

ORDER NO. 2047

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

Before Commissioners:

Ruth Y. Goldway, Chairman;  
Mark Acton, Vice Chairman; and  
Robert G. Taub

Competitive Product Prices  
Priority Mail Express & Priority Mail  
Priority Mail Express & Priority Mail Contract 15

Docket No. MC2014-3

Competitive Product Prices  
Priority Mail Express & Priority Mail Contract 15  
(MC2014-3)  
Negotiated Service Agreement

Docket No. CP2014-3

ORDER DENYING MOTION REQUESTING ACCESS TO NON-PUBLIC MATERIALS

(Issued April 11, 2014)

I. INTRODUCTION

On March 31, 2014, Mark Jamison filed a motion pursuant to 39 C.F.R. § 3007.50 requesting access to the non-public Governors' Decision, contract, and workpapers filed by the Postal Service in the above-captioned dockets.<sup>1</sup> For the reasons discussed below, the Motion is denied without prejudice.

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<sup>1</sup> Motion of Mark Jamison Requesting Access to Non-Public Materials, March 31, 2014 (Motion).

## II. BACKGROUND

On October 23, 2013, the Postal Service filed with the Commission a request to add Priority Mail Express and Priority Mail Contract 15 to the competitive product list.<sup>2</sup> The Request included the contract, supporting workpapers, and Governors' Decision 11-6.<sup>3</sup> The Postal Service asserted that portions of the contract, workpapers, and Governors' Decision are commercial information that would not be publicly disclosed under good business practice and, pursuant to 39 C.F.R. § 3007.21, applied for non-public treatment of those portions. Request, Attachment F at 1.

On October 24, 2013, the Commission issued an order noticing the filing, appointing a Public Representative, and providing interested persons with an opportunity to comment.<sup>4</sup> The deadline for comments concerning the contract was October 31, 2013. *Id.* at 3. Comments were filed by the Public Representative who concluded that it satisfied relevant statutory requirements.<sup>5</sup>

The Commission examined the contract and the supporting workpapers and concluded that the rates in the first year of the contract cover attributable costs and that the contract otherwise complies with 39 U.S.C. § 3633(a) and 39 C.F.R. § 3015.5.<sup>6</sup> The Commission granted the Request on November 7, 2013. Order No. 1872 at 5. The

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<sup>2</sup> Request of the United States Postal Service to Add Priority Mail Express & Priority Mail Contract 15 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data, October 23, 2013 (Request).

<sup>3</sup> Decision of the Governors of the United States Postal Service on the Establishment of Prices and Classifications for Domestic Competitive Agreements, Outbound International Competitive Agreements, Inbound International Competitive Agreements, and other Non-Published Competitive Rates, March 22, 2011 (Governors' Decision No. 11-6).

<sup>4</sup> Notice and Order Concerning the Addition of Priority Mail Express & Priority Mail Contract 15 to the Competitive Product List, October 24, 2013 (Order No. 1860).

<sup>5</sup> Public Representative Comments on Postal Service Request to Add Priority Mail Express & Priority Mail Contract 15 to the Competitive Product List, October 31, 2013, at 2 (PR Comments).

<sup>6</sup> Order Adding Priority Mail Express & Priority Mail Contract 15 to the Competitive Product List, November 7, 2013, at 3-5 (Order No. 1872).

contract took effect December 1, 2013<sup>7</sup>, and it is scheduled to expire 1 year after that date. See Request, Attachment B at 5.

Mr. Jamison filed a Motion for access to non-public materials relating to the contract on March 31, 2014. On April 3 2014, the Postal Service filed a response in opposition to the Motion.<sup>8</sup> On April 4, 2014, the Postal Service updated its response by an errata to include a letter from counsel to the Counterparty of the agreement.<sup>9</sup>

### III. PARTIES' POSITIONS

*Motion.* Mr. Jamison requests access to the contract, supporting workpapers, and Governors' Decision filed in the above-captioned dockets in order to conduct "an independent evaluation of the contract to determine if it meets the terms and conditions asserted by the Postal Service in its filing." Motion at 1. Mr. Jamison states that he plans to review the materials pursuant to 39 U.S.C. § 3653 specifically in the 2014 Annual Compliance Review. *Id.* He contends that as he is an individual interested in several competitive dockets it would likely take several months to review materials relevant to the FY 2014 ACR and therefore access is "wholly appropriate at this time." *Id.*

Mr. Jamison references review of the materials pursuant to: 39 U.S.C. § 3642, the section that provides criteria and guidance as to whether Postal Service products are properly categorized as market dominant or competitive; 39 U.S.C. § 101(b), a policy statement of title 39 regarding the provision of postal services, including retail channels, to all areas, especially rural areas, communities, and small towns where post

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<sup>7</sup> Response of the United States Postal Service to Order No. 1872, Concerning Effective Date of Contract, November 25, 2013.

