

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

Before Commissioners:

Robert G. Taub, Chairman;  
Nanci E. Langley, Vice Chairman;  
Mark Acton;  
Tony Hammond; and  
Michael Kubayanda

Annual Compliance Report, 2018

Docket No. ACR2018

ORDER ISSUING THE DETERMINATION TO  
UNSEAL LIBRARY REFERENCE PRC-LR-ACR2018-NP3



Washington, DC 20268-0001  
July 12, 2019

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Concurrence in Part, Dissent in Part of Commissioner Michael Kubayanda and Vice Chairman Nanci E. Langley

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I. INTRODUCTION

In accordance with 39 U.S.C. §§ 3652(f)(2) and 504(g)(3) and 39 C.F.R. § 3007.103(c), the Commission has determined the appropriate degree of confidentiality to accord to Library Reference PRC–LR–ACR2018–NP3. Library Reference PRC–LR–ACR2018–NP3 contains the Commission analysis of Inbound Letter Post<sup>1</sup> data, which

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<sup>1</sup> The term “Inbound Letter Post” refers to the product offered by the Postal Service. See Postal Regulatory Commission, Mail Classification Schedule (MCS) (posted March 31, 2019), § 1130, available at <http://www.prc.gov/mail-classification-schedule>. This Postal Service product is a subset of a broader category of mailpieces referred to as “UPU letter post.” See Universal Postal Convention, Article 17 (adopted by the 2016 Universal Postal Union Congress), available at [http://www.upu.int/uploads/tx\\_sbdownloader/actsActsOfThe26ThCongressIstanbul2016En.pdf](http://www.upu.int/uploads/tx_sbdownloader/actsActsOfThe26ThCongressIstanbul2016En.pdf) (UPU Convention). UPU letter post includes inbound and outbound items, single-piece and bulk items, and priority and non-priority items. UPU Convention, Article 17. Accordingly, the term “UPU letter post” refers to several Postal Service products, in addition to Inbound Letter Post.

were filed by the Postal Service under seal.<sup>2</sup> For the reasons discussed below, the Commission determines that it is not appropriate to accord non-public treatment to the data and analysis appearing in Library Reference PRC–LR–ACR2018–NP3 and that these materials should be unsealed.

## II. BACKGROUND

### A. The Universal Postal Union

The Universal Postal Union (UPU) is a United Nations specialized agency comprising 192 member countries, including the United States.<sup>3</sup> Member countries negotiate international agreements governing the exchange of international mail, including applicable rates for the delivery of international mail. The UPU identifies three types of international mail: Letter Post, Parcel Post, and Express Mail Service (EMS).<sup>4</sup>

The data at issue in this proceeding involve a subset of UPU letter post. UPU letter post consists of letters, postcards, printed papers, and small packets weighing up to 2 kilograms.<sup>5</sup> The UPU divides letter post into three shapes: small letters and cards (format P); large letters or “flats” (format G); and bulky letters and small packets (format E). *Id.* Article 17.5. In January 2018, the UPU Convention began differentiating UPU

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<sup>2</sup> See Library Reference PRC–LR–ACR2018–NP3, April 12, 2019; see Library Reference USPS–FY18–NP9, December 28, 2018, Excel file “IB LP Shape by UPU Group FY18.xlsx,” tab “Summary.”

<sup>3</sup> The UPU website, available at <http://www.upu.int/en/the-upu/the-upu.html>. The full list of UPU member countries is available at <http://www.upu.int/en/the-upu/member-countries.html>.

<sup>4</sup> UPU Convention, Article 1. EMS mail is an express service for documents and merchandise, which member countries have the option of providing. MCS § 2515.6.1. EMS prices are set through bilateral or multilateral negotiations. *Id.* §§ 2515.6.4., 2515.6.6.

<sup>5</sup> UPU Convention, Article 17.5. UPU letter post also consists of literature for the blind weighing up to 7 kilograms and M-bags weighing up to 30 kilograms. *Id.* Article 17.2.3. M-bags are special bags containing newspapers, periodicals, books, and similar matter mailed to a single addressee at a single address. *Id.* Article 17.2.4.

letter post by content in addition to shape.<sup>6</sup> The UPU Convention limits the contents of cards, letters, flats, and bulky letters to documents. UPU Convention, Article 17.2. Small packets are UPU letter post mailpieces containing goods. *Id.* Article 17.3.

Designated operators<sup>7</sup> compensate the Postal Service for the delivery of inbound UPU letter post inside the United States. The term “inbound” refers to mail received by a destination country’s designated operator for delivery in that country from the designated operator in the country in which the mail originated. The term “outbound” refers to mail originated in a given country and destined for delivery by a designated operator in another country. Terminal dues are the prices designated operators pay each other for the delivery of UPU letter post.<sup>8</sup> Designated operators are responsible for the processing and transportation of outbound mail to the destination country and set the prices for outbound UPU letter post in their countries. For example, when a mailer in the United Kingdom sends UPU letter post to the United States, that mailer pays the outbound postage rate determined by Royal Mail, the designated operator in the United Kingdom. Royal Mail then processes and transports the mailpiece to the United States. At that point, the Postal Service processes and delivers the mailpiece to its destination in the United States, receiving terminal dues as compensation from Royal Mail.

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<sup>6</sup> See International Mailing Services: Mailing Services Product and Price Changes, 82 Fed. Reg. 57,356, 57,357 (Dec. 5, 2017) (to be codified at 39 C.F.R. pt. 20); Docket No. R2018-1, Notice of Market Dominant Price Adjustment, October 6, 2017, at 10 (Docket No. R2018-1 Notice).

