

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

ANNUAL COMPLIANCE REPORT, 2017

Docket No. ACR2017

**MOTION OF THE UNITED STATES POSTAL SERVICE TO
STAY ORDER NO. 4394 CONCERNING THE UNSEALING OF MATERIAL FILED IN
RESPONSE TO CHAIRMAN'S INFORMATION REQUEST NO. 1, QUESTION 1**
(January 29, 2018)

After 4:00 p.m. on January 26, 2018, the Postal Regulatory Commission ("Commission") issued Order No. 4394 affirming its preliminary determination in Order No. 4377 to unseal the materials filed in the Response to Chairman's Information Request (CHIR) No. 1, question 1 submitted by the United States Postal Service (Postal Service), and directed the Postal Service to re-file its response and related materials in a public library reference only one business day later, on Monday, January 29, 2018. Pursuant to 39 C.F.R. § 3001.21, the Postal Service respectfully requests that the Commission stay the unsealing of the material in question to preserve the status quo, pending judicial review, per the Postal Service's petition for review to be filed with the United States Court of Appeals for the District of Columbia Circuit pursuant to 39 U.S.C. § 3663. This request will protect the interests of the Postal Service and any other parties who are likely to be adversely impacted by the public disclosure; that impact far outweighs any impact on other parties.¹

¹ In the alternative, if the Commission denies this motion for a stay pending judicial review, the Postal Service respectfully requests a temporary administrative stay for a brief reasonable period of time to provide for due process and allow the Postal Service the opportunity to seek further relief under 39 U.S.C. § 3663. Because the Postal Service has sought to give the Commission the chance to address this motion for a stay pending judicial review in the first instance, a brief administrative stay is necessary to afford due process without contravening the Commission's order to unseal the materials at issue, on the one hand, and without depriving the Postal Service of its appellate rights, on the other. No participant will be prejudiced by such a brief administrative stay, and, to the extent any participant suggests otherwise,

As described below, the Postal Service’s request for a stay is supported by an analysis of the Postal Service’s likelihood of success in appealing the Commission’s decision to unseal the information, the likelihood of irreparable harm to the Postal Service, the likelihood of irreparable harm to third parties, and the public interest. Importantly, the harms relevant to this analysis far outweigh any potential benefits, as the information sought to be unsealed is not necessary to the assessment of the issues under review in this docket, and, even if this information has some tangential relationship to the relevant issues, there is no justification for its public disclosure. Given the long-standing and consistent precedent and practice supporting the nonpublic and confidential treatment of the information identified for public disclosure by the Commission, the Commission’s unilateral attempt to require public disclosure of this information in a sudden departure from this precedent and practice exacerbates the uncertainty and confusion surrounding this issue, and the potential harm to relationships between the Postal Service and third parties that share information with the Postal Service in the normal course of business.

I. THE APPLICABLE LEGAL STANDARD SUPPORTS THE STAY REQUESTED IN THIS MOTION.

In evaluating motions to stay pending judicial review, the Commission has previously considered factors similar to those articulated in *Virginia Petroleum Jobbers Ass’n v. Fed. Power Comm’n*, 259 F.2d 921 (D.C. Cir. 1958). In Order No. 2075 in Docket No. R2013-11, the Commission adopted the four-part preliminary injunction test articulated in *Virginia Petroleum Jobbers*, because the test was “consistent and

the Commission controls its own dockets and can modify its own deadlines for Comments on the Annual Compliance Report in this docket to provide other participants more time to file Comments.

overlap[ped] with the factors the Commission has historically considered when determining whether a stay [wa]s appropriate.”² In Order No. 2075, the Commission stated that:

[t]he relevant factors include[d]: (1) likelihood of success on the merits; (2) irreparable harm to the requesting party; (3) irreparable harm to other parties if relief is granted; and (4) the public interest. See *Mills v. District of Columbia*, 571 F.3d 1304, 1308 (D.C. Cir. 2009); *Corning Sav. And Loan Ass’n v. Federal Home Loan Bank BD.*, 562 F. Supp. 279 (E.D. Ark. 1983).³

The Commission also noted that the four-part preliminary injunction test “[wa]s the exclusive test used by the courts when determining whether it is appropriate to issue a stay pending judicial review.”⁴ Applying the *Virginia Petroleum Jobbers’* factors, a stay is appropriate and necessary here based on the reasons articulated below.

A. The Postal Service Is Likely To Succeed On The Merits Of The Appeal Because The Information In Question Is Commercially Sensitive And Has Been Recognized As Such In Precedent From Federal Courts And The Commission.

