

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

Annual Compliance Review, 2018)
) Docket No. ACR2018
)

**MOTION FOR LEAVE TO REPLY AND
REPLY OF THE ASSOCIATION FOR POSTAL COMMERCE TO
UNITED STATES POSTAL SERVICE RESPONSE TO MOTION
REQUESTING ACCESS TO NON-PUBLIC MATERIALS**

(January 30, 2019)

On January 28, 2019, the United States Postal Service (“Postal Service”) filed a Response to Association for Postal Commerce’s Motion Requesting Access to Non-Public Materials Under Protective Conditions (“Response”). In its Response, the Postal Service urges the Postal Service to deny, in part, the Association for Postal Commerce’s (“PostCom”) Motion for Access to Nonpublic Materials, filed on January 10, 2019 (“Motion”). Specifically, the Postal Service asks the Commission to deny PostCom’s representatives access to the nonpublic information included in Nonpublic Folders USPS-FY18-NP2, USPS-FY18-NP3, USPS-FY18-NP7, USPS-FY18-NP8, USPS-FY18-NP9, and USPS-FY18-NP14. Because the Postal Service’s Response has no support in law, practice, precedent, or reason, the Commission should ignore the Postal Service’s arguments and grant PostCom’s representatives access to these materials pursuant to protective conditions.

I. MOTION FOR LEAVE TO REPLY

Pursuant to Rule 30001.21 of the Commission’s Rules of Practice and Procedure, PostCom respectfully moves that the Commission grant it leave to file this Reply to the Postal Service’s Response. While PostCom recognizes that 39 C.F.R. § 3007.301(d) generally states

that no reply to a response to a motion for access to nonpublic materials shall be filed, it allows such a reply if “the Commission otherwise provides.” PostCom submits that there is good cause to allow a reply in this instance.

The Postal Service’s response raises issues of first impression and, if its arguments are accepted, would upset years of standard practice before the Commission. For the first time, the Postal Service seeks to deny access to nonpublic materials filed with the Commission as part of its Annual Compliance reporting obligations even under protective conditions without any showing that the individuals or entities seeking access to the materials engage in competition with the Postal Service. This position stands in stark contrast to standard Commission practice in which access to nonpublic materials is regularly granted so long as the individuals seeking the materials are not involved in competitive decision-making for competitors or customers of the Postal Service. The Postal Service is essentially seeking to establish a new standard for access, claiming that some information, simply by virtue of being associated with third parties, is too commercially sensitive for any member of the interested public to review, regardless of the protective conditions imposed.

While PostCom’s counsel and counsel for the Postal Service briefly discussed PostCom’s motion shortly after it was filed, PostCom was provided with no notice that the Postal Service intended to object to PostCom’s access to these materials. Fairness and equity counsel for providing PostCom with an opportunity to respond to the Postal Service’s novel arguments to assist the Commission in reaching a reasoned decision. Accordingly, PostCom respectfully requests that the Commission grant it leave to file this Reply.

II. REPLY

As the Commission explained in Order No. 4707, “in determining the appropriate degree of confidentiality to be given to information alleged to be non-public by the Postal Service,

section 504(g)(3)(A) directs the Commission to ‘balance the nature and extent of the likely commercial injury to the Postal Service against the public interest in maintaining the financial transparency of a government establishment competing in commercial markets.’ 39 U.S.C. § 504(g)(3)(A).” Order No. 4707 at 15. Applying this balance is easy in this case, since providing the requested information to PostCom’s President and its outside counsel would entail *no* risk of commercial injury to the Postal Service. PostCom does not compete with the Postal Service. PostCom does not compete with any foreign posts. And PostCom does not compete with any customers of the Postal Service. There is simply no avenue through which PostCom’s representatives could use the information sought to cause commercial injury to the Postal Service, its partners, or its customers without blatantly violating the protective conditions established by the Commission. And surely the Postal Service is not suggesting it believes PostCom would do so.

Yet the Postal Service’s Response provides no justification for denying PostCom’s representatives access to the information they seek other than the suggestion that the information might be disclosed in contravention of the protective conditions. The Postal Service claims access to this information would force its customers to “accept an uncertain risk” that the information will “be shared with third parties or their representatives, particularly a major supplier in the shipping industry.” Response at 4. It is not clear to whom the Postal Service is referring in this passage—certainly neither PostCom nor Venable LLP is “a major supplier in the shipping industry.” Regardless, the concern appears to be an unfounded one that PostCom reviewing representatives will share the information they obtain with unauthorized parties.

The Postal Service further states that PostCom’s “Motion has created uncertainty regarding the protection afforded to confidential information of third parties that is filed at the

Commission.” *Id.* at 4. How so? The PostCom representatives’ access will be governed by the Commission’s rules and protective conditions. PostCom’s representatives will not disclose the information to any party not granted access to the information. They will only use the materials in relation to this matter. They will take reasonable precautions to guard against the disclosure of the materials. If they violate these conditions, they will be subject to sanctions from the Commission. The level of protection afforded these materials is plainly stated in the Commission’s rules and the protective conditions, and nothing in PostCom’s motion seeks to change these requirements. In fact, each of the reviewing representatives has certified that they will comply with the protective conditions. The concerns of Canada Post that an “improper disclosure” could harm its business interests may be warranted, but that concern applies to all nonpublic material—it is why the Commission requires parties to certify that they will prevent such disclosures. Response at 5.

