

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

ANNUAL COMPLIANCE REVIEW, 2018

Docket No. ACR2018

RESPONSE OF THE UNITED STATES POSTAL SERVICE TO ORDER NO. 5055
(April 24, 2019)

In conjunction with the issuance of the Annual Compliance Determination (ACD) Report for Fiscal Year (FY) 2018 on April 12, 2019, the Commission filed a Notice regarding the public and nonpublic library references it had created to support the ACD.¹ Among the three nonpublic library references identified was one designated as:

PRC-LR-ACR2018-NP3 FY 2018 Inbound Letter Post Data by Country
Group and Shape (Nonpublic)

Simultaneously, in accordance with 39 U.S.C. §§ 3652(f)(2), 504(g)(3), and 39 C.F.R. § 3007.103(c), the Commission issued Order No. 5055 regarding PRC-LR-ACR2018-NP3 (hereinafter "PRC-LR-NP3").² This Order provided notice of a preliminary determination that, although the Commission was initially treating the contents of PRC-LR-NP3 as nonpublic because the underlying material had been submitted by the Postal Service under seal in USPS-FY18-NP9, the Commission was not inclined to continue to accord nonpublic status to PRC-LR-NP3. The Order initially established April 19 as the date by which any interested parties could respond to the preliminary

¹ Notice of Filing of Library References PRC-LR-ACR2018-1 Through PRC-LR-ACR2018-10 and PRC-LR-ACR2018-NP1 Through PRC-LR-ACR2018-NP3 (April 12, 2019).

² Notice of a Preliminary Determination to Unseal Library Reference PRC-LR-ACR2018-NP3, April 12, 2019 (Order No. 5055).

determination to unseal the contents of PRC-LR-NP3; the Commission later extended the deadline for any responses until April 24.³

The Postal Service hereby submits its response in opposition to the Commission's preliminary determination to unseal PRC-LR-NP3. For the reasons stated herein, the Postal Service respectfully urges the Commission to reverse the preliminary determination and continue to afford the contents of PRC-LR-NP3 the same level of confidentiality requested by the Postal Service when submitting the underlying material in USPS-FY18-NP9.

I. THE COMMISSION'S DETERMINATION TO UNSEAL WOULD CAUSE COMMERCIAL HARM THAT IS NOT OUTWEIGHED BY ANY OUTDATED INTEREST IN THE PUBLIC DISCLOSURE OF DISAGGREGATED DATA FOR THIS COMPETITIVE PRODUCT.

The Commission's determination to unseal disaggregated data in this case conflicts with the longstanding standard that Congress established. Although the Freedom of Information Act (FOIA), 5 U.S.C. § 552, generally applies to the Postal Service (subject to FOIA's own exceptions, including subsections 552(b)(3)-(4)),⁴ Congress made it clear that the Postal Service may withhold from public disclosure "information of a commercial nature, including trade secrets, whether or not obtained from a person outside the Postal Service, which under good business practice would not be publicly disclosed." 39 U.S.C. § 410(c)(2). In appropriate circumstances, the Commission may balance the nature and extent of the likely commercial harm against the public interest in financial transparency of a government entity that competes in

³ Order Extending Response Deadline and Setting Reply Period, Order No. 5063, April 22, 2019.

⁴ 39 U.S.C. § 410(b)(1).

commercial markets, 39 U.S.C. § 504(g)(3)(A); 39 C.F.R. § 3007.104. That balancing, however, does not allow the Commission to discount the real commercial harm under the present circumstances, when the product has been found by the Commission to be competitive and when the Administration and the Postal Service are in the midst of trying to negotiate better competitive inbound remuneration outside the old terminal dues structure of the Universal Postal Union (UPU).

The information provided in USPS-FY18-NP9 and incorporated into PRC-LR-NP3 includes data on volumes, revenues, costs, and contribution for what has been determined to be a competitive product, all of which could provide competitors information that is potentially commercially damaging.⁵ Consequently, PRC-LR-NP3 displays material that, consistent with good business practice, has never before been disclosed publicly – namely, the above categories of information for Inbound Letter Post disaggregated by UPU country group and shape.

Disclosure of the detailed information in PRC-LR-NP3 could result in significant commercial harm to the Postal Service, negatively affecting the Postal Service's ability to compete in the inbound shipping services market. It is important to keep in mind that the Postal Service has not released information publicly on inbound letter post volumes by shape, even at an aggregated level. As the Commission has recognized, the Postal Service operates in a competitive market for inbound international shipping, which includes inbound small packets containing merchandise. There are currently more than 225 Extraterritorial Offices of Exchange (ETOE) operating worldwide, about fifty of

⁵ See, e.g., *DNC Parks & Resorts at Yosemite, Inc. v. United States*, 127 Fed. Cl. 435 (2016) (granting 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).

which are located in the United States.⁶ These ETOE operators compete for business in the same markets as designated postal operators operating in their territories, including letter post mail. In addition, there are a number of private-sector international operators that compete with the Postal Service for the inbound package market, offering products similar to inbound small packets.

