other comments referenced below were filed in this docket.

<sup>2</sup> Initial Comments of Greeting Card Association at 4 (September 25, 2008).

commercial injury to the Postal Service.” As such, GCA’s characterization of transparency as “seem[ing]” clearly [to be] a formulation of a ‘pro-disclosure’ policy” is misleading.<sup>3</sup> As a matter of both fact and law, section 504(g)(3)(A) directs the Commission to balance two compelling interests. In this regard, postal regulatory law is neutral concerning public disclosure of commercial postal information, entrusting to the Commission the responsibility of making decisions – whether to require public disclosure, permit restricted access, or to conduct *in camera* inspection– after applying the statutory balancing test.

Subsection 504(g)(3)(A) requires the Commission to adopt regulations that establish a procedure for according appropriate confidentiality to information that the Postal Service designates as non-public under subsection 504(g)(1). Consistent with this scope, proposed rule 3007.21(b)(1) recognizes that the Postal Service may assert that such material is:

commercially sensitive, or otherwise protectable within the meaning of 39 U.S.C. 410(c); . . . exempt from disclosure under 5 U.S.C. 552(b); . . . [or that it qualifies] for a particular evidentiary privilege . . . recognized by Federal Rule of Civil Procedure 26(c).

Order No. 96 at 18. The Postal Service interprets the Commission’s reference to “commercially sensitive or otherwise protectable” information as an acknowledgement of its responsibility to make disclosure and/or access determinations that involve considerations beyond commercial injury to the Postal Service and accountability through financial transparency. Section 504(g) recognizes that the exercise of the Commission’s regulatory responsibilities may intersect with the Postal Service’s authority to withhold commercial or other

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<sup>3</sup> *Id.*

information from public disclosure under 39 U.S.C. §§ 410(c) and 412; as well as the Freedom of Information Act and the Privacy Act, 5 U.S.C. §§ 552 and 552a, respectively. Thus, as it concerns information provided by the Postal Service, the PAEA does not direct the Commission to subordinate all other postal interests to the interest in financial transparency. The Postal Service's FOIA determinations are binding on the Commission, except in cases where the Commission, exercising its regulatory responsibilities under § 504(g)(3)(A), must decide whether the public interest in postal financial transparency outweighs the interest in protecting the Postal Service from commercial harm.<sup>4</sup>

Without considering itself strictly bound by them, the Commission has long relied upon the Federal Rules of Civil Procedure (FRCP) and the Federal Rules of Evidence (FRE) as general guides for resolving procedural and substantive disputes involving discovery and evidence in its dockets, in circumstances where its own rules and precedent do not specifically resolve an issue. The Postal Service assumes that any continued reference to the FRCP or FRE by the Commission will be for the purpose of seeking non-binding guidance on issues not immediately resolved by reference to § 504(g)(3), or the Commission's rules and precedent.

When issues arise at the Commission concerning the disclosure of or access to commercial postal information, the Postal Service assumes that the Commission's review of relevant FOIA, FRCP or FRE principles, whether procedural or substantive, will be subordinate to the criteria in the § 504(g)(3)(A)

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<sup>4</sup> Presumably, an order issued by the Commission requiring public disclosure of sensitive postal data and information would be subject to review, pursuant to 39 U.S.C. § 3663.

balancing test. Valpak's comments express concern about the interplay between § 504(g) and the Federal Rules of Civil Procedure.<sup>5</sup> Valpak contends that the Commission's proposed rules may import procedural, not substantive, guidance from FRCP 26(c).

The Postal Service agrees with Valpak that § 504(g)(3)(B) directs the Commission to base its procedures for the application of protective conditions on FRCP 26(c)(1). However, the Postal Service does not read § 504(g)(3)(B) as precluding the Commission from relying on the substantive guidance in FRCP 26(c)(1), to the extent that it is not inconsistent with § 504(g)(3)(A). For instance, the Postal Service concurs with Valpak's argument, at pages 10 and 13 of its comments, that no application of the § 504(g)(3)(A) balancing test should result in consideration of whether the Postal Service, as a government agency, would be "embarrassed" by the revelation of some aspect of its commercial or financial transactions.