<sup>7</sup> Designated operators are “any governmental or non-governmental entity officially designated by the member country to operate postal services and to [fulfill] the related obligations arising out of the Acts of the [UPU] on its territory[.]” Universal Postal Convention Manual, Article 1.12 (2018), available at [http://www.upu.int/uploads/tx\\_sbdownloader/actInThreeVolumesManualOfConventionEn.pdf](http://www.upu.int/uploads/tx_sbdownloader/actInThreeVolumesManualOfConventionEn.pdf) (UPU Convention Manual). The Postal Service is the designated operator for the United States.

<sup>8</sup> Member countries negotiate the terminal dues. For example, Articles 28, 29, and 30 of the UPU Convention, which member countries adopted at the 2016 UPU Congress, provide terminal dues for Calendar Years 2018 through 2021. See UPU Convention, Articles 28-30.

For purposes of UPU letter post remuneration, the UPU classifies its members into four country groups, which are based on a postal development indicator developed by the UPU.<sup>9</sup> Group I consists of 41 countries and territories, including: the United States, Australia, Canada, France, Germany, Great Britain, Israel, Japan, and New Zealand. *Id.* Group II consists of 34 countries and territories, including: the Bahamas, Bahrain, the Czech Republic, Hungary, Saudi Arabia, Singapore, South Korea, and Trinidad and Tobago. *Id.* Group III consists of 39 countries and territories, including: Argentina, Brazil, China, Malaysia, Mexico, Russia, South Africa, and Turkey. *Id.* Group IV consists of 105 countries and territories, including: Albania, Afghanistan, Belize, Bolivia, India, Moldova, Morocco, Nigeria, and the Philippines. *Id.*

B. Prior Related Proceedings Before the Commission

1. The Inbound Letter Post Product

There is a well-documented history of concern about Inbound Letter Post's ongoing negative contribution, both in Commission orders and in stakeholder comments.<sup>10</sup> In each of its Annual Compliance Determination (ACD) reports for FY 2007 through FY 2018, the Commission reiterated its concern that the UPU pricing regime for the Inbound Letter Post product continues to result in non-compensatory

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<sup>9</sup> See Decisions of the UPU Istanbul Congress, Resolution C 7/2016, Classification of countries and territories for terminal dues and Quality of Service Fund (QSF) purposes for the 2018–2021 period, 2017, Annex 2, available at [http://www.upu.int/uploads/tx\\_sbdownloader/actsActsOfThe26ThCongressIstanbul2016En.pdf](http://www.upu.int/uploads/tx_sbdownloader/actsActsOfThe26ThCongressIstanbul2016En.pdf).

<sup>10</sup> Order No. 4836 at 15 n.30 (listing examples of stakeholder comments); Order No. 4706 at 18 n.35 (same).

terminal dues.<sup>11</sup> This trend of negative contribution existed well before the PAEA. The Commission also expressed this concern to the Secretary of State prior to UPU Congresses that determined terminal dues.<sup>12</sup> The Commission's predecessor agency, the Postal Rate Commission, identified a trend of net loss in contribution for Inbound Letter Post in its annual reports to Congress on international mail for FY 1998 to FY 2006.<sup>13</sup>

An analysis by Copenhagen Economics conducted at the request of the Commission found that non-compensatory terminal dues distort competition in the destination country.<sup>14</sup> Non-compensatory terminal dues can lead to “excessive use of packet delivery services at the expense of parcel delivery services” and lead to “distortions in mail and trade flows[.]” Copenhagen Economics Report at 10.

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<sup>11</sup> Docket No. ACR2018, Annual Compliance Determination, April 12, 2019, at 84-85 (FY 2018 ACD); Docket No. ACR2017, Annual Compliance Determination, March 29, 2018, at 68 (FY 2017 ACD); Docket No. ACR2016, Annual Compliance Determination, March 28, 2016, at 66 (FY 2016 ACD); Docket No. ACR2015, Annual Compliance Determination, March 28, 2016, at 70 (FY 2015 ACD); Docket No. ACR2014, Annual Compliance Determination, March 27, 2015, at 53 (FY 2014 ACD); Docket No. ACR2013, Annual Compliance Determination, March 27, 2014, at 59 (FY 2013 ACD); Docket No. ACR2012, Annual Compliance Determination, March 28, 2013, at 143 (FY 2012 ACD); Docket No. ACR2011, Annual Compliance Determination, March 28, 2012, at 143-44 (FY 2011 ACD); Docket No. ACR2010, Annual Compliance Determination, March 29, 2011, at 130-31 (FY 2010 ACD); Docket No. ACR2009, Annual Compliance Determination, March 29, 2010, at 108-09 (FY 2009 ACD); Docket No. ACR2008, Annual Compliance Determination, March 30, 2009, at 81 (FY 2008 ACD); Docket No. ACR2007, Annual Compliance Determination, March 27, 2008, at 115, 118 (FY 2007 ACD).

<sup>12</sup> Docket No. IM2016-1, Notice of Posting Views, October 7, 2016, Attachment B at 5, 17-18; Letter to Gerald C. Anderson, U.S. Department of State Deputy Assistant Secretary for Economic and Global Issues, from Dan G. Blair, Chairman of the Postal Regulatory Commission, June 30, 2008, at 1, available at [https://www.prc.gov/sites/default/files/reports/2008\\_Views.pdf](https://www.prc.gov/sites/default/files/reports/2008_Views.pdf).