The Postal Service would be at a disadvantage if the Inbound Letter Post revenue and cost data by country group and shape at issue here were shared with third parties, particularly major competitors and suppliers in the shipping industry. Disclosure of the nonpublic materials in PRC-LR-NP3 would have negative effects on the Postal Service's shipping services business, and ultimately, its overall financial health. It would publicly expose information that could be used by competitors to direct their sales efforts worldwide, resulting in competitive harm to the Postal Service. Competitors could use the Inbound Letter Post volume and revenue data by country group and shape to analyze the Postal Service's possible market strengths and weaknesses and to focus sales and marketing efforts on those areas, to the detriment of the Postal Service.

Moreover, there is a new element that distinguishes the information in PRC-LR-NP3 from that which was the focus of similar dispute in last year's ACR proceeding (see, e.g., Order No. 4451, March 28, 2018). Unlike last year, the materials presented in PRC-LR-NP3 contain not merely volume and revenue data, but also contain the Postal Service's cost and contribution data that correspond to those volume and

⁶ See UPU, Standards, International Mail Processing Centres, SCMS (Standards Code List Management System), 108b IMPC codes - Open offices, available at <http://www.upu.int/en/activities/standards/impcs.html>.

revenue data. This expansion introduces an added dimension of sensitivity. On the one hand, confidential volume and revenue data plainly need to be shielded from the Postal Service's potential competitors, but the Postal Service's counterparty postal operators are equally obviously already aware of the volume and revenue associated with the mail they themselves tender to the Postal Service. On the other hand, granting those same counterparty postal operators access to the Postal Service's disaggregated **cost** data would immediately give them valuable new information to utilize when negotiating with the Postal Service regarding rates. They would always push for agreements to keep the rates they would pay as close as possible to the Postal Service's estimated costs. That is certainly one reason why, for example, cost data by shape for Inbound Letter Post have never been publicly disclosed. Both competitors and counterparty postal operators could use disaggregated cost data to their advantage and to the Postal Service's detriment, which is why good business practice counsels that such data not be publicly disclosed.

It is not, however, simply the disaggregation of these data by country group and shape that is problematic, though that itself is a departure. Instead, as the Postal Service explained in its ACR application for nonpublic treatment of the underlying material in USPS-FY18-NP9, the fundamental problem is that these country groups also reveal commercially sensitive, and competitively valuable, country-specific data because of the reality that revenue from at least one particular postal operator overwhelmingly dominates its UPU country group.⁷ The supporting figures demonstrating this situation were previously provided in last year's ACR, in the context

⁷ Application of the United States Postal Service for Nonpublic Treatment of Materials, filed as Attachment 2 to the FY 2018 ACR (December 28, 2018) at 28.

of a very similar discussion regarding a previous incarnation of the same dispute.⁸ Even casual observers of the international shipping and delivery industries – and certainly the sophisticated and self-interested industry participants themselves – would be able to use the revenue data disaggregated by group and shape to gauge market size and market shares within a small range of error. Worse still, one could infer not only the magnitude of actual data attributable to mail from at least that one postal operator, but also the disaggregated data for that operator for particular shapes including packets (E-format) which already face considerable competition today.⁹ The Commission cannot treat the issue here as merely concerning country group and shape data – what the Commission is ordering ultimately exposes country-specific revenue, cost, and other data by product shape, particularly when coupled with commonly understood characteristics of the market.

In Order No. 5055, however, the Commission erroneously dismisses these concerns, primarily on two grounds. First, the Commission claims that country-group level aggregation adequately masks operator-specific data. Order No. 5055 at 11. Second, the Commission suggests that piercing through the aggregation levels provided in PRC-LR-NP3 to more useable operator-level data “would require speculation.” *Id.*

With respect to the first claim, the mere fact that there exist potential levels of disaggregation *beyond* what is provided in PRC-LR-NP3 (such as all the way down to the operator level) does not allow a jump to the conclusion that no commercial harm

⁸ See United States Postal Service Notice of Filing Nonpublic Folder USPS-FY17-NP40 and Application for Nonpublic Treatment, Docket No. ACR2017 (February 14, 2018) at 2 (setting forth details as to at least one foreign postal operator that faces commercial harm if the data under seal are disclosed publicly).