<sup>8</sup> Response of the United States Postal Service in Opposition to Motion for Access to Non-Public Materials, April 3, 2014 (Postal Service Response).

<sup>9</sup> Notice of the United States Postal Service of Filing Errata to Response in Opposition to Motion for Access to Non-Public Materials, April 4, 2014 (Counterparty Response).

offices are not self-sustaining; and 39 C.F.R. § 3007.20, the Commission's rule that requires the Postal Service to file an application for non-public treatment when it files materials under seal. *Id.* at 2.

Mr. Jamison asserts that he has no commercial relationship with the Postal Service, companies doing business with the Postal Service, or the mailing industry in general. *Id.* at 2. The Motion includes a signed copy of the protective conditions set out in Appendix A of 39 C.F.R. part 3007.

Mr. Jamison references his previous request for access to non-public materials in Docket Nos. MC2014-1 and CP2014-1. He provides responses to two anticipated objections from the Postal Service: (1) that disclosure of such commercially sensitive material to him would harm the Postal Service and Counterparty; and (2) that the request is insufficiently specific and detailed to show the cause for the request. Motion at 2. Mr. Jamison argues that the first anticipated objection would create an insurmountable hurdle that would frustrate the intent of the applicable procedures, especially given that he has signed the protective conditions and has no relationship with any entity in the mailing industry. *Id.* Mr. Jamison similarly argues that the second anticipated objection would also create an insurmountable obstacle, as it would be impossible to be more specific without access to more specific information about the materials. *Id.*

Mr. Jamison contends that his request meets a public purpose because he contributes "reporting and commentary" to a website that "exists purely for the purpose of providing a public service, information related to postal affairs." *Id.* at 3.

*Postal Service.* The Postal Service opposes the Motion. It states that, in its view, the requested materials are "information of a commercial nature, which under good business practice would not be publicly disclosed." Postal Service Response at 1-2. It asserts that disclosure would cause clear commercial injury to the Postal Service and its Counterparty, by allowing competitors and prospective contract partners to gain advantages in negotiating similar contracts. *Id.* at 2. It also asserts that disclosure

could have a significant negative effect on its ability to enter negotiated service agreements, because it could not assure its contract partners that information submitted to the Commission would remain confidential. *Id.* at 2-3.

The Postal Service argues that the Motion lacks a detailed statement of justification for access as well as a compelling justification for access. *Id.* at 3. It notes that the Commission has already determined that the contract complies with chapter 36 of title 39, United States Code, and that the Commission will review the contract for compliance each year as part of its Annual Compliance Determination (ACD). *Id.* at 4. The Postal Service contends that insofar as the Motion seeks the materials for Mr. Jamison to conduct an independent evaluation of the contract to determine if it meets the terms and conditions asserted by the Postal Service, it is untimely and should be denied. *Id.*

The Postal Service states that the FY 2013 ACR process concluded on March 27, 2014 when the Commission issued its ACD Report. *Id.* at 5. It also explains that because the contract at issue did not take effect until after the end of FY 2013, it is not subject to review in the FY 2013 ACR. With regard to the FY 2014 ACR process, the Postal Service contends that the relevant data are not yet available as the Fiscal Year is ongoing. *Id.* The Postal Service concludes that the request for access pursuant to compliance review (39 U.S.C. § 3653) should be denied as premature. *Id.*

The Postal Service reiterates that the docket opened to consider the contract at issue and receive comments on the contract had a deadline for comments of more than five months previous. *Id.* Therefore, the Postal Service contends that Mr. Jamison's motion to review the contract materials pursuant to 39 U.S.C. § 3642 and 39 C.F.R. § 3007.20 is either out of time for the underlying docket, inappropriate for the FY 2013 ACR process as no data are available and the deadline has passed, or premature for the FY 2014 ACR process. *Id.* at 5-6.

Further, the Postal Service contends that Mr. Jamison's reference to review for issues related to 39 U.S.C. § 101(b) is not explained, and the nexus between the policy

statement in section 101(b) and a contract for rates and services “not of general applicability” is not alleged. *Id.* at 6-7.

The Postal Service also alleges that Mr. Jamison’s motion fails because he did not include his affiliation with a website that provides reporting and commentary on postal issues. *Id.* at 7.

*Counterparty.* The Counterparty supports the Postal Service’s opposition to the Motion. Counterparty Response at 3. It asserts that given the short timeframe, it is unable to prepare a filing on its own. *Id.* It asserts that the contract contains commercial information of a highly confidential and commercially sensitive nature, disclosure of which would unfairly and inappropriately place the Counterparty at a significant competitive disadvantage. *Id.* at 4.