However, the Postal Service considers that the Commission may seek guidance from FRCP 26(c)(1) for the purpose of determining whether disclosure of or restricted access to postal information in Commission proceedings, rather than advancing the public interest in postal accountability or financial transparency, would result in "embarrassment" or otherwise invade the privacy of particular individuals.<sup>6</sup> Likewise, the Commission should look to FRCP 26(c)(1),

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<sup>5</sup> Valpak Comments Regarding Regulations To Establish A Procedure For According Appropriate Confidentiality at 7-14 (September 25, 2008).

<sup>6</sup> In this regard, there may be overlap between FRCP 26(c)(1) and the application of 5 U.S.C. §§ 552(b)(6) and 552a to protect the personal privacy of individuals, postal or otherwise. The Postal Service understands that the Commission may rely on each source independently.

as interpreted by the federal courts, for guidance as to whether information access conditions proposed by a party in a Commission docket may reasonably be judged as “oppressive,” “annoying” or as imposing any “undue burden or expense.”

### The Proposed Regulations

#### 1. Proposed Rule 3007.23(b)

At page 3 of its comments, the American Postal Workers Union (APWU) suggests a change to proposed rule 3007.23(b).<sup>7</sup> In response to each § 504(g)(1) submission of confidential information by the Postal Service, APWU suggests that the Commission issue a preliminary determination concerning the appropriate degree of protection, if any, to be accorded to the material in every instance, and thus, automatically trigger the procedures in proposed rules 3007.23(b)(1) and (2).

APWU’s proposal would seem to be counter-productive to the efficient and expeditious administration of Commission proceedings. One of the principal objectives of the PAEA, increased postal accountability, is accomplished through greater transparency. Specific provisions of the PAEA expand the scope of the Commission’s regulatory and oversight responsibilities in certain areas, and require the provision of postal costing, revenue and service data on a periodic basis for review, and additional information whenever the Postal Service files pricing or classification change notices. See 39 U.S.C. §§ 3622(e)(4), 3652 and 3654. Accountability also is enhanced through the Commission’s exercise of its authority under §§ 503 and 504(f)(2) to obtain such postal information as may be

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<sup>7</sup> Initial Comments of American Postal Workers Union, AFL-CIO. (September 25, 2008).

necessary to fulfill its responsibilities.

The PAEA directs the Commission to balance the goal of financial transparency against the equally compelling public interest of protecting postal commercial interests from competitive harm. For the purpose of organizing orderly public review and analysis of Postal Service pricing and classification change notices, the Commission has adopted procedures and timelines that adhere to very expeditious statutory review deadlines, in some instances as short as 15 days. See 39 U.S.C. §§ 3622(d)(1)(C) and (E); §§ 3632(b)(2) and (3); § 3641(c)(1) . The Commission's proposed rules implementing § 504(g), in part, are intended to accommodate the needs of interested parties seeking to examine postal pricing and classification change notices. The rules are intended to support the goal of accountability through transparency, while protecting the Postal Service's interests, commercial or otherwise, that could be harmed either by public disclosure or by access to underlying information. This is consistent with the over-arching objective of the statutory scheme created by the PAEA of maintaining a viable and effective national postal system.

The proposed rules also appear reasonably designed to serve the goal of due process in the fast-moving dockets where they are expected to come into play. Parties are given opportunities to expeditiously access confidential information to conduct substantive review of Postal Service rate and classification notices, subject to appropriate protective conditions, without suffering the delays that might result if every submission of confidential postal data were subjected to a time-consuming preliminary determination by the

Commission under proposed rule 3007.23(b), which could then be subject to a time-consuming request for reconsideration.

Section § 504(g) imposes obligations on both the Commission and the Postal Service. The Commission has fashioned a reasonable process in proposed rule 3007.23 for managing access to postal information and safeguarding postal interests. The Commission proposes what seems to be a minor imposition on parties seeking access to information that reasonably can be presumed to warrant protection from public disclosure. The proposed rule minimizes potential barriers to expeditious access to confidential information in the face of inflexible statutory deadlines. Section 504(g)(3)(A) requires the Commission to tread carefully, while subsections 3622 and 3632 require the Commission to act swiftly. The proposed rules seem to balance both mandates reasonably.