<sup>13</sup> FY 2008 ACD at 82; FY 2007 ACD at 116. Pursuant the Postal Reorganization Act (see 39 U.S.C. § 3663 (2000)), the Postal Rate Commission issued eight annual reports to Congress covering FYs 1998 through 2005. See Docket Nos. IM99-1, IM2000-1, IM2001-1, IM2002-1, IM2003-1, IM2004-1, IM2005-1, and IM2006-1.

<sup>14</sup> See generally Copenhagen Economics, The Economics of Terminal Dues, September 30, 2014, available at [https://www.prc.gov/sites/default/files/reports/The%20Economics%20of%20Terminal%20Dues\\_final%20report%20300914.pdf](https://www.prc.gov/sites/default/files/reports/The%20Economics%20of%20Terminal%20Dues_final%20report%20300914.pdf) (Copenhagen Economics Report).

## 2. Docket No. R2018-1

On October 6, 2017, the Postal Service initiated Docket No. R2018-1, which, among other things, proposed to adjust to market dominant rates, including for Inbound Letter Post, effective January 21, 2018.<sup>15</sup> The Postal Service requested non-public treatment for Library Reference USPS–LR–R2018–1/NP1, which included country-specific Inbound Letter Post pricing, revenue, volume, and weight data, as well as non-published rate information.<sup>16</sup> The U.S. Chamber of Commerce (Chamber) requested that the Commission unseal the entirety of Library Reference USPS–LR–R2018–1/NP1.<sup>17</sup> The Postal Service objected to this request and filed a letter written by Canada Post Corporation (Canada Post) opposing unsealing.<sup>18</sup> In response to a Chairman’s Information Request (CHIR), the Postal Service publicly filed four of the eight Excel files that were initially redacted in Library Reference USPS–LR–R2018–1/NP1 without further objection.<sup>19</sup> Subsequently, the Chamber stated that it would not

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<sup>15</sup> Docket No. R2018-1 Notice; see Docket No. R2018-1, Order on Price Adjustments for First-Class Mail, USPS Marketing Mail, Periodicals, Package Services, and Special Services Products and Related Mail Classification Changes, November 9, 2017, at 1, 13 (Order No. 4215).

<sup>16</sup> Docket No. R2018-1, Notice of the United States Postal Service of Filing USPS-LR-R2018-1/NP1, October 6, 2017, Attachment 1 at 5. Non-published rates refer to negotiated service agreements (NSAs), which are not included within the Inbound Letter Post product.

<sup>17</sup> Docket No. R2018-1, U.S. Chamber of Commerce, Motion to Unseal Library Reference and Motion to Request Issuance of Information Request, October 16, 2017 (Docket No. R2018-1 Motion to Unseal).

<sup>18</sup> Docket No. R2018-1, United States Postal Service Answer in Opposition to U.S. Chamber of Commerce Motion to Unseal Library Reference and Motion to Request Issuance of Information Request, October 23, 2017; Docket No. R2018-1, United States Postal Service Notice of Filing Third Party Comments, October 26, 2017, Letter from Donald Campbell, Senior Counsel, Canada Post Corporation, to Anthony Alverno, Chief Counsel, Global Business & Service Development, United States Postal Service (October 23, 2017) (Docket No. R2018-1 Canada Post Letter). Canada Post stated that disclosure of its operator-specific information would have a “serious and significant impact” on its commercial interests. Docket No. R2018-1 Canada Post Letter at 2.

<sup>19</sup> Docket No. R2018-1, United States Postal Service Response to Chairman’s Information Request No. 6, October 27, 2017, question 1; Docket No. R2018-1, Notice of the United States Postal Service of Filing Public Library Reference, October 27, 2017; Docket No. R2018-1, Library Reference USPS–LR–R2018–1/8, October 27, 2017.

object if the only information unsealed was the data necessary to calculate Inbound Letter Post revenue by country group and shape.<sup>20</sup>

With respect to unsealing the remaining four Excel files, the Commission denied the Chamber's request for failure to satisfy the Commission rules concerning the contents of the motion. Order No. 4215 at 34-35. The Docket No. R2018-1 Motion to Unseal did not contain a detailed statement that specifically challenged the rationales appearing in the Postal Service's application for non-public treatment. *See generally* Docket No. R2018-1 Motion to Unseal. Although the Chamber's subsequent filing attempted to focus the scope of its initial request on revenue data aggregated at the UPU country group level and exclude NSA data, Library Reference USPS-LR-R2018-1/NP1 did not contain revenue data at that level of aggregation.<sup>21</sup> Ultimately, the Commission encouraged the Postal Service to make a public filing of Inbound Letter Post revenue aggregated by country group and shape in the Fiscal Year (FY) 2017 Annual Compliance Report (ACR), or explain why it cannot do so. Order No. 4215 at 36.

### 3. Docket No. ACR2017

The Postal Service's FY 2017 ACR did not contain Inbound Letter Post revenue data by country group or by shape.<sup>22</sup> After the issuance of two separate CHIRs, the Postal Service provided FY 2016 Inbound Letter Post revenue data by country group

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<sup>20</sup> Docket No. R2018-1, US Chamber of Commerce Motion for Leave to Comment on the Postal Service's Answer to Chairman's Information Request No. 6, November 1, 2017, at 2 n.2.

<sup>21</sup> *See id.* at 2 n.2; Order No. 4215 at 35. The Chamber did not seek access to the non-public material filed in Library Reference USPS-LR-R2018-1/NP1 and therefore, was unable to view the redacted data at issue when making its request. *See generally* Docket No. R2018-1; *see* Order No. 4215 at 30, 32.