The Counterparty asserts that the terms at issue are confidential and not known within the broader retail market. *Id.* Specifically the Counterparty states that the sealed material includes “specific price terms, incentive arrangements, and volume requirements (among others)...[that are] among the most protected, sensitive business information in any vendor-supplier relationship.” *Id.*

The Counterparty contends that disclosure of the material under seal would cause competitive harm because “[c]ompetitors could use such information to evaluate revenues and profitability associated with [the Counterparty’s] provision of certain products and services.” *Id.*

#### IV. COMMISSION ANALYSIS

The Commission’s rules allow any person to file a motion requesting access to non-public materials relevant to compliance under 39 U.S.C. § 3653. 39 C.F.R. § 3007.50(a). The motion must contain a “detailed statement providing justification for access, including reference to the materials’ relevance to compliance under chapter 36 of title 39 of the U.S. Code” and a list of relevant affiliations, including relationships with the party requesting access and whether that party is affiliated with the delivery

services, communications or mailing industries. *Id.* In determining whether to grant a motion for access to non-public materials relevant to compliance, the Commission is required to “balance the interests of the parties based on Federal Rule of Civil Procedure 26(c).” 39 C.F.R. § 3007.52.

Mr. Jamison requests the materials filed under seal in Docket Nos. MC2014-3 and CP2014-3 pursuant to 39 C.F.R. § 3007.50. Specifically, Mr. Jamison seeks “access to the non-public materials for the purpose of conducting an independent evaluation of the contract to determine if it meets the terms and conditions asserted by the Postal Service in its filing.” Motion at 1. On the surface, his request appears to be broader than the mandate of the Annual Compliance Report (ACR) process.

The Commission established Docket Nos. MC2014-3 and CP2014-3 on October 24, 2013 to conduct an independent evaluation of the Priority Mail Express & Priority Mail Contract 15 and the supporting materials. Interested persons were invited to comment by October 31, 2013. Mr. Jamison did not participate in that proceeding. At the conclusion of the proceeding, the Public Representative concluded that the contract appears to comport with the relevant requirements and the Commission agreed in Order No. 1872. Review of the information relevant to those dockets concluded with issuance of Order No. 1870. Insofar as Mr. Jamison requests access to the protected materials for the purpose of conducting an independent evaluation of the docket materials that is not related to the ACR process, the request is denied as untimely.

Mr. Jamison also requests access to materials on the basis that they are relevant to his review of compliance pursuant to 39 U.S.C. § 3653. Under the authority of that section, the Commission conducts an annual review of the Postal Service’s compliance with the provisions of chapter 36 of title 39, United States Code, and the service standards in effect for the fiscal year. The annual review process for each fiscal year begins when the Postal Service submits its ACR to the Commission, not later than 90 days after the end of the fiscal year. 39 U.S.C. § 3652(a). For each competitive contract in effect during that fiscal year, the ACR must identify the rates and service

features under the contract and estimate the contract's costs, volumes, and revenues. 39 C.F.R. § 3050.21(g).

Upon receipt of the ACR, the Commission issues a notice and order providing the opportunity for comment on the ACR by users of the mails, affected parties, and the Public Representative. 39 U.S.C. § 3653(a). The Commission issues its ACD for a fiscal year not later than 90 days after the date on which the Postal Service submits the ACR for that fiscal year. *Id.* at 3653(b).

The Priority Mail Express & Priority Mail Contract 15 agreement took effect on December 1, 2013, approximately two months after the end of fiscal year 2013; therefore the FY 2013 ACR did not contain information concerning this contract. As a consequence, the contract was not subject to review in Docket No. ACR2013.

Information relevant to compliance for the FY 2014 ACR proceeding has not yet been filed. The contract at issue contains price information, and forecasted estimates of cost and volume. To determine compliance in the ACR proceeding, the Commission and other participating parties will review the revenues (which are a function of price and volume) and the costs (which are updated annually as part of the proceeding). The forecasted estimates of cost or volume are no longer used. Mr. Jamison would require, in addition to the available price information, volume and cost data.

Mr. Jamison's contention that an individual with limited resources could not endeavor to work through the materials in "several competitive dockets" during the course of the ACR proceeding is not persuasive. The principal analysis entails a review of cost and revenue under the contract for the relevant fiscal year. That does not require extensive time. Moreover, during the ACR proceeding, parties of varying sizes review voluminous and complex materials relating to a range of Postal Service products, both market dominant and competitive. Further, to assess compliance, the Postal Service must first provide volume and cost data that do not currently exist. Without access to this yet-to-be developed or filed data, there is no meaningful analysis relevant to section 3653 that any party could undertake.

Therefore, in the absence of any current compliance issue relevant to Priority Mail Express & Priority Mail Contract 15, the Motion is denied as premature.

V. ORDERING PARAGRAPH

*It is ordered:*

The Motion of Mark Jamison Requesting Access to Non-Public Materials, filed March 31, 2014, is denied without prejudice.

By the Commission.

Ruth Ann Abrams  
Acting Secretary