There is a strong likelihood that the Postal Service will succeed on the merits. As stated in the Postal Service’s Response to the Commission’s Notice of Preliminary Determination to Unseal in Order No. 4377, the Inbound Letter Post revenue information separated by country group and shape at issue here is exempt from mandatory public disclosure under 39 U.S.C. § 410(c)(2) (which applies specifically to the Postal Service), as well as under the Freedom of Information Act (“FOIA”) Exemption 4.⁵ The information in question consists of commercially sensitive

² PRC Order No. 2075, Order Denying Stay and Establishing Schedule for Reporting Requirements, Docket No. R2013-11, May 2, 2014, at 8.

³ *Id.* at 7.

⁴ *Id.* at 8.

⁵ 5 U.S.C. § 552(b)(4).

information. Under good business practice, this information would not be publicly disclosed and it is confidential within the broader shipping services market.⁶ The information in question is not truly obscured or masked simply because it is aggregated as the Commission concluded in Order No. 4394.⁷ For the reasons explained in the Postal Service's initial non-public filing of annex USPS-FY17-NP31 and its Response to Order No. 4377, the aggregated Inbound Letter Post revenue could give indications of non-public information of at least one foreign postal operator.⁸

Courts, including the D.C. Circuit, have previously reviewed similar cases that involved the confidentiality of volume and revenue information, and ruled in favor of allowing withholding of similar volume and revenue information from mandatory disclosure. For example, in *McDonnell Douglas Corp. v. U.S. Dept. of the Air Force*, 375 F.3d 1182 (D.C. Cir. 2004), the D.C. Circuit held that disclosure of costs could likely cause competitive harm and that those costs were exempt from disclosure under the Freedom of Information Act. In *DNC Parks & Resorts At Yosemite, Inc. v. United States*, 127 Fed.Cl. 435 (2016), the Court of Federal Claims granted a protective order in recognition of the commercially sensitive nature of information, including a breakdown of revenues by operational category, and the likelihood that public disclosure would enable competitors to gain a competitive advantage.

⁶ Response of United States Postal Service to Order No. 4377, with Portions Filed Under Seal, Docket No. ACR2017, January 24, 2018 (USPS Response to Order No. 4377). See also Response of the United States Postal Service to Questions 1-16 of Chairman's Information Request No. 1, Docket No. ACR2017, January 12, 2018 (Response to CHIR No. 1); Notice of the United States Postal Service of Filing of USPS-FY17-NP31 and Application for Nonpublic Treatment, Docket No. ACR2017, January 12, 2018 (Notice of Filing USPS-FY17-NP31); and United States Postal Service FY 2017 Annual Compliance Report, Docket No. ACR2017, December 29, 2017, Application of the United States Postal Service for Nonpublic Treatment of Materials.

⁷ PRC Order No. 4394 at 8-9.

⁸ Notice of Filing USPS-FY17-NP31, at 2 and Response to Order No. 4377.

In *DNC Parks & Resorts*, the plaintiffs filed a motion for a protective order seeking to maintain a Valuation Report that was marked “confidential” and filed under seal due to the risk of a competitive disadvantage if the confidential information were publicly disclosed. The Valuation Report at issue contained the plaintiffs’ operating margins for the years 2005 through 2009, and a detailed listing of revenues by location and operational category. The court ultimately held that the information in question contained confidential trade secrets and the disclosure of such information would allow the plaintiffs’ competitors to gain access to important economic information about the plaintiffs’ business, so the protective seal that was in place remained undisturbed. *Id.*, at 5. The same reasoning should apply here because the Postal Service has shown good cause for a protective order which supports maintaining the Inbound Letter Post revenue information separated by country group and shape under seal.

The Commission’s decision in Order No. 4394 also represents an arbitrary departure from accepted Commission practice. The information in question here concerns subcomponents of Inbound Letter Post mail, which is listed as a single product in section 1130 of the Mail Classification Schedule.⁹ Neither the Postal Service nor the Commission has initiated proceedings to treat Inbound Letter Post mail by country group or by shape components as separate “products” to be listed on the Mail Classification Schedule. In addition, compliance with the applicable statutory and regulatory requirements for Inbound Letter Post mail is not measured at the subcomponent level of shape or origin country group.

⁹ See PRC, Mail Classification Schedule, posted January 21, 2018, available at <http://www.prc.gov/mail-classification-schedule>, section 1130 Inbound Letter Post.