<sup>22</sup> *See generally* Docket No. ACR2017; *see also* Docket No. ACR2017, Determination to Unseal the Postal Service's Response to Chairman's Information Request No. 15, March 28, 2019, at 8 (Order No. 4451).

and by shape under seal.<sup>23</sup> The Commission issued notice of its preliminary determination to unseal this material and provided an opportunity for any interested person to file a response.<sup>24</sup> After consideration of the responses, the Commission issued its final determination to unseal and ordered the Postal Service to file this material publicly. Order No. 4451. Subsequently, the Commission determined that it would not require the Postal Service to make this public filing and would instead initiate two separate proceedings: to revise its periodic reporting requirements and to initiate a public inquiry docket relating to the classification of the Inbound Letter Post product.<sup>25</sup>

#### 4. Periodic Reporting Requirements for the Inbound Letter Post Product

In recent ACD reports, the Commission repeatedly expressed concerns about the poor financial performance of the Inbound Letter Post product.<sup>26</sup> As a result and to attempt to better understand the issues underlying the concern, the Commission codified an additional reporting requirement specific to this product.<sup>27</sup> Pursuant to 39 C.F.R. § 3050.21(l), the Postal Service must provide Inbound Letter Post revenue, volume, attributable cost, and contribution data by UPU country group and by shape.<sup>28</sup>

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<sup>23</sup> Order No. 4451 at 8-9 (discussing the full procedural history related to the process for obtaining this information).

<sup>24</sup> Docket No. ACR2017, Notice of a Preliminary Determination to Unseal the Postal Service's Response to Chairman's Information Request No. 15, February 16, 2018 (Order No. 4409).

<sup>25</sup> Docket No. ACR2017, Order Denying Motion for Reconsideration of Order No. 4451 as Moot, July 12, 2018, at 22-27 (Order No. 4707).

<sup>26</sup> FY 2018 ACD at 84-85; FY 2017 ACD at 68; FY 2016 ACD at 66; FY 2015 ACD at 70; FY 2014 ACD at 53; FY 2013 ACD at 59; FY 2012 ACD at 143; FY 2011 ACD at 143-44; FY 2010 ACD at 130-31; FY 2009 ACD at 108-09; FY 2008 ACD at 81; FY 2007 ACD at 115, 118.

<sup>27</sup> Docket No. RM2018-2, Order Amending Rules for Periodic Reporting, September 25, 2018, at 29 (Order No. 4836). See Periodic Reporting Requirements, 83 Fed. Reg. 49,286, 49,293 (Oct. 1, 2018) (to be codified at 39 C.F.R. § 3050.21(l)). The Commission noted that it is not uncommon for it to seek additional information about products of particular concern. Order No. 4836 at 14.

<sup>28</sup> The Postal Service reports Inbound Letter Post data as format P/G items (letters and flats) and format E items (bulky letters and small packets). Both format P/G items and format E items weigh up to 4.4 pounds.

To enable trend analysis, these data must be provided for the fiscal year subject to review and each of the preceding four fiscal years.<sup>29</sup> In codifying this reporting requirement, the Commission explained that it would use these data to analyze trends below the product level to help the Commission more accurately identify issues with this product.<sup>30</sup>

## 5. Classification of Inbound International Mail

In 2006, the Postal Accountability and Enhancement Act (PAEA)<sup>31</sup> was enacted. Among other things, the PAEA separated postal products and services<sup>32</sup> into two distinct categories, market dominant products and competitive products.<sup>33</sup> Pursuant to 39 U.S.C. § 3642(b), market dominant products are those products over which “the Postal Service exercises sufficient market power that it can effectively set the price of such product[s] substantially above costs, raise prices significantly, decrease quality, or decrease output, without risk of losing a significant level of business to other firms offering similar products.”<sup>34</sup> Competitive products “consist of all other products.”<sup>35</sup>

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<sup>29</sup> 39 C.F.R. § 3050.21(l). The Commission granted the Postal Service’s request for a partial waiver of the requirement to report Inbound Letter Post revenue, volume, attributable cost, and contribution data by shape for fiscal years prior to FY 2017 based on the Postal Service’s representation that such data were unavailable. Order Granting Partial Waiver, December 21, 2018, at 1-2 (Order No. 4943).

<sup>30</sup> Docket No. RM2018-2, Notice of Proposed Rulemaking to Revise the Periodic Reporting Requirements, July 12, 2018, at 18 (Order No. 4706); Order No. 4836 at 16-17.

<sup>31</sup> Pub. L. 109-435, 120 Stat. 3198 (2006).

<sup>32</sup> 39 U.S.C. § 102(5) defines “postal service” as “the delivery of letters, printed matter, or mailable packages, including the acceptance, collection, sorting, transportation, or other functions ancillary thereto[.]” 39 U.S.C. § 102(6) defines a postal “product” as “a postal service with a distinct cost or market characteristic for which a rate or rates are, or may reasonably be, applied[.]”

<sup>33</sup> 39 U.S.C. §§ 3621, 3631, 3642. The PAEA exempted experimental products from the requirement that they be classified as market dominant or competitive products. 39 U.S.C. § 3641(a)(2).

<sup>34</sup> 39 U.S.C. § 3642(b)(1). Examples of market dominant products include products in the First-Class Mail, USPS Marketing Mail, and Periodicals classes.

<sup>35</sup> *Id.* Examples of competitive products include Priority Mail, Priority Mail Express, and First-Class Package Service.