In its application for nonpublic treatment of these materials, the Postal Service was more precise about the potential harms that could result from publicly releasing these materials. Notably, none of these contemplated harms would result from PostCom’s representatives’ access to the materials. For instance, with respect to cost information, the Postal Service argues that disclosure would allow its competitors “to better identify and understand areas where they could adapt their own operations to be more competitive with postal products and better assess how to price and market their own products in such a way as to target the Postal Service’s weaknesses and compensate for its strengths in producing and marketing various products.” ACR, Attachment Two. Since neither PostCom nor its representatives produce, price, or market products that compete with Postal Service products, there is no risk of harm in this respect. Similarly, PostCom’s representatives have no reason to use volume and revenue information “to

analyze the Postal Service’s market strengths and weaknesses . . . to focus sales and marketing efforts on those areas” or to use billing determinants in a similar manner. *Id.* For the same reasons, PostCom and its representatives will not use NSA-related information to “direct their sales and marketing efforts at the customer segment that the Postal Service has had the most success at attracting.” *Id.*

In addition to these concerns, the Postal Service worries that disclosure of information regarding international products “would likely lead to limitations on the negotiating positions of both the Postal Service and the other foreign postal operator in similar agreements they might wish to negotiate with other foreign postal operators.” ACR, Attachment Two. Since PostCom’s representatives are not foreign posts and are not involved in such negotiations, these concerns are irrelevant to PostCom’s motion. Even if the information is associated with a specific foreign postal operator, it is unclear how PostCom’s representatives could use that information in a way that would cause competitive harm to the Postal Service.

PostCom seeks access to these materials solely to inform its comments on the Postal Service’s compliance with the Postal Accountability and Enhancement Act and to address topics the Postal Service discusses in its Annual Compliance Report. As PostCom explained in its Motion for Access, PostCom plans to focus primarily on service and cost issues that impact market dominant products. Information related to international and competitive products, however, may bear on these issues or serve as a useful point of comparison. Motion for Access at 1-2. Further, it appears that some information pertaining to market dominant products has been filed in non-public workpapers related to international products. The Postal Service’s Response does not claim that use of the nonpublic materials in this manner will cause it any competitive harm.

In the end, the Postal Service can provide nothing more than vague assertions that granting access to PostCom’s representatives “will have an adverse effect on third-party interests in pursuing business with the Postal Service.” *Id.* at 4. At bottom, this assertion is an argument that *no one* should have access to non-public information filed by the Postal Service relating to international products or NSAs. Such a position is simply untenable. While the Postal Service has legitimate interests in protecting competitively sensitive information from disclosure to the public or to those who would use the information to gain a competitive advantage over the Postal Service, the type of wholesale exclusion envisioned in the response is entirely inconsistent with the Postal Service’s status as a regulated governmental entity.

The Commission promulgated rules, including in Docket RM2018-3, specifically to address the types of concerns raised by the Postal Service’s Response. These rules allow access to nonpublic materials under protective conditions to allow interested parties to meaningfully participate in Commission proceedings while still protecting the Postal Service from competitive harm. Where the individuals seeking access are not involved in competitive decision-making for any individual or entity that might gain competitive advantage from using the materials, those individuals should, as a rule, be granted access to the nonpublic materials. *See* 39 C.F.R. § 30007.300(b). As the Commission has long recognized, “The PAEA relies on public transparency, in addition to regulation, to achieve its goal of Postal Service accountability.” Order No. 96, *Regulations to Establish Procedure for According Appropriate Confidentiality* at 5 (Aug. 13, 2008). The Commission has applied this approach without incident in the past, and there is no reason to change course now. *See* Order No. 4679 at 26 (explaining that it has been standard practice to allow personnel not involved in an entity’s competitive decision-making access to non-public materials for “many years”).

Finally, to the extent the Postal Service can identify specific information that it is not willing to disclose, PostCom is willing to discuss these objections with the Postal Service and may accept a redacted or aggregated version of the requested information.¹ For instance, PostCom is not interested in the pricing or profit margin associated with any particular NSA, nor is it interested in the identity of any customer with an NSA. Thus, to the extent the Postal Service is willing to disclose the costs associated with processing and transporting particular categories of mail covered by NSAs, but not the price it charges for those activities, PostCom may be willing to accept redacted versions of the information. But PostCom is not willing to withdraw its request simply because the Postal Service has a fear that PostCom would “be able to gauge substantial intelligence about the Postal Service’s customer base” through anonymous information related to NSAs. Response at 3. Because PostCom is not competing with the Postal Service, even this “substantial intelligence” will not cause the Postal Service any harm.

Respectfully submitted,

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January 30, 2019

¹ While the Postal Service claims that “it is not feasible . . . to remove, redact, or aggregate the information in a way that protects” third party information related to international products, it makes no similar claim regarding NSA information. Response at 3. Moreover, without further support, the Commission should view these claims with skepticism.