

**BEFORE THE
POSTAL REGULATORY COMMISSION**

**REGULATIONS TO ESTABLISH PROCEDURE
FOR ACCORDING APPROPRIATE CONFIDENTIALITY :** **DOCKET NO. RM2008-1**
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**REPLY COMMENTS OF UNITED PARCEL SERVICE ON
NOTICE OF PROPOSED RULEMAKING
TO ESTABLISH A PROCEDURE FOR
ACCORDING APPROPRIATE CONFIDENTIALITY
(October 10, 2008)**

Pursuant to Commission Order No. 96 (August 13, 2008), United Parcel Service hereby replies to certain parties' comments on the proposed rules to establish procedures for acting on Postal Service requests that information relevant to the Commission's regulatory responsibilities should not be disclosed to the public.

I. The Commission Has Proposed Procedural Rules, Not Rules Making Substantive Determinations About the Confidentiality of Any Specific Information.

In its Order, the Commission proposes procedures for determining whether materials claimed to be confidential by the Postal Service should be disclosed to the public, and the terms of that disclosure. While the proposed rules include a balancing test for making confidentiality determinations (Proposed Rule 3007.25(a)), they do not make any substantive determinations about what information or materials will ultimately be considered confidential or subject to protective conditions. Rather, the rules merely

provide a mechanism which the Commission will use to make those determinations, on a case-by-case basis.

Several parties have commented either directly or indirectly on the substantive question of what types of materials should be considered confidential, and what level of access the Commission should give the interested public. For example, Valpak assumes that competitive negotiated service agreements (“NSAs”) will be granted “blanket confidential treatment” and argues that such confidential treatment should not be extended to market-dominant NSAs. Valpak Comments (September 25, 2008), at 7.

Those substantive issues are not before the Commission in this proceeding. While, as noted, the Commission has proposed a balancing test in Proposed Rule 3007.25(a), it has not asked for comments on the outcome of applying that test to any specific materials, including any aspect of competitive NSAs. Instead, as the proposed rules contemplate, the Commission will address those questions when it is faced with an interested party’s request to obtain information deemed “non-public” by the Postal Service, or a request to remove protective conditions already placed on information filed by the Postal Service. At that time, both the Postal Service and all interested parties will have an opportunity to address the substantive issue of whether the designated information should in fact be withheld from the public.

The parties have not had an adequate opportunity to comment on those issues in this proceeding. Thus, the Commission should not make any premature substantive determination about the types of information that are or are not truly confidential.

II. At This Time, There Is No Reason To Depart From the Substantive Confidentiality Standards That Have Always Been Applied to Postal Service Information.

Until the Commission addresses what information should not be publicly disclosed and the extent of the protection accorded that information, the Commission should continue to require the disclosure of the same type of information that has customarily been disclosed for well over thirty years.

At times during the Commission's implementation of PAEA, some parties have suggested that the statute mandates heightened confidentiality for information on the Postal Service's competitive products, while other parties have suggested that PAEA requires increased Postal Service transparency to the public. UPS submits that Congress clearly intended PAEA to increase, rather than decrease, the public's transparency into the Postal Service's finances and operations, in order to improve its accountability to the public. See S. Rep. No. 108-318, at 1 (2004) ("[PAEA] guarantees a higher degree of transparency to ensure fair treatment of customers of the Postal Service's and those companies competing with the Postal Service's competitive products"); see also Order No. 96, at 5 ("The PAEA relies on public transparency, in addition to regulation, to achieve its goal of Postal Service accountability.").

PAEA did not change the substantive standards for confidential treatment that existed under the Postal Reorganization Act (“PRA”). To the contrary, PAEA permits the Postal Service to seek protective conditions for materials that (1) contain information described in Section 410(c), or (2) are exempt from public disclosure under Section 552(b) of Title 5. 39 U.S.C. § 504(g)(1). Those two bases for non-disclosure -- 39 U.S.C. § 410(c) and 5 U.S.C. § 552(b) -- are the same two sections that have long governed confidentiality determinations under the PRA. See 39 U.S.C. §§ 410(b)(1) and (c) (unmodified by PAEA).

So far, the Commission has not been faced with an interested party’s request for access to information filed by the Postal Service and designated by it as “non-public.” While the Postal Service has designated virtually all information regarding competitive negotiated service agreements as non-public, no party has yet challenged those designations. See, e.g., Docket No. CP2008-8. Thus, it is not an “open and shut” matter that all competitive contract rates and costs should be completely or partially protected from public view. To the contrary, that question will be decided when a party seeks access to that information and the Commission is confronted with the specific question of what level of access is appropriate.

CONCLUSION

The issue of what specific information should be held in secret rather than publicly disclosed is not before the Commission in this proceeding. As a result, UPS urges the Commission to keep an open mind and refrain from making any substantive determinations in this proceeding about what types of materials should not be made public, while maintaining the same confidentiality standards as existed under the Postal Reorganization Act.

Respectfully submitted,

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