Sections 3621 and 3631 listed the products preliminarily classified as market dominant and competitive, respectively. The PAEA preliminarily classified single-piece international mail as market dominant and bulk international mail as competitive. 39 U.S.C. §§ 3621(a)(10) and 3631(a)(4). When the Commission requested comments related to the classification of inbound international mail in its initial rulemaking pursuant to the requirements of PAEA, the Postal Service argued that the Commission should not classify inbound international mail as market dominant or competitive.<sup>36</sup>

The Commission found the Postal Service's arguments for exceptional treatment of inbound international mail as neither market dominant nor competitive to be unpersuasive and inconsistent with section 3642.<sup>37</sup> The Commission concluded, "[h]ad Congress intended to exempt inbound international mail from the requirement that all products be categorized as either market dominant or competitive, it would have done so explicitly, as it did by specifically exempting experimental products from the requirements of section 3642." Order No. 43 at 78 (footnote omitted). The Commission found that the PAEA unambiguously requires the Commission to classify inbound international mail as either market dominant or competitive. *Id.* at 79. The Commission then classified the various inbound international mail products as either market dominant or competitive.<sup>38</sup> Consistent with section 3621(a)(10), the Commission

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<sup>36</sup> Docket No. RM2007-1, Initial Comments of the United States Postal Service in Response to Order No. 26, September 24, 2007, at 13-22. The Postal Service advanced two principal arguments in support of its position. First, it argued that inbound products and services are not offered or priced by the Postal Service in the same manner as outbound products and services because prices for inbound mail are set by the UPU and beyond the Postal Service's control. *Id.* at 13-15. Second, it asserted that the PAEA "establishes a separate scheme for transparency and oversight of inbound international mail," which warranted not classifying inbound international mail as either market dominant or competitive. *Id.* at 16.

<sup>37</sup> Docket No. RM2007-1, Order Establishing Ratemaking Regulations for Market Dominant and Competitive Products, October 29, 2007, at 78 (Order No. 43).

<sup>38</sup> *Id.* For example, because EMS is an express service, the Commission found that, consistent with 39 U.S.C. § 3631(a)(3), inbound EMS is properly categorized as competitive. *Id.* at 82-83.

classified all inbound UPU letter post mail as market dominant and included such mail in the Inbound Letter Post product. *Id.* at 85.

After its initial categorization of international mail products as either market dominant or competitive, the Commission has since approved the transfer or partial transfer of some international mail products from the market dominant product list to the competitive product list.<sup>39</sup> On July 12, 2018, the Commission established Docket No. PI2018-1 to examine the classification of the Inbound Letter Post product and issued an information request related to the Postal Service's claims of competition.<sup>40</sup> On January 9, 2019, the Commission conditionally approved the Postal Service's request to transfer Inbound Letter Post small packets and bulky letters from the market dominant to the competitive product list.<sup>41</sup> Accordingly, the Commission closed the public inquiry docket.<sup>42</sup>

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<sup>39</sup> See Docket No. MC2012-44, Order Approving Request for Product List Transfer, September 10, 2012, at 9 (Order No. 1461) (approving the Postal Service's request to transfer outbound small packets from the Outbound Single-Piece First-Class Mail International product to the competitive product list as Outbound Single-Piece First-Class Package International Service); Docket No. MC2014-28, Order Approving Product List Transfer, August 19, 2014, at 8 (Order No. 2160) (approving the Postal Service's request to transfer Inbound Surface Parcel Post (at UPU rates) from the market dominant product list to the competitive product list).

<sup>40</sup> Docket No. PI2018-1, Notice and Order Initiating Public Inquiry on the Classification of the Inbound Letter Post Product, July 12, 2018, at 1, 7 (Order No. 4708); Docket No. PI2018-1, Commission Information Request No. 1, July 12, 2018; see Docket No. PI2018-1, Commission Information Request No. 2, September 13, 2018; see *also* Docket No. PI2018-1, Chairman's Information Request No. 1, November 2, 2018.

<sup>41</sup> See *generally* Docket No. MC2019-17, United States Postal Service Request to Transfer Inbound Letter Post Small Packets and Bulky Letters, and Inbound Registered Service Associated with Such Items, to the Competitive Product List, November 16, 2018; Docket No. MC2019-17, Order Conditionally Approving Transfer, January 9, 2019 (Order No. 4980).

<sup>42</sup> Docket No. PI2018-1, Order Closing Docket, March 5, 2019, at 5 (Order No. 5005).

### III. PROCEDURAL HISTORY

#### A. Initiation of this Proceeding and Relevant Public Participation

On December 28, 2018, the Postal Service filed its FY 2018 ACR, covering the period from October 1, 2017, through September 30, 2018.<sup>43</sup> Concurrently, the Postal Service filed 30 library references under seal and applied for non-public treatment of those materials, which contain more than 650 individual files. See FY 2018 ACR, Attachment 2 at 1 (Application). The Postal Service provided the data required by 39 C.F.R. § 3050.21(l) in a non-public file appearing in Library Reference USPS–FY18–NP9.

On December 31, 2018, the Commission issued an order establishing Docket No. ACR2018 to consider the ACR, appointing a Public Representative to represent the interests of the general public, and establishing January 31, 2019, and February 11, 2019, as the deadlines for comments and reply comments, respectively.<sup>44</sup>

On February 8, 2019, the Commission granted requests filed by United Parcel Service, Inc. (UPS) and the Association for Postal Commerce (PostCom) to access multiple non-public library references filed with the FY 2018 ACR, including Library Reference USPS–FY18–NP9.<sup>45</sup> Access to Library Reference USPS–FY18–NP9, subject to protective conditions, was provided to individuals representing UPS and

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<sup>43</sup> United States Postal Service Fiscal Year 2018 Annual Compliance Report, December 28, 2018, at 12 (FY 2018 ACR).