⁹ See Application for USPS-FY17-NP40 (February 14, 2018) at 2, 7.

could be caused by the release of data at the new level of disaggregation that is presented in the NP3 material. In the past, consistent with ordinary good business practice, neither volume/revenue data nor cost data have been disclosed publicly in disaggregated subsets. That would be true whether the disaggregation were either by discrete geographic region (such as country) or by discrete mail stream (such as product or shape). Here, however, despite its reliance on an approach ostensibly premised on group-level data rather than operator-level data, the Commission has risked commercial harm by tentatively directing the disclosure of the data both by shape and, in at least one instance, by country. Both would provide competitors and counterparty postal operators with valuable data about these markets to which they would not otherwise have access. The Commission should not break from its past practice, but instead apply it consistently to the present circumstances under which disclosure of the country group and shape disaggregation in reality would expose both the Postal Service and at least one particular foreign postal operator to commercial harm.

Importantly, the Postal Service is not alone in concluding that aggregation at the country-group level may be insufficient to protect commercial information that legitimately needs to be shielded. In its ACR comments, after reviewing the information in USPS-FY18-NP9 under protective conditions, UPS itself acknowledged that “certain ‘country group’ data may indirectly disclose data regarding the Postal Service’s international partners.”¹⁰ UPS then conceded that further aggregation (i.e., above the

¹⁰ Initial Comments of United Parcel Service, Inc. (UPS) on United States Postal Service’s Annual Compliance Report for Fiscal Year 2018 (February 19, 2019) at 18.

country-group level) may be warranted.¹¹ Obviously, however, no such further aggregation has been conducted with respect to the PRC-LR-NP3 material. Therefore, the preliminary determination to unseal PRC-LR-NP3 in its present form would appear to ignore concerns that even UPS acknowledged have substance.

With respect to the second grounds offered in Order No. 5055, the suggestion about “speculation,” the Postal Service notes in response that actors in the marketplace routinely base decisions in part on assumptions, and their assumptions are not speculative. Rather, they are based on the actors’ experience and knowledge of the real world in which they compete. For example, although competitors do not know the specific percentages individual countries represent within their country groups, they undoubtedly understand that, in one particular instance, one country represents an overwhelming proportion. Coupled with the actual cost and revenue figures for that group (if unsealed), they would also learn a very useful approximation of the country-specific cost and revenue.¹²

II. THE COMMISSION’S DETERMINATION TO UNSEAL IS PARTICULARLY PERNICIOUS IN LIGHT OF RECENT NATIONAL AND INTERNATIONAL CHANGES THAT BOTH HIGHLIGHT AND HEIGHTEN THE COMMERCIAL SENSITIVITY OF THE COMPETITIVE DATA AT ISSUE.

Changes that have occurred nationally and internationally within the past year have highlighted and heightened the commercial sensitivity of the Postal Service’s

¹¹ *Id.*

¹² Of course, that particular operator, once it sees the group figures, would know exactly the proportion of the group volume that its volume represents, and would likely get a very precise estimate of what it costs the Postal Service to handle its volume. This would give that postal operator a strong advantage when dealing with the Postal Service, which would be even greater than the advantage that would also be given to other postal operators from disclosing the Postal Service’s disaggregated cost information.

competitive inbound letter post data. That is, these developments have amplified the competitive harm that would befall the Postal Service through the Commission's disclosure of the disaggregated data at issue – disclosure that would certainly not occur voluntarily under good business practices in a competitive market.

A. The Commission's Own Order Determining Inbound Small Packets and Bulky Letters to be Competitive.

On January 9, 2019, the Commission conditionally granted the Postal Service's request to transfer small packets and bulky letters from the market dominant product list to the competitive product list.¹³ The Commission's preliminary determination to unseal, however, does not even mention its Order from January, much less attempt to reconcile the Commission's two decisions this year.

The transfer of the product to the competitive product list will become effective on the effective date of new prices, assuming that the Commission approves those new prices. Approval, of course, will require that the new rates satisfy all statutory and regulatory requirements, including those regarding adequate cost coverage and cross-subsidization.¹⁴ Yet those contingencies regarding the new rates that the Postal Service will propose do not undermine the present significance of the Commission's January Order. The Commission has concluded that the Postal Service's E-format

¹³ Order Conditionally Approving Transfer, Docket No. MC2019-17, Jan. 9, 2019 (Order No. 4980). The Commission's approval was conditioned upon the subsequent approval and implementation of new prices for the transferred product.

¹⁴ 39 U.S.C. § 3633(a); 39 C.F.R. Part 3015.

inbound letter post is part of a competitive market in which the Postal Service is but one competitor without dominant market power.¹⁵

In its January Order, the Commission found that the Postal Service does not exercise sufficient market power over the product such that it could raise prices significantly, set them substantially over costs, or decrease quality or output without risk of loss of significant business to competitors.¹⁶ That change is significant; the Commission's prior treatment of the product last year was in the context of a market dominant product. Because the Commission this year determined that the product should be considered competitive, the harm that would flow from public disclosure of the Postal Service's data can no longer be discounted. If the Postal Service does not have sufficient market power over the product, then its competitiveness also should not be compromised by the Commission in that same marketplace.