Order No. 4394 is moreover a departure from the usual level of aggregation that has been presented without recent controversy in periodic reporting for comparable inbound international products. For instance, the competitive products section in the FY 2017 RPW Report reports the revenue, volumes, and weights for inbound international mail as only “Inbound International” or “International Mail Fees,” as shown below.¹⁰

COMPETITIVE PRODUCTS
FINAL REVENUE, PIECES, AND WEIGHT BY CLASSES OF MAIL AND SPECIAL SERVICES FOR FISCAL YEAR
FISCAL YEAR 2017 (Oct. 1, 2016-Sep. 30, 2017) COMPARED WITH THE CORRESPONDING PERIOD OF FISCAL YEAR 2016
(Data in Thousands)

Service Category	REVENUE \$/				PIECES \$/				WEIGHT (Pounds) \$/			
	Fiscal Year		Change		Fiscal Year		Change		Fiscal Year		Change	
	FY 2017	FY 2016	FY 2017 over FY 2016 Amount	Percent	FY 2017	FY 2016	FY 2017 over FY 2016 Amount	Percent	FY 2017	FY 2016	FY 2017 over FY 2016 Amount	Percent

Inbound International	236,986	230,564	6,421	2.8	15,348	16,099	(751)	(4.7)	109,581	107,553	2,028	1.9
International Mail Fees	7	81	(74)	(91.4)	-	-	-	-	-	-	-	-
Total International Mail	1,743,206	1,770,542	(27,336)	(1.5)	207,404	227,404	(20,000)	(8.8)	268,069	269,363	(1,293)	(0.5)
Total Competitive Mail	19,830,400	17,632,451	2,197,949	12.5	5,103,669	4,496,352	607,216	13.5	9,837,002	8,366,265	1,470,737	17.6

This is a level of aggregation above the product level, as there are separate inbound international products listed in section 2515 of the Mail Classification Schedule (MCS), including section 2515.6 concerning Inbound EMS and section 2515.8 Inbound Air Parcel Post (at non-UPU rates). Also, the public version of the FY 2017 Public Cost and Revenue Analysis (PRCA) reports competitive products information as “Total Competitive International,” as shown below.¹¹

¹⁰ See USPS-FY17-42 – FY 2017 Revenue, Pieces, and Weight Report (Public Version), Docket No. ACR2017, December 29, 2017, Excel worksheet “FY2017_RPWsummaryreport_public_eoy.xls,” lines 152 through 158.

¹¹ See USPS-FY17-1 – FY 2017 Public Cost and Revenue Analysis (PCRA) Report, Excel worksheet “Public_FY17ICRARReport.xlsx,” “Cost 3,” as well as “Volume 2” tabs.

PUBLIC COST AND REVENUE ANALYSIS
Fiscal Year 2017

Mail Classes and Products (note 1)	(in millions)			(per piece)				
	Revenue	Attributable Cost	Volume Variable Cost	Revenue \$	Attributable Cost \$	Volume Variable Cost \$	Contribution \$	Cost Coverage
	(note 1)	(note 2)	(note 2)		(note 2)	Cost \$	(note 2)	(note 2)
	A	B	C	D	E	F	(D-E)	(D/E)
COMPETITIVE MAIL AND SERVICES								

Total Competitive International.....	1,749.4	1,052.6	1,025.2	8,440	5,078	4,946	3,362	166.20%

Again, this is a much higher level of aggregation above the product level.

The same logic should inform data reporting for Inbound Letter Post. At present, MCS section 1130 Inbound Letter Post encompasses letters, packages, postcards, printed matter, and small packets, up to 2 kilograms.¹² Not only are Inbound Letter Post packets subject to considerable competition, but bulk international letter and flat mail can be subject to competition as well. Thus, the Commission’s determination to disclose Inbound Letter Post revenue information by country group and shape is a request to disclose information at a much more granular level of detail than the Postal Service has customarily disclosed in ACR dockets for other similar services and marks a significant departure from accepted reporting conventions.

In previous proceedings, the Commission has been solicitous of concerns raised about disclosure of disaggregated information about mail from foreign postal operators. For instance, in Docket No. RM2016-10, in ruling whether access to commercially sensitive information implicating a foreign postal operator should be disclosed under protective conditions, the Commission imposed a higher bar by conditioning disclosure on execution of an indemnification agreement “concerning inadvertent disclosure.” The

¹² See PRC, Mail Classification Schedule, posted January 21, 2018, available at <https://www.prc.gov/mail-classification-schedule>, section 1130 Inbound Letter Post, at 32.