<sup>44</sup> Notice of Postal Service's Filing of Annual Compliance Report and Request for Public Comments, December 31, 2018 (Order No. 4960); see 84 Fed. Reg. 826 (Jan. 31, 2019). On January 29, 2019, due to the lapse of appropriations resulting in suspension of Commission operations, the Commission extended the deadline for filing comments to February 14, 2019, and the deadline for filing reply comments to February 25, 2019. Order Extending Comment Deadlines, January 29, 2019 (Order No. 4988).

<sup>45</sup> Order Granting Motions for Access, February 8, 2019 (Order No. 4998). The Commission had previously granted UPS and PostCom access to other non-public library references, to which the Postal Service did not object. Order No. 4998 at 2-4. The Commission also extended the deadline for UPS and PostCom to file initial comments to February 19, 2019, and extended the time for reply comments responding to issues raised in those comments to March 1, 2019. *Id.* at 28.

PostCom in this proceeding, over the objection of the Postal Service.<sup>46</sup> In response to the FY 2018 ACR, the Commission received multiple sets of public comments and reply comments on a variety of issues—including comments from UPS, PostCom, and the Postal Service's reply comments to UPS and PostCom.<sup>47</sup>

B. The Commission's Analysis and Preliminary Determination of Non-Public Treatment

In conjunction with the issuance of the FY 2018 ACD, the Commission analyzed Inbound Letter Post data provided by the Postal Service. The Commission's analysis highlighted key trends underlying this product's continued negative contribution and discussed the impact that shape-based pricing has on cost and contribution. The Commission's library reference also provided the underlying data—Inbound Letter Post revenue, volume, attributable cost, and contribution data by UPU country group for FY 2014 through FY 2018, and further separated by shape for FY 2017 and FY 2018. Because the Postal Service submitted those underlying data under seal and requested that those data be accorded non-public treatment, the Commission filed both its analysis and the underlying data under seal in Library Reference PRC–LR–ACR2018–NP3 on April 12, 2019. See Library Reference PRC–LR–ACR2018–NP3.

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<sup>46</sup> *Id.* at 28-29. PostCom attached a Statement of Compliance with Protective Conditions along with certifications signed by each of the individuals requesting access (outside counsel and PostCom's president), acknowledging their agreement to comply with the protective conditions. Motion of Association for Postal Commerce for Access to Nonpublic Materials, January 10, 2019, at 2. Additionally, UPS attached a Statement of Compliance with Protective Conditions along with certifications signed by each of the individuals requesting access (outside counsel and consultants), acknowledging their agreement to comply with the protective conditions. United Parcel Service, Inc.'s Motion Requesting Access to Non-Public Materials Under Protective Conditions, January 9, 2019, at 2; United Parcel Service, Inc.'s Motion to Supplement its January 9, 2019 Motion Requesting Access to Non-Public Materials Under Protective Conditions, January 31, 2019, at 2 (correcting certain procedural deficiencies and requesting access for one additional outside counsel).

<sup>47</sup> Initial Comments of United Parcel Service, Inc. on United States Postal Service's Annual Compliance Report for Fiscal Year 2018, February 19, 2019 (UPS Comments); Comments of the Association for Postal Commerce, February 19, 2019; Postal Service Reply to UPS and PostCom Comments, March 1, 2019 (Postal Service Reply Comments).

Concurrently, the Commission issued notice of its preliminary determination that it would not be appropriate to accord non-public treatment to Library Reference PRC–LR–ACR2018–NP3 and that these materials should be unsealed.<sup>48</sup> Consistent with 39 C.F.R. § 3007.103(c), the Commission provided that any interested person could file a response to Order No. 5055 by April 19, 2019. *Id.* at 14.

### C. Responses and Replies to Order No. 5055

The Taxpayers Protection Alliance (TPA), the International Housewares Association (IHA), UPS, the Chamber, the National Association of Manufacturers (NAM), and the American Consumer Institute (ACI) filed timely responses to Order No. 5055.<sup>49</sup> On April 19, 2019, the Postal Service filed a motion requesting an extension of three business days to file its response to Order No. 5055.<sup>50</sup> On April 22, 2019, the Commission granted the Postal Service’s Motion and extended the deadline by which interested persons could file a response to Order No. 5055.<sup>51</sup> Additionally, because several participants filed their responses to Order No. 5055 on or before April 19, 2019, the Commission allowed replies to the responses to Order No. 5055 to be filed by April 29, 2019, in the interest of fairness to all participants. Order No. 5063 at 2. Accordingly, the Postal Service and the Lexington Institute (LI) filed their responses to

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<sup>48</sup> Notice of a Preliminary Determination to Unseal Library Reference PRC–LR–ACR2018–NP3, April 12, 2019, at 14 (Order No. 5055).

<sup>49</sup> Comments of Taxpayers Protection Alliance, April 18, 2019 (TPA Response); Comments of the International Housewares Association, April 18, 2019 (IHA Response); Comments of United Parcel Service, Inc. in Response to Notice of Preliminary Determination to Unseal Library Reference PRC-LR-ACR2018-NP3, April 19, 2019 (UPS Response); Comments of U.S. Chamber of Commerce, April 19, 2019 (Chamber Response); Comments of National Association of Manufacturers to Docket No. ACR2018, Order No. 5055, April 19, 2019 (NAM Response); Comments of American Consumer Institute Center for Citizen Research Regarding Docket No. ACR2018 and in Response to Order No. 5055, April 19, 2019 (ACI Response).