To be clear, the Postal Service is not seeking special treatment; to the contrary, it is seeking nondiscriminatory treatment in a competitive marketplace. The Postal Service does not have access to comparable data of its competitors in this market, and,

¹⁵ That conclusion is not under challenge in this Docket No. ACR2018, and indeed evidence from the marketplace amply bolsters it. *See, e.g.*, Reply Comments of United Parcel Service, Inc., Docket No. RM2017-3, March 30, 2018, at 7 ("parcels within the scope of Inbound Letter Post are contestable by private sector companies, including UPS"); Comments of Federal Express Corporation, Docket No. IM2016-1, July 21, 2016, at 24 ("FedEx and UPS, and smaller companies such as International Bridge, compete actively against foreign D[esignated] O[perator]s for the business of collecting and conveying e-commerce merchandise to the U.S. for distribution by USPS or other delivery services"). In the USPS Office of Inspector General (OIG) report titled "Terminal Dues in the Age of Ecommerce," the OIG identified the DP DHL GM Packet as a product that competes with inbound letter post at certain weights. OFFICE OF INSPECTOR GENERAL, UNITED STATES POSTAL SERVICE, TERMINAL DUES IN THE AGE OF ECOMMERCE, Report No. RARC-WP-16-003 (Dec. 14, 2015), at 17 (available at <https://www.usps.oig.gov/sites/default/files/document-library-files/2015/RARC-WP-16-003.pdf>). Retailers and e-tailers compete with inbound letter post products through drop-ship and logistics services and in-store and direct delivery services. *See* UNIVERSAL POSTAL UNION, TRENDS AND DRIVERS FOR INTERNATIONAL LETTER MAIL, PARCELS, AND EXPRESS MAIL SERVICES (2016), at 8 (available at http://www.upu.int/uploads/tx_sbdownloader/researchOnPostalMarketsTrendsAndDriversForInternationalLetterMailParcelsAndExpressMailServicesEn.pdf.pdf).

¹⁶ Order No. 4980 at 14.

absent Commission fiat, its competitors would not have access to the Postal Service's disaggregated data. The Commission should not disregard its own determination, just three months ago, to classify this product as competitive. To disclose these data publicly would constitute arbitrary agency decision-making at the Postal Service's expense in a market that the Commission has declared competitive.

These data consist of commercially sensitive information, including inbound revenue, volume, and cost separated by letter post format and country group. Public disclosure of this disaggregated information would cause significant harm to the Postal Service. Based on its longstanding and deep familiarity with the postal and communications businesses and markets generally, and its knowledge of many firms, including competitors, mailers, and suppliers, the Postal Service does not believe that any commercial enterprise would voluntarily publish such information pertaining to the volumes, revenues, costs, and markets for its products that are subject to competition at such a disaggregated level. Rather, this information is exempt from mandatory disclosure pursuant to 39 U.S.C. § 410(c)(2) and 5 U.S.C. § 552(b)(3). The information includes commercially sensitive information regarding Inbound Letter Post packets (E-format), which are subject to considerable competition. Importantly, to our knowledge, there is no such publicly available information on Inbound Letter Post by shape, even at an aggregated level.

The Commission acknowledges, yet dismisses,¹⁷ the Postal Service's expressed concerns that competitors could unfairly use the disaggregated data to divert business to themselves, and that suppliers and counterparty postal operators could unfairly use

¹⁷ Order No. 5055 at 9-11.

the disaggregated data to negotiate more favorable rates and other terms for themselves. However, if the Postal Service does not have access to the same types of disaggregated data of those competitors, suppliers, and counterparty postal operators, then through forced disclosure of the Postal Service's data the Commission will have placed its hands on the scales in a market that it has already determined is competitive.

Competitors could use such information, disaggregated by shape and country group, to gain knowledge and insights about the relative strengths and weaknesses of the Postal Service's business. That refined understanding would, in turn, give competitors advantages in seeking to divert business from the Postal Service and to gain new business for which the Postal Service might compete, and in allocating resources in a more efficient manner. Competitors could assess the financial performance of products with a certain shape based on the information released. They could then target their advertising and sales efforts at actual or potential customers in market segments associated with certain-shaped products, thereby hindering the Postal Service's ability to keep this business.

Potential suppliers and counterparty postal operators could use such information to undermine the Postal Service's negotiations for new contracts. Unfairly arming them with disaggregated data, including previously nonpublic data on the Postal Service's costs, would provide them bargaining power to extract better rates and other terms. In a competitive market – like the one that the Commission classified in January for E-format inbound letter post products – negotiating counterparty postal operators do not ordinarily have access to their counterparts' costs. As with respect to competitors, such counterparty postal operators should be conducting their business on a level playing

field. The Commission's determination to unseal would not only unfairly tip that field against the Postal Service, but would also irrationally conflict with the Commission's own recognition this year that this is a competitive market.