Commission explained “that an agreement between UPS and the Postal Service regarding additional legal protections and indemnification in the event of an inadvertent disclosure will mitigate the concerns over adequate safeguards to protect the information.”¹³ Subsequently, in Docket No. RM2017-10, the Commission denied access to certain materials implicating a foreign postal operator. The Commission concluded that access to the library reference in question was unnecessary, and ruled that, if the movant were to renew “its request, it should address the appropriateness of the scope of its request and issues regarding access to third-party information.”¹⁴ The Postal Service has routinely filed country-specific information with the Commission under seal under well-documented applications for nonpublic treatment, and this information has been unquestionably treated as sensitive business information by the Commission without any controversy.¹⁵ Thus, the Commission has treated Inbound Letter Post information attributable to foreign postal operators as sensitive business information without exception. Moreover, contrary to the Commission’s characterization of the information in question, disclosure of the information by country-group and shape will expose individual mail streams of at least one large-volume country’s postal operator whose revenues and volumes populate such “aggregated” groupings.

In sum, the information in question consists of sensitive business information eligible for protection from mandatory disclosure under 39 U.S.C. § 410(c)(2) and FOIA Exemption 4. The Commission’s self-initiated desire to make the information in

¹³ PRC Order No. 3560, Order Granting Motion for Access to Non-Public Materials Filed Under Seal, Docket No. RM2016-10, October 11, 2016, at 4.

¹⁴ PRC Order No. 4042, Order Granting Request for Access in Part, Docket No. RM2017-10, August 15, 2017, at 3-4.

¹⁵ See, e.g., Docket Nos. R2018-2, R2017-6, R2017-5, R2017-4, R2017-3, R2017-2.

question public is a sudden and significant departure from prior practice. Therefore, there is a strong likelihood that the Postal Service will prevail on the merits.

B. The Postal Service Will Suffer Irreparable Harm From Public Disclosure Of The Information In Question Because Such Disclosure Will Provide Postal Service Competitors With A Competitive Advantage And Will Have A Negative Impact On The Postal Service's Commercial Relationships With Third Parties, And The Resulting Losses To The Postal Service Will Be Unrecoverable.

The irreparable harm that this unsealing will cause the Postal Service is significant and will adversely affect the Postal Service's ability to compete in the inbound shipping services market. Were the information at issue here to be disclosed publicly, the information would probably remain public in some form. Thus, if the information in question were unsealed, the Postal Service would have no way to recapture it and place it back under seal, even if Order No. 4394 were later found to be erroneous.

In *Judicial Watch, Inc. v. Dept. of Justice*, 432 F.3d 366 (D.C. Cir. 2005), the D.C. Circuit Court ultimately reversed the district court's decision to order the U.S. Department of Justice to disclose redacted versions of emails because all of the contents of the emails were attorney-work product, and therefore, exempt from disclosure under FOIA. Specifically, the D.C. Circuit held that the trial court's orders were "final and appealable. 'To hold otherwise would be to force the government to let the cat out of the bag, without any effective way of recapturing it if the district court's directive was ultimately found to be erroneous.' *Irons v. FBI*, 811 F.2d 681, 683 (1st Cir. 1987)." *Judicial Watch, Inc.*, 432 F.3d at 369. The same is evident here: once the revenues and volumes are publicly posted online, any person around the world can

download them from the Commission's website, and there is no way to undo that harm even if the appellate court ultimately reverses.

The Postal Service has properly cited FOIA exemptions concerning the information in question. Order No. 4394 is the Commission's final decision, requiring the Postal Service to "re-file its Response to CHIR No. 1, question 1 and related materials in a public library reference no later than January 29, 2018."¹⁶ Order No. 4394 is an appealable action. Absent judicial review, Order No. 4394 requiring public disclosure essentially lets the "genie out of the bottle," or "the cat out of the bag," and leaves the Postal Service with no effective means of recapturing it.

In addition, public disclosure would cause irreparable harm to at least one foreign postal operator that has a proprietary interest in this country-specific information. As the Postal Service explained in its Response to Order No. 4377, like the Postal Service, such a postal operator will be at a competitive disadvantage were the materials at issue to be disclosed. The fact that foreign postal operators have not expressed their concern should not inform the Commission's determination. Unlike domestic corporations and associations, foreign postal operators face challenges of language and knowledge of U.S. law and procedures. It is therefore a flawed presumption to assume that all 192 member countries have the capacity to carefully follow Commission proceedings, and respond on short notice to Commission orders. There is no prerequisite that a third-party with a proprietary interest in the information appear in this proceeding; moreover, protection of such interests are particularly compelling when the time for any third-party

¹⁶ PRC Order No. 4394, at 10.

action, or even awareness, has been so limited. Indeed, the Postal Service would expect the same protective treatment of its sensitive information abroad.