2. Proposed Rule 3007.25

At page 2 of its comments, APWU argues that proposed rule 3007.25(a) “is far broader than the law contemplates.” APWU’s assertion is based upon a narrow reading of 39 U.S.C. § 504(g). APWU is correct that, in § 504(g)(3)(A), Congress has articulated the specific balancing test for the Commission to apply when determining whether to disclose or permit restricted access to postal information of a commercial nature. However, APWU’s critique of proposed rule 3007.25(a) seems to gloss over the requirement in § 504(g)(1) that the Commission be mindful of the broader range of confidential postal interests that are within the scope of the statutory exemptions from public disclosure codified in

39 U.S.C. § 410(c),<sup>8</sup> as well as the FOIA and the Privacy Act.

Proposed rule 3007.25(a) does nothing more than succinctly acknowledge the full range of confidentiality issues that the Commission must consider in determining whether “the public interest in maintaining the financial transparency” of the Postal Service compels the disclosure of or restricted access to particular postal information in the Commission’s custody. Subsection 504(g)(3)(A) articulates a test applicable to the narrow context in which the Commission must determine whether to disclose or permit restricted access to postal information of a commercial nature. Otherwise, as contemplated by § 504(g), the Commission is expected to defer to the Postal Service’s application of FOIA exemptions.

At page 2 of its comments, APWU also argues that proposed rule 3007.25(a) contradicts a restriction that limits application of the § 504(g)(3)(A) balancing test only to postal products that are designated as competitive for purposes of chapter 36 of title 39. However, § 504(g)(3)(A) makes no distinction among market dominant, competitive or experimental products. Instead, the balancing test allows the Commission to weigh “the nature and extent of likely commercial injury to the Postal Service against the public interest in maintaining the financial transparency of a government establishment competing in commercial markets” – without any reference to or limitation on product type.

To one degree or another, virtually all postal products operate or compete in commercial markets against hard copy or electronic message delivery

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<sup>8</sup> In this regard, the Commission also must also consider the strict disclosure prohibition found in 39 U.S.C. § 412.

systems, or against parcel delivery services. The extent of the likely commercial injury that could result from either public disclosure or restricted access to postal data pertaining to each product will vary depending on the information, the product, and the nature of the competition. It is beyond dispute that some market dominant postal products are the beneficiaries of statutory limitations on competition, and that some competitive postal products are subject to relatively unrestricted competition. But even those postal products that benefit from the existence of the Private Express Statutes are not immune from the effects of competition and the potential risk of commercial harm. Notwithstanding such generalities, § 504(g)(3) directs the Commission to make determinations -- regarding public disclosure, restricted access under protective conditions, or the use of *in camera* inspection -- on a case-by-case basis.

The statute does not pre-ordain particular disclosure or access outcomes simply on the basis of chapter 36 product designations. Thus, APWU is mistaken in asserting that proposed rule 3007.25(a) “would permit the Postal Service to claim as non-public information relevant to its market dominant products . . . without . . . specify[ing] why information withheld relates to its competitive position.” The Postal Service recognizes the obligation imposed by the proposed regulation to make a showing of competitive harm in support of every assertion of non-public status for sensitive information.

3. Proposed Rule 3007.32(a)

At page 5 of its initial comments, the Public Representative (PR) suggests that proposed rule 3007.32(a) be amended to eliminate the requirement that a

party seeking to have protective conditions lifted first examine the non-public records subject to those protective conditions.<sup>9</sup> However, it seems that not requiring the moving party to first examine the records at issue before arguing for public disclosure would be counterproductive. Such an approach would have the effect, in many cases, of depriving the Commission of the benefit of receiving “a specific and detailed statement and rationale why the materials should be made public,” which appears to be a principal objective of the rule.

When it provides information it deems to be confidential to the Commission, the Postal Service is required by § 504(g)(1)<sup>10</sup> to explain its confidentiality claims. It is reasonable for the Commission to impose upon a party seeking to rebut such claims the need to access the information under protective conditions and to actually examine it before attempting to articulate why it should be made public. The Commission is entitled to some level of assurance that the parties before it are making informed arguments.

#### FOIA Considerations

At page 6 of its initial comments, the PR raises concerns about a possible conflict between the rules proposed by the Commission to implement § 504(g) and its existing regulations implementing the Freedom of Information Act, 5 U.S.C. § 552. The PR asserts that “the proposed rules may, in effect, conflict with current FOIA rules for appeals of denials for access to 552(b) material.” PR Comments at 7. This is followed by a suggestion that the Commission amend its

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<sup>9</sup> Public Representative Comments On Proposed Regulations To Establish Procedure For According Appropriate Confidentiality (September 25, 2008).

<sup>10</sup> And by proposed 39 C.F.R. § 3007.21.