Notably, in its January Order, the Commission considered, then rejected, the recommendation of UPS to require the Postal Service to report disaggregated data on inbound letter post in future ACR dockets. The Postal Service had filed comments explaining that, if transferred, the product should be subject to the same reporting requirements as other competitive products.¹⁸ In its Order, the Commission did not disagree with that position; instead, it concluded that, if the reporting requirements that are applicable to competitive products later seemed inadequate for UPS to be able to comment appropriately on the compliance of the competitive product with statutory standards, then UPS could file a request with the Commission seeking further information or a change in Commission rules.¹⁹ As explained above, UPS later reviewed the information in USPS-FY18-NP9 under protective conditions, but, far from seeking public disclosure of the disaggregated data, UPS itself then acknowledged that "certain 'country group' data may indirectly disclose data regarding the Postal Service's international partners," and indeed conceded that further aggregation (i.e., above the country-group level) may be warranted.²⁰ Now, however, the Commission has sua sponte proposed to take action that would jeopardize the Postal Service's competitive and bargaining positions, notwithstanding its own prior determination that the product is competitive.

¹⁸ See Order No. 4980 at 21.

¹⁹ Order No. 4980 at 21-22.

²⁰ Initial Comments of UPS on the ACR for FY 2018 (February 19, 2019) at 18.

B. The Presidential Memorandum and Impending UPU Withdrawal.

Besides the Commission's own decision this year to transfer small packets and bulky letters to the competitive product list, the commercially sensitive nature of the data at issue is highlighted and heightened further by certain national and international policies regarding Inbound Letter Post. Contrary to the Preliminary Determination's public interest analysis, these changed circumstances weigh against, not in favor, of public disclosure at this time. The Commission looks backwards at historical problems with cost coverage for a market dominant, inbound letter post product remunerated under the old UPU terminal dues structure, but, going forward, this structure will not govern the new competitively classified E-format letter post. The Administration has already decided, as a matter of policy, that the presently problematic terminal dues will be replaced. The Commission must, therefore, analyze the public interest holistically and in light of the reality of these changed circumstances. Notwithstanding whatever public interest in transparency concerning disaggregated data on inbound letter post may have existed in the past, at present the public interest should overwhelmingly support the Administration's policy initiatives in favor of market-driven, nondiscriminatory rates, untethered by unfair UPU distortions. Yet assigning antiquated weight to "transparency" in a rush to disclose disaggregated data such as Postal Service volumes and costs undermines the forward-looking public interest in negotiation of arms-length rates for the newly competitive product.

On August 23, 2018, the President issued a Memorandum that required the United States to seek reforms to the UPU that would effectively raise the rates by which

the Postal Service is remunerated for inbound letter post products.²¹ Following the UPU's subsequent Extraordinary Congress in September 2018, and pursuant to the Memorandum, the Secretary of State reported to the President that sufficient progress on those reforms had not been achieved. As a result, the United States, through the Secretary of State, gave notice to the UPU on October 17, 2018, that it would withdraw as a member country, effective one year later in accordance with the UPU Constitution's procedure.

The United States has continued to negotiate at the UPU to achieve reforms sufficient to satisfy the policies of the Presidential Memorandum. If those efforts achieve that goal, then the United States could decide to rescind its notice of withdrawal from the UPU before that withdrawal takes effect on October 17, 2019. The UPU has issued a ballot to all member countries to determine whether to hold another Extraordinary Congress on September 24-25, 2019, in order to negotiate collectively towards mutually acceptable reforms. If the UPU members decide not to hold that Extraordinary Congress, then the UPU intends to distribute reform proposals by paper ballot for a decision on proposed reforms by the end of the summer. Whether through an Extraordinary Congress or through paper ballots, the Postal Service will not know until late summer or early autumn whether the United States will remain a member country of the UPU.

Nevertheless, the Postal Service will continue its ongoing efforts to plan for the provision of international mail services to and from the United States, which will necessarily entail negotiations with foreign postal operators. The Commission should

²¹ Presidential Memorandum for the Secretary of State, Secretary of the Treasury, Secretary of Homeland Security, Postmaster General, and Chairman of the Postal Regulatory Commission, August 23, 2018.

support -- not undermine -- the Postal Service's efforts to maintain its competitive international services for American recipients and senders of international mail. The American public will benefit from ensuring that the Postal Service retains flexibility in negotiating and adapting to the new competitive landscape.

Public disclosure of the Postal Service's competitive data would work against that objective. Competitors do not have those data now, but surely would appreciate the ability to use them to contest the Postal Service's international business in the more competitive marketplace. Those data would help them determine the locations of the Postal Service's most lucrative and vulnerable markets to target. Likewise, counterparty postal operators and other third parties such as suppliers would gain an advantage from knowing the Postal Service's disaggregated competitive data while they sit at the negotiating tables with the Postal Service regarding the exchange of international mail (with those negotiations gaining particular salience if the United States is no longer in the UPU). Just as the Postal Service does not have visibility into the comparable competitive data of its competitors and negotiating counterparty postal operators, so, too, should the Commission not hand over the Postal Service's competitive data to them.