<sup>50</sup> United States Postal Service Motion for Extension of Time to File Response to Order No. 5055, April 19, 2019 (Motion).

<sup>51</sup> Order Extending Response Deadline and Setting Reply Period, April 22, 2019, at 2 (Order No. 5063).

Order No. 5055 on April 24, 2019.<sup>52</sup> UPS and TPA filed replies to the Postal Service Response.<sup>53</sup>

#### IV. THE NON-PUBLIC MATERIALS

The non-public file provided by the Postal Service contains Inbound Letter Post revenue, volume, cost, and contribution data by UPU country group for FY 2014 through FY 2018, and further separated by shape for FY 2017 and FY 2018.<sup>54</sup> Although 39 C.F.R. § 3050.21(l) requires attributable cost data, this non-public file contains only volume-variable cost data. The remainder of the data necessary to calculate attributable cost data for Inbound Letter Post (product-specific cost data) are included in public Cost and Revenue Analysis reports for FY 2014 through FY 2018.<sup>55</sup> Additionally, the Postal Service's non-public file includes revenue, volume, cost, and contribution data for international mail products other than the Inbound Letter Post product.<sup>56</sup> These

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<sup>52</sup> Response of the United States Postal Service to Order No. 5055, April 24, 2019 (Postal Service Response); Comments of Lexington Institute, April 24, 2019 (LI Response).

<sup>53</sup> Reply Comments of United Parcel Service, Inc. to Response of the United States Postal Service to Order No. 5055, April 29, 2019 (UPS Reply); Amendments to Initial Comments of Taxpayers Protection Alliance, April 29, 2019 (TPA Reply).

<sup>54</sup> See Library Reference USPS–FY18–NP9, December 28, 2018, Excel file “IB LP Shape by UPU Group FY18.xlsx,” tab “Summary.”

<sup>55</sup> See Docket No. ACR2014, Library Reference USPS–FY14–1, December 29, 2014, Excel file “Public\_FY14CRA.xls,” tab “Cost1,” cell J21; Docket No. ACR2015, Library Reference USPS–FY15–1, December 29, 2015, Excel file “Public-FY15CRA.xls,” tab “Cost1,” cell J21; Docket No. ACR2016, Library Reference USPS–FY16–1, December 29, 2016, Excel file “Public\_FY16CRARReport.xls,” tab “Cost1,” cell J21; Docket No. ACR2017, Library Reference USPS–FY17–1, December 29, 2017, Excel file “Public\_FY17CRARReport.xlsx,” tab “Cost1,” cells F21, H21; Library Reference USPS–FY18–1, December 28, 2018 (revised February 11, 2019), Excel file “Public\_FY18CRA\_Expanded\_RevFeb11.xlsm,” cell J20; see Notice of the United States Postal Service of Revisions to Multiple Annual Compliance Report Folders -- ERRATA, February 11, 2019 (Errata).

<sup>56</sup> When conducting its annual compliance review, “[t]he Commission has consistently evaluated compliance at the product level because products, by definition, reflect distinct cost or market characteristics to which a rate or rates are applied.” FY 2017 ACD at 68 (citing 39 U.S.C. § 102(6)).

extraneous data pertain to products such as Inbound International Registered Mail,<sup>57</sup> inbound M-bags,<sup>58</sup> bilateral NSAs,<sup>59</sup> and certain multilateral NSAs.<sup>60</sup>

To focus the Commission's evaluation on the data required by 39 C.F.R. § 3050.21(I), the Commission excluded the data relating to international mail products other than the Inbound Letter Post product and added the product-specific costs to the volume-variable costs to calculate the attributable costs for Inbound Letter Post.<sup>61</sup> The Commission analyzes the aggregated Inbound Letter Post data and highlights key trends underlying this product's continued negative contribution.<sup>62</sup>

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<sup>57</sup> MCS § 1510.2. Inbound International Registered Mail is a component of the International Ancillary Services product. *Id.* § 1510. Designated operators pay the Postal Service a supplemental remuneration in addition to terminal dues for this service. UPU Convention Manual, Article 28.8.

<sup>58</sup> MCS § 2330. Inbound M-bags are a component of UPU letter post and designated operators pay terminal dues to the Postal Service for the processing and delivery of inbound M-bags. UPU Convention Manual, Article 28.7. However, M-bags are distinct from the Inbound Letter Post product. See MCS § 1130. The Postal Service revised the data it provided in Library Reference USPS–FY18–NP9 to exclude M-bag data. Responses of the United States Postal Service to Questions 1-20 of Chairman's Information Request No. 3, January 28, 2019, question 13; see Library Reference USPS–FY18–NP34, January 28, 2019, Excel file "ChIR.3.Q.13 IB LP Shape.Group.FY18.xlsx," tab "Summary."

<sup>59</sup> MCS § 1602.3. Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators 1 includes NSAs with designated operators for the processing and delivery of inbound UPU letter post items from designated operators at negotiated rates. *Id.* § 1602.3.1.

<sup>60</sup> *Id.* §§ 1602.4, 1602.5, 1602.6.

<sup>61</sup> Although attributable costs also include inframarginal costs calculated as part of a product's incremental costs, the data necessary to estimate inframarginal costs for individual international mail products continue to be unavailable. Accordingly, the best available estimate for the attributable costs of the Inbound Letter Post product is the sum of the volume-variable costs and product-specific costs for the product. See Library Reference USPS–FY18–43, December 28, 2018 (revised February 11, 2019), file "USPS-FY18-43 Preface.Rev.2.11.19.pdf," at 2; see Errata.