Because public access to the material at issue will irreparably damage the interests of both the Postal Service and its trading partners, the opportunity for appellate review is necessary. There is no possibility that adequate corrective relief would be available at a later date to remedy the public disclosure that the Commission ordered. Therefore, the instant Motion should be granted.

C. A Decision To Grant The Stay Requested By This Motion Will Cause No Irreparable Harm To Other Parties Because These Parties Have Ample Opportunity To Obtain Access To The Information Maintained Under Seal.

The harm to the other participants who filed responses concerning Order No. 4377 and have expressed an interest in this matter¹⁷ is illusory because they do not need access to the information on a public basis in order to participate in this docket. Instead, as noted in the Postal Service's Response to Order No. 4377, if parties are interested in viewing the Inbound Letter Post revenue information during the pendency of judicial review, they may request access to this information pursuant to Commission regulations.¹⁸ Participants can access the sealed information by furnishing appropriate certifications under 39 C.F.R. § 3007.40 and satisfying any other requirements imposed

¹⁷ Comments of United Parcel Service, Inc. in Response to Notice of Preliminary Determination to Unseal the Material Filed in Response to Chairman's Information Request No. 1, Question 1, Docket No. ACR2017, January 24, 2018 (UPS Response); Response of the Association for Postal Commerce to Order No. 4377, Docket No. ACR2017, January 24, 2018 (PostCom Response); Comments of National Association of Manufacturers on Order No. 4377, Docket No. ACR2017, January 24, 2018 (NAM Response); Comments of US Chamber of Commerce, Docket No. ACR2017, January 25, 2018 (U.S. Chamber of Commerce Response); Comments of the International Housewares Association, Docket No. ACR2017, January 25, 2018 (IHA Response); Comments of the Honorable Kenny Marchant on Determination to Unseal the Material Filed in Response to Chairman's Information Request No. 1, Question 1, Docket No. ACR2017, January 25, 2018 (Congressman Marchant Response); Preliminary Comments of James Smaldone, Founder & CEO, Mighty Mug, Inc., Docket No. ACR2017, January 25, 2018 (Mighty Mug Response).

¹⁸ USPS Response to Order No. 4377, at 5.

by the Commission to address any third party concerns.¹⁹ While other participants would need to complete additional steps to secure access to the information, these are merely procedural hurdles that do not pose a barrier to access, as long as any other third party concerns are satisfied. In sum, there would be no harm to third party participants in this proceeding were the Commission to grant the stay requested in this motion.

The policy-based arguments that outside observers have expressed regarding the terminal dues system do not outweigh the Postal Service's need for a stay pending judicial review. Although participants in this docket have expressed concern about the need for greater transparency related to international mail prices, that need is not specific to this docket, and those parties will not be irreparably harmed by a stay, while the Postal Service and at least one other postal operator will be.

D. The Public Interest Supports Granting The Stay Because Public Disclosure Would Cause Significant Harm To Core Operations Of The Postal Service, Without Benefitting Participation In The ACR Docket.

While the public interest in maintaining the financial transparency of a government entity is important, the public interest is not served by a rushed judgment concerning the sensitivity and confidentiality of the information in question. The goal of transparency, as articulated in Order No. 4394, is not specific to this docket, nor is it time sensitive. The Postal Service recognizes the public interest in maintaining an appropriate balance of public and sealed commercial information, but there is also public interest in avoiding hasty outcomes that could impede the Postal Service's ability to maintain a sustainable enterprise and also frustrate its relationships with its trading

¹⁹ 39 C.F.R. § 3007.40.

partners. The Commission can effectively complete its review in the ACR2017 docket regardless of the public or non-public status of the materials at issue here. A stay is necessary to afford the Postal Service an opportunity for judicial review, while allowing a full and fair vetting of the underlying controversy presented here. In sum, the public interest lies in granting a stay.

II. CONCLUSION

Based on the reasons stated above, a stay pending judicial review is appropriate. The Postal Service respectfully requests that the Commission stay the unsealing of the material filed in response to Chairman's Information Request No. 1, question 1, pending judicial review to prevent irreparable harm to the Postal Service and at least one other operator that is also likely to be adversely and irreparably impacted by the public disclosure.

Respectfully submitted,

UNITED STATES POSTAL SERVICE
By its attorneys:

Anthony F. Alverno
Chief Counsel, Global Business & Service
Development

LaSandy K. Raynor
James M. Mecone
Christopher C. Meyerson
Jeffrey A. Rackow

475 L'Enfant Plaza, S.W.
Washington, D.C. 20260-1101
(202) 268-7820; Fax -5628
christopher.c.meyerson@usps.gov
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