The Commission's determination to unseal the Postal Service's competitive disaggregated data therefore works **against** the policies of the Presidential Memorandum. First, the Memorandum is fundamentally intended to "promote and encourage unrestricted and undistorted competition in the provision of international postal services and other international delivery services."²² By contrast, the

²² Presidential Memorandum sec. 2(b)(ii).

Commission's determination to unseal would tilt the playing field of a competitive market and distort the data that would otherwise be available to all players in that competitive marketplace. Moreover, the Memorandum explicitly explains that "[i]t is in the interest of the United States to ... participate in multilateral and bilateral agreements with other countries to accomplish these objectives."²³ Unsealing the Postal Service's disaggregated competitive data would work directly against that United States interest, compromising the Postal Service's bargaining power in negotiating agreements.

Second, the Commission expressly relies²⁴ upon the Presidential Memorandum and the impending U.S. withdrawal from the UPU to demonstrate a public interest in transparency of the Postal Service's data. Yet the principal goal of the Presidential Memorandum and the U.S. pursuit of UPU reforms is not unwarranted transparency of the Postal Service's competitive data, but the elimination of artificially and excessively suppressed terminal dues rates for inbound letter post destined for the United States. Public release of the Postal Service's confidential competitive data about its inbound letter post would not promote that Administration goal; it would impede it. In seeking solutions to the problems of UPU terminal dues, the Postal Service needs fair flexibility to negotiate contracts with designated postal operators of foreign countries in accord with 39 U.S.C. § 407(d). The Postal Service's ability to negotiate appropriate rates for the remuneration of its inbound letter post would be severely compromised by exposing its cost and other data to all other postal operators in the world. The Postal Service does not have access to their parallel data, and they should not be handed unfair bargaining power with the Postal Service's competitive data. Further, public exposure

²³ *Id.* § 2(b)(iv).

²⁴ Order No. 5055 at 12-13.

of the Postal Service's disaggregated competitive data is unnecessary to promote any general interest in "transparency," when the process for setting the rates for this product going forward will already be inherently transparent. In other words, implementation of the policies of the Presidential Memorandum already will provide ample transparency regarding the E-format rates in the ways that are relevant for the future without unnecessarily compromising the Postal Service's competitive and negotiating positions. Moreover, in the future the Commission may still afford limited access under appropriate protective conditions under its rules²⁵ so that interested persons can investigate and comment on such matters, just as it has in the past, including in this docket earlier this year.²⁶ A Commission determination to unseal, though, would undermine the Postal Service competitively with no relevant countervailing transparency gain, while also undermining the principal purposes of the Presidential Memorandum itself.

III. THE COMMISSION'S DETERMINATION TO UNSEAL CONSTITUTES AN ARBITRARY DEPARTURE FROM YEARS OF ESTABLISHED COMMISSION PRACTICE WITHOUT ANY REASONED JUSTIFICATION FOR THE CHANGE.

The Commission's decision is not only commercially harmful and in conflict with good business practice; it also constitutes an arbitrary and capricious departure from past Commission practice without any reasoned justification.²⁷ As explained above, the

²⁵ 39 C.F.R. § 3007.300(b).

²⁶ See Order Granting Motions for Access, February 8, 2019 (granting access under strict protective conditions to protect commercially sensitive data) (Order No. 4998).

²⁷ See *CBS Corp. v. F.C.C.*, 785 F.3d 699, 708 (D.C. Cir. 2015) ("When an agency departs from past practice, it must provide a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored."); *Qwest Commc'ns Int'l Inc. v. F.C.C.*, 229 F.3d 1172, 1183–84 (D.C. Cir. 2000) (stating that the agency "must consider plausible alternatives and discount them" prior to releasing sensitive commercial information in a manner contrary to its own policy and precedent); *MCI WorldCom, Inc. v. Gen. Servs. Admin.*, 163 F. Supp. 2d 28, 37 (D.D.C. 2001) (holding that the agency

Commission's own preliminary determination acknowledges that, in the past, it has granted nonpublic treatment to inbound letter post revenue data disaggregated by foreign postal operator.²⁸ Yet the Commission's decision fails to recognize that it is breaking from the very past practice that it has identified, relying solely on the mistaken premise that the disclosure in this case is not specific to at least one foreign postal operator.

Worse still, the Commission's preliminary determination to unseal squarely conflicts with its own, and well-established judicial,²⁹ precedent to protect from public disclosure commercially sensitive data pertaining to competitive products and markets. The Postal Service has followed a long-standing practice of filing this type of information under seal with the Commission, and the Commission has recognized the commercially sensitive nature of international data similar to the data at issue here.³⁰ For example, in Docket No. IM2016- 1, FedEx requested public disclosure of inputs used to forecast the financial impact of changes in terminal dues, including volume and weight data by surface and air, and by target and transition system, and

"acted arbitrarily and capriciously" by failing to provide a reasoned explanation for departing from its established policy of not disclosing future year pricing information).

²⁸ Order No. 4409, at 7 (citing Order No. 4215 at 34).

²⁹ See, e.g., *McDonnell Douglas Corp. v. U.S. Dept. of the Air Force*, 375 F.3d 1182 (D.C. Cir. 2004) (holding that disclosure of costs could likely cause competitive harm and that those costs were exempt from disclosure under the Freedom of Information Act); *DNC Parks & Resorts at Yosemite, Inc. v. United States*, 127 Fed. Cl. 435 (2016) (granting 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).

³⁰ See, e.g., Order Granting Motion for Access to Non-public Materials Filed Under Seal, Order No. 3560, Docket No. RM2016-10 (Oct. 11, 2016) (recognizing commercially sensitive nature of certain international data of foreign postal operators); Order Granting, in Part, Request for Data and Explanations, Order No. 3427, Docket No. IM2016-1 (July 14, 2016) (recognizing commercially sensitive nature of certain data regarding Inbound and Outbound Letter Post); Order Granting Revised Second Motion for Access, Order No. 3044, Docket No. ACR2015 (Jan. 22, 2016) (recognizing commercially sensitive nature of certain foreign postal operator information).

disaggregated volume and weight data by country and transportation method.³¹ The Commission recognized the commercially sensitive nature of these data, and denied FedEx's request for public disclosure.³² Similarly, in Docket No. RM2016-10, the Commission considered a motion for access to certain disaggregated data of foreign postal operators organized by operator and by product. "[R]ecogniz[ing] that the Postal Service has a legitimate interest in protecting confidential commercial data," the Commission granted the motion for access "on the condition that the parties first file an executed agreement regarding inadvertent disclosure."³³

The Commission's recent determination to transfer inbound E-format letter post to the competitive product list places the product into a category for which the Commission itself has long afforded protection to avoid harming both the suppliers that compete in the market and the consumers who ultimately benefit from their competition. However, the Commission's preliminary determination to unseal does not even mention its own recent order conditionally approving the addition of the competitive Inbound Letter Post Small Packets and Bulky Letters product and associated inbound registered mail services to the competitive product list,³⁴ let alone try to reconcile it with the Commission's preliminary determination to unseal.

Public disclosure is, moreover, inconsistent with how the Commission treats disaggregated data filed under seal as part of the International Cost and Revenue Analysis (ICRA) that accompanies the Postal Service's Annual Compliance Report.³⁵

³¹ Order No. 3427 at 6-7.

³² *Id.*

³³ Order No. 3560 at 4-5.

³⁴ See Order No. 4980.

³⁵ See USPS-FY18-NP2 (ICRA Core Files); Notice of Postal Service's Filing of Annual Compliance Report and Request for Public Comments, Order No. 4960, Docket No. ACR2018, December 31, 2018, at 2

Additionally, prior to the FY 2017 ACR, the nonpublic data filed under seal in the ICRA included revenue data for Inbound Letter Post aggregated into only two UPU groups, known as Target System Countries and Transition System Countries.³⁶ Likewise, the Commission itself has filed those data in that manner under seal in nonpublic annexes in support of its Annual Compliance Determination Report.³⁷ In August 2017, the Commission approved the Postal Service’s proposal to “combin[e] the reporting of cost and revenue of Inbound Letter Post from Target System and Transition System countries in the ICRA.”³⁸ Nevertheless, the fact that the Commission treated as nonpublic the revenue data aggregated in those broader two UPU country groups – including with the ACR and ACD for FY 2016 – accentuates its arbitrary departure now with respect to revenue data (including for the same FY 2016), disaggregated into four narrower UPU country groups (rather than two), one of which is dominated by one country.

Moreover, the Commission’s departure is not only from its own recent practice, but represents a break from longstanding Commission treatment of similar commercially sensitive data. For example, two decades ago, Congress required the Commission’s predecessor, the Postal Rate Commission, to commence reporting annually on the Postal Service’s international costs, volumes, and revenues.³⁹ In 1999, UPS moved for

(identifying the filing of the ICRA as part of the ACR 2018 while acknowledging that, “[i]n line with past practice, some of the material in the FY 2018 ACR appears in non-public annexes”).

³⁶ See, e.g., USPS-FY16-NP2 (including ICRA Core Files, Reports (Unified).xls).

³⁷ See PRC-LR-ACR2016/NP2; see also Notice of Filing of Library References PRC-LR-ACR2016/1 Through PRC-LR-ACR2016/9 and PRC-LR-ACR2016/NP1 and PRC-LR-ACR2016/NP2, Docket No. ACR2016, March 28, 2017.

³⁸ Order on Analytical Principles Used in Periodic Reporting (Proposal Two), Order No. 4080, at 5, RM2017-6, August 29, 2017.

³⁹ That requirement appeared in former 39 U.S.C. § 3663, which was later superseded by reporting through the ACR process, 39 U.S.C § 3652.

access to the Postal Service's underlying information, but the Postal Rate Commission denied it access to disaggregated data.⁴⁰ Later that year, the Postal Rate Commission accepted certain of the Postal Service's proposed redactions of portions of the ICRA in response to a FOIA request for the information that UPS had sought unsuccessfully; tellingly, the Postal Rate Commission distinguished the commercial sensitivity of disaggregated data.⁴¹

To be clear, the Postal Service in that FOIA matter in 1999 did not object to the disclosure of inbound revenue data,⁴² though that is of little relevance now, given that the inbound letter post market has changed significantly in the past two decades with the rapid rise of ecommerce that has transformed letter post with merchandise into a growing competitive market. But even without accounting for those subsequent changes, notably the data at issue in 1999 did not cover data disaggregated by geographic or product markets, as the Postal Rate Commission explained:

The Postal Service's memorandum does not discuss the competitive situation with respect to any specific outbound or inbound international postal service in any specific geographic market. Accordingly, its assertions of commercial sensitivity would probably be too conclusory to sustain a [FOIA exemption] claim [S]pecific showings of likely commercial harm in specific product and geographic markets would likely be required. ... ***The "good business practice" standard of § 410(c)(2), however, appears to intend that the Postal Service be placed on an equal footing with private competitors with respect to its disclosure obligations***⁴³

Notwithstanding that established interpretation of the statutory standard, the Commission's present determination to unseal would place the Postal Service at a distinct disadvantage with respect to a specific product (inbound E-format letter post),

⁴⁰ See Postal Rate Commission's Order No. 1245, Docket No. IM99-1, May 21, 1999.

⁴¹ See Letter of Margaret P. Crenshaw, PRC Secretary, July 28, 1999, at 1-2.

⁴² *Id.* at 4.

⁴³ *Id.* at 3 (emphasis added).

rather than “on an equal footing with private competitors” in the product’s competitive market.

In the same decision, the Postal Rate Commission similarly analyzed certain proposed redactions related to outbound international mail. The Postal Service had contended that revenue and other data disaggregated by countries or by certain country groups were commercially sensitive, and that the identities and revenues of certain large customers could be inferred if the data were publicly disclosed.⁴⁴ Unlike the country-specific data for Canada and Mexico, the Postal Rate Commission would not generally shield from disclosure the revenue data for a European bilateral group and a group of all other UPU countries, concluding:

The latter two groups are so broad that it is difficult to ascertain the commercial harm that might result from disaggregating outbound volumes and revenue to that minimal degree. The [Postal Service’s] concerns ... that disclosing country-specific data might allow competitors to target the business of particular mailers would appear to be inapplicable to country groupings that are this broad. Accordingly, the copy of the report that the Commission is providing does not redact volume and revenue figures for the European Bilateral Group and for remaining UPU countries, ***except where redaction is needed to prevent country-specific data from being disclosed indirectly.***⁴⁵

The rationale from that 1999 decision is instructive, as the Commission’s predecessor distinguished between nonpublic treatment of country-specific revenue data (including country-specific data that would be revealed indirectly through the disclosure of group data) and public disclosure of data that are aggregated in broader geographic groups. Where, as in the present case, country-specific data can be inferred from the country groups at issue, those data warrant protection against public disclosure. The Commission’s preliminary determination, if affirmed, would not only

⁴⁴ *Id.* at 7.

⁴⁵ *Id.* at 8 (emphasis added).

cause unjustified commercial harm, but would also represent an arbitrary and unexplained departure from both recent and decades-old past Commission practice.

Conclusion

For the foregoing reasons, the Postal Service respectfully requests that the Commission reverse the preliminary determination of Order No. 5055, and continue to accord nonpublic treatment to PRC-LR-ACR2018-NP3.

In the alternative, if the Commission decides to sustain its Preliminary Determination and unseal PRC-LR-ACR2018-NP3 in whole or in part, the Postal Service respectfully requests that the Commission not implement its order immediately. Rather, the Commission should make any order to unseal effective only following some reasonable period of time after its issuance (e.g., 20 days). That would allow the Postal Service time to consider the parameters of any final order to unseal and their likely consequences and, if appropriate, seek a stay from the Commission of the final order pending appeal. To disallow a reasonable time period would risk irreparable harm to the Postal Service through immediate public disclosure that later could not be undone.

Respectfully submitted,

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