<sup>62</sup> See Library Reference PRC–LR–ACR2018–NP3, file "PRC-LR-ACR2018-NP3 Analysis.pdf."

## V. SUMMARY OF ARGUMENTS

### A. The Postal Service

#### 1. Application for Non-Public Treatment

The Postal Service states that if detailed data related to international mail products are disclosed, two general commercial harms would be likely to result for both the Postal Service and a foreign postal operator: harm to competitive and negotiation interests. Application at 14-15. The Postal Service asserts that a competitor could formulate an analysis of the sealed information that would inform the competitor's decision-making, to the detriment of the Postal Service or its business partners. See *id.* at 15, 17, 19-20, 23-24, 26-30. Additionally, the Postal Service asserts that business partners or suppliers could formulate an analysis of the sealed information that would inform their decision-making when negotiating rates, to the detriment of the Postal Service or its business partners. See *id.* at 17, 21-22, 25, 29. The Postal Service separately alleges that disclosure of Inbound Letter Post revenue data aggregated by UPU country group and by shape would result in commercial harm to the Postal Service or at least one foreign postal operator. *Id.* at 27-30.

#### 2. Response Opposing the Unsealing of Library Reference PRC–LR–ACR2018–NP3

Characterizing Library Reference PRC–LR–ACR2018–NP3 as containing “detailed information,” the Postal Service asserts that unsealing could result in significant commercial harm to the Postal Service. Postal Service Response at 3.

The Postal Service argues that the “fundamental problem” is that the Inbound Letter Post data, although aggregated by country group, reveal country-specific data because revenue from a certain designated operator “overwhelmingly dominates its UPU country group.” *Id.* at 5. According to the Postal Service, even casual observers would be able to use the revenue data appearing in Library Reference PRC–LR–ACR2018–NP3 “to gauge market size and market shares [for that specific country]

within a small range of error.” *Id.* at 6. It posits that “although competitors do not know the specific percentages individual countries represent within their country groups,” they would assume that, at least in one instance, one country represents an overwhelming proportion of its group’s data. *Id.* at 8. It contends that unsealing Library Reference PRC–LR–ACR2018–NP3 would therefore risk commercial harm by disclosing “data both by shape and, in at least one instance, by country.” *Id.* at 7. Stating that volume, revenue, and cost data have not been disclosed “in disaggregated subsets” previously, the Postal Service asserts that “[t]he Commission should not break from its past practice.” *Id.*

The Postal Service argues that two recent events heighten the commercial sensitivity of the data now compared to when the Commission issued Order No. 4451: (1) the August 2018 presidential memorandum<sup>63</sup> and subsequent efforts to self-declare rates for inbound small packets and bulky letters and (2) the conditional transfer of Inbound Letter Post small packets and bulky letters from the market dominant to the competitive product list. *Id.* at 8-18.

The Postal Service states that the principal goal of the Presidential Memorandum is to reform the current terminal dues system rather than “unwarranted transparency of the Postal Service’s competitive data.” *Id.* at 17. It argues that unsealing the data would impede the Administration’s policy of “promot[ing] and encourag[ing] unrestricted and undistorted competition” by increasing the data that would be available regarding the Postal Service. *Id.* at 16-17 (citing Presidential Memorandum § 2(b)(ii)).

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<sup>63</sup> 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, available at <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-secretary-state-secretary-treasury-secretary-homeland-security-postmaster-general-chairman-postal-regulatory-commission/> (Presidential Memorandum).

The Postal Service argues that unsealing Library Reference PRC–LR–ACR2018–NP3 would be inconsistent with the Commission’s conditional approval of the transfer of Inbound Letter Post small packets and bulky letters from the market dominant to the competitive product list. Postal Service Response at 9. The Postal Service states it “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 the level of disaggregation appearing in Library Reference PRC–LR–ACR2018–NP3. *Id.* at 11. It asserts that such information is exempt from mandatory disclosure pursuant to 39 U.S.C. § 410(c)(2) and 5 U.S.C. § 552(b)(3). *Id.*

The Postal Service argues that the mere existence of levels of disaggregation below the data appearing in Library Reference PRC–LR–ACR2018–NP3 does not allow the Commission to conclude that disclosure could not result in commercial harm. See *id.* at 7-8. It argues that actors in the marketplace routinely base their decisions on assumptions, which are based on their experience and knowledge. *Id.* at 8. It states that UPS acknowledged ““certain country group data may indirectly disclose data regarding the Postal Service’s international partners.””<sup>64</sup>

The Postal Service states that disclosure could “negatively affect[] the Postal Service’s ability to compete in the inbound shipping services market.” Postal Service Response at 3. It states that the Commission has recognized that “the Postal Service operates in a competitive market for inbound international shipping, which includes inbound small packets containing merchandise.” *Id.* It adds that it competes with private-sector international operators for inbound packages, including Inbound Letter Post small packets. *Id.* at 4. It states that operators of Extra-Territorial Offices of

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<sup>64</sup> *Id.* at 7 (citing UPS Comments at 18) (internal marks omitted); see Postal Service Reply Comments at 5.

Exchange (ETOE)s<sup>65</sup> compete in the same markets as designated operators for letter post mail. Postal Service Response at 3-4. It asserts that competitors could use the data appearing in Library Reference PRC–LR–ACR2018–NP3 to direct their sales efforts worldwide, which would result in competitive harm to the Postal Service. *Id.* at 4. It asserts that competitors could use the data to “gain knowledge and insights about the relative strengths and weaknesses of the Postal Service’s business,” which could be used to divert business from the Postal Service. *Id.* at 12; *see id