FOIA regulations to inform requesters of “the potential availability of [FOIA-exempt] materials pursuant to protective conditions under [39 C.F.R.] Part 3007.”

*Id.* For several reasons, the Postal Service considers this suggestion to be a prescription for confusion.

When an agency issues final decisions denying access to records under the FOIA, it is required to inform requesters that they may seek judicial review of those final decisions. 5 U.S.C. § 552(a)(6)(A)(ii).<sup>11</sup> Notwithstanding the statutory finality of the Commission’s FOIA denials of access and the availability of judicial review, it would threaten to make a muddle of the Commission’s dockets if it were to adopt the practice of concurrently informing FOIA requesters that they might also intervene in a pending Commission docket in which they have otherwise not expressed an interest, for the sole purpose of applying for access to the same or similar records subject to protective conditions, or otherwise seeking to have applicable protective conditions lifted.

The PR's proposal at pages 7-8 of its comments, which seeks to improve the protective condition certification process, highlights the prospect for confusion (or worse) in the scenario its proposed revision to 39 C.F.R. § 3004 would create. Persons seeking public disclosure of records, but nevertheless denied access to records by either the Postal Service or the Commission appropriately exercising their authority under 5 U.S.C. § 552, would be told by either agency that they could go to federal district court to seek review of those denial decisions. In the alternative, they would be instructed by the Commission to ignore its final agency

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<sup>11</sup> As implemented by the Postal Service and the Commission, respectively, at 39 C.F.R. §§ 265.7(f)(2) and 3004.5.

decision and apply to obtain access to the same records under protective conditions, if they are able to successfully intervene in an ongoing Commission docket. But, assuming such parties are able to intervene, they still might be denied access under protective conditions. Not unreasonably, such parties would likely regard this secondary denial to be subject to judicial review under the terms of 39 C.F.R. § 3004.5, and might proceed to court on that basis.

When parties uninterested in the subject matter of a Commission docket have intervened solely for the purpose of circumventing a final agency decision denying access under the FOIA, it raises the risk that some of them will treat access to records under protective condition as synonymous with the public disclosure they originally sought under the FOIA. The distinction between public disclosure (and the accompanying freedom to disseminate) and restricted access obtained after signing something called “protective conditions” could easily be misunderstood. The adverse economic and competitive consequences of unauthorized dissemination would fall squarely on the Postal Service and third-party submitters of such confidential commercial information. There would be an increased likelihood that the safeguards in applicable protective conditions based on prescribed methods of maintenance, disposal and return of records will be undermined as a result of non-compliance by casual intervenors. The PR's proposal also brings into sharper focus the alarming prospect that a “party without a direct interest in the proceeding could obtain access to protected confidential commercial information for an improper purpose without fear of

reprisal under the Commission's rules."<sup>12</sup>

In addition, duplicative FOIA requests for postal records in the custody of both the Postal Service and the Commission, followed by good faith applications of FOIA exemptions and redaction techniques by both agencies that are not perfectly consistent, could compound matters further. The PR's reference to the FOIA serves the purpose of exposing a need, in the new regulatory landscape, for the Postal Service and the Commission to consider how best to coordinate their sometimes overlapping, but independent FOIA decision-making responsibilities with their roles under § 504(g).

The preferred way for the Commission to avoid practices that would generate the confusion described above would be for it to refer all FOIA requests for records within its custody that were generated by the Postal Service directly to the Postal Service for response. This is a common practice among numerous federal agencies, including the many law enforcement agencies from which the Postal Inspection Service often obtains records that are subject to the FOIA, and is consistent with the persuasive guidance of the Department of Justice. Alternatively, in light of § 504(g), the Postal Service and the Commission could jointly evaluate the need to establish guidelines for inter-agency FOIA consultation that are consistent with regulations adopted by the Department of Justice at 28 C.F.R. § 16.4(c)(1). In any event, it is the Postal Service's view that the instant rulemaking is not the proper venue for resolution of various complex FOIA administrative issues raised by the PR's suggestion.

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<sup>12</sup> See Comments of Pitney Bowes at 8 (September 25, 2008).

In conclusion, the Postal Service trusts that the Commission will find these reply comments to be constructive.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

Daniel J. Foucheaux, Jr.  
Chief Counsel, Ratemaking

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Michael T. Tidwell

475 L'Enfant Plaza West, S.W.  
Washington, D.C. 20260-1137  
(202) 268-2998; Fax -5402  
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