

BEFORE THE  
POSTAL REGULATORY COMMISSION

---

Annual Compliance Review 2018

:  
:  
:

Docket No. ACR2018

---

---

**UNITED PARCEL SERVICE, INC.'S MOTION FOR LEAVE  
TO REPLY AND REPLY TO THE UNITED STATES POSTAL  
SERVICE'S RESPONSE TO MOTION REQUESTING  
ACCESS TO NON-PUBLIC MATERIALS  
(February 4, 2019)**

---

United Parcel Service, Inc. ("UPS") respectfully submits this motion for leave to reply and reply to the United States Postal Service's ("Postal Service") response to UPS's motion requesting access to non-public information for its outside counsel and consultants for use in analyzing the Postal Service's Annual Compliance Report ("ACR") for Fiscal Year ("FY") 2018.

UPS filed its motion for access on January 9, 2019. See United Parcel Serv., Inc.'s Mot. Requesting Access to Non-Public Materials Under Protective Conditions, Dkt. No. ACR2018 (Jan. 9, 2019) (the "Motion"). The Postal Service responded on January 28, 2019, asking the Commission to deny the Motion in part. See U.S. Postal Serv. Resp. to United Parcel Serv. Inc.'s Mot. Requesting Access to Non-Public Materials Under Protective Conditions, Dkt. No. ACR2018 (Jan. 28, 2019) (the "Opposition"). On February 1, the Commission granted UPS's outside counsel and consultants access to USPS-FY18-NP10, -NP11, -NP12, -NP13, -NP19, -NP21, -NP22, -NP23, and -NP24 (the "Domestic Materials"), as well as continued access to certain non-public information from Docket Nos. ACR2014, ACR2015, ACR2016, and

ACR2017, while it continues to consider UPS's request for access to the library references with regard to which the Postal Service opposes the Motion. See Order No. 4996, Dkt. No. ACR2018 (Feb. 1, 2019).

Specifically, the Postal Service requests that the Commission deny access to non-public library references USPS-FY18-NP2, USPS-FY18-NP3, USPS-FY18-NP7, USPS-FY18-NP8, USPS-FY18-NP9, and USPS-FY18-NP14 (the "International Materials").<sup>1</sup> UPS respectfully requests that leave to reply be granted, and that the Motion be granted in full upon due consideration.

#### **I. Motion for Leave to Reply**

Pursuant to Commission Rules 3001.21 and 3007.301(d), UPS requests that the Commission grant it leave to file this reply to the Postal Service's Response. Rule 3007.301(d) states that no reply may be filed "unless the Commission otherwise provides." 39 C.F.R 3007.301(d). UPS submits that there is good cause for the Commission to grant leave to reply in these circumstances.

The Postal Service essentially argues that there should be two tiers of non-public information submitted in and relied upon in proceedings before the Commission. According to the Postal Service, access to domestic non-public data may be granted to interested parties under the ordinary protective conditions imposed by the Commission and according to the Commission's rules. The Postal Service appears to contend, however, that international non-public data should *never* be disclosed to any interested parties under the Commission's protective conditions and rules. Such a distinction is untethered from the relevant statutes and regulations. Indeed, the Commission recently

---

<sup>1</sup> See Response at 1-2.

amended its regulations dealing with non-public information, and made no exceptions for international data.<sup>2</sup> Fairness dictates that leave to reply to the Postal Service's position should be granted.

## **II. Reply**

39 U.S.C. § 504(g)(3)(A) requires that the Commission "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." For the reasons described below, the Postal Service's fears of commercial injury are unrealistic, and the public interest strongly weighs in favor of transparency. Allowing UPS's outside counsel and consultants to review and analyze the International Materials is necessary in order to assure that the Postal Service is fully reporting data regarding its international package business, and fairly modeling the costs of that business.

### **A. International And Domestic Non-Public Data Are Treated Equally By Applicable Law, And There Is No Realistic Likelihood of Commercial Injury If The Motion Is Granted**

There is no basis to treat the International Materials any differently than any other non-public library references. The applicable statutes and regulations make no exceptions for non-public international data: "In determining the appropriate degree of confidentiality to be accorded information identified by the Postal Service [as confidential] the Commission shall balance the nature and extent of the likely commercial injury to the Postal Service against the public interest in maintaining the

---

<sup>2</sup> See Order Adopting Final Rules Relating To Non-Public Information, Dkt. No. RM2018-3 (June 27, 2018).

financial transparency of a government establishment competing in commercial markets.” 39 U.S.C. § 504(g)(3)(A); Order No. 4707 at 15.

The rules exclude from eligibility for receiving non-public information all individuals who are “involved in competitive decision-making for any individual or entity that might gain competitive advantage from using non-public materials,” but explicitly notes that “[i]nvolved in competitive decision-making . . . does not include rendering legal advice or performing other services that are not directly in furtherance of activities in competition with an individual or entity having a proprietary interest in the protected material.” 39 C.F.R. 3007.300(b).

The Postal Service does not argue, nor could it argue, that any of UPS’s outside counsel or consultants for whom access is requested are engaged in any competitive decision making for a competitor or customer of the Postal Service. The Postal Service opposes the Motion only on the basis that the International Materials might be inadvertently disclosed, causing unspecified harm to the Postal Service and its foreign business partners.<sup>3</sup> The risk of inadvertent disclosure of the International Materials, however, is no greater than the risk of inadvertent disclosure of any other non-public library reference to which the Commission has granted UPS’s outside and consultants access. That risk is *de minimus*, and cannot support denial of the Motion.

The Postal Service does not argue, nor could it argue, that UPS’s outside counsel and consultants have *ever* inadvertently disclosed non-public materials provided in proceedings before the Commission in the years UPS has been participating in these proceedings. There will be no harm to the Postal Service or its

---

<sup>3</sup> Response at 4-5.

international partners for the simple reason that there will be no disclosure of this non-public information to anyone other than those outside counsel and consultants specifically listed in the Motion.<sup>4</sup> The Postal Service should not be permitted to bar access to its international data based on an unrealistic assertion of potential harm, and the support of certain of its international business partners.

The Postal Service also opposes UPS's motion for access on the basis that the Commission's standard protective conditions are not severe enough for the Postal Service's tastes. Specifically, the Postal Service notes that UPS's outside counsel and consultants have not executed non-disclosure agreements, nor has UPS agreed to indemnify the Postal Service or its business partners for any harms caused by inadvertent disclosure of the requested materials. This is a red herring. The Commission's rules regarding non-public information treat domestic and international information identically. There is no basis to require interested parties to provide the Postal Service any additional contractual or financial protections to gain access to non-public international data. See 39 U.S.C. § 504(g)(3)(A); 39 C.F.R. 3007.300.

#### **B. Public Interest Weighs In Favor Of Granting The Motion**

The public interest in access to this information vastly outweighs the miniscule risk of commercial injury to the Postal Service and its international partners. UPS seeks access to the International Materials solely to inform its comments on the Postal Service's compliance with the Postal Accountability and Enhancement Act and to

---

<sup>4</sup> Indeed, UPS's outside counsel and consultants, Quinn Emanuel and the Brattle Group, have a decades-long record of maintaining the confidentiality of competitively sensitive non-public information. In fact, the commercial viability of these entities depends on their ability to maintain the confidentiality of the non-public information belonging to their clients and adversaries. The Postal Service's concerns about inadvertent disclosure are unrealistic, disingenuous, or naïve.

address topics the Postal Service discusses in its Annual Compliance Report. As explained in UPS's Motion, meaningful substantive commentary on the Postal Service's international competitive costing practices is nearly impossible without access to the International Materials. See Motion at 5-7. Moreover, as UPS has noted elsewhere, there are serious questions about the accuracy of the Postal Service's international package costing models.<sup>5</sup> UPS intends to expand its analysis of unexplained anomalies of the Postal Service's international package costing models beyond Inbound Letter Post in particular. Further investigation of the discrepancies related to the Postal Service's costing of international packages is impossible without access to the granular international data sought in the Motion.

In FY2018, the Commission ordered certain changes to the reporting requirements for international products. The Commission ordered the Postal Service to provide "revenue, volume, attributable cost, and contribution data by Universal Postal Union country group and by shape for the preceding the fiscal year subject to review and each of the preceding four fiscal years[.]" Order Amending Rules For Periodic Reporting, Order No. 4836, Dkt. No. RM2018-2 (September 25, 2018) at 4, 16-7, 29. These disaggregated data that the Commission has ordered reported, on its face, do not appear to warrant non-public treatment. These data were to have been reported at the UPU country group level. This level of aggregation should effectively prevent identification of country- or partner-specific commercial information about which the Postal Service and its partner organizations have expressed concern. As such, data of

---

<sup>5</sup> See, e.g., Comments of United Parcel Serv., Inc. on Notice of Proposed Rulemaking on Analytical Principles Used in Periodic Reporting (Proposal Five), Dkt. No. RM2018-8 (Aug. 29, 2018) at 6-15.

this kind does not appear competitively sensitive, nor does it implicate any sensitive information of third parties. Nonetheless, it appears that the Postal Service has reported this data within the International Materials requested by the Motion. UPS requests access to this data both to continue its investigation of Inbound Letter Post<sup>6</sup> and to assess whether to request that the Commission require this data to be publically disclosed.

Finally, Library Reference NP14 includes both domestic and international data. Even if the Commission does not grant the Motion as to any international non-public information, the Commission should require the Postal Service to redact any international data contained in NP14 and provide the remaining, domestic data to UPS's outside counsel and consultants. UPS's outside counsel and consultants were granted access to this library reference in FY2014 without incident.<sup>7</sup> At that time, NP14 did not appear to contain any non-public international data. To the extent that reporting methodologies have changed since FY2014 such that NP14 now includes some non-public international data, it should be a simple matter for the Postal Service to redact it appropriately.

UPS respectfully requests that the Motion be granted in full for the reasons stated above.

---

<sup>6</sup> See Comments of United Parcel Serv., Inc. on Notice of Proposed Rulemaking on Analytical Principles Used in Periodic Reporting (Proposal Five), Dkt. No. RM2018-8 (Aug. 29, 2018).

<sup>7</sup> See United Parcel Service, Inc.'s Motion Requesting Access To Non-Public Materials Relevant to Compliance Under Protective Conditions, Dkt. No. ACR2014 (January 9, 2015) at Exhibit 1 (listing "USPS-FY14-NP14 FY 2014 CRA "B" Workpapers, (Non-Public Version)" among the library references requested); Order Granting Request For Access, Order No. 2321, Dkt. No. ACR2014 (January 15, 2015) (granting UPS's motion for access in full).

Respectfully submitted,

UNITED PARCEL SERVICE, INC.,

By: /s/ Steig D. Olson\_\_\_\_\_

Steig D. Olson

Quinn Emanuel Urquhart & Sullivan, LLP

51 Madison Ave., 22<sup>nd</sup> Floor

New York, NY 10010

(212) 849-7152

steigolson@quinnemanuel.com

***Attorney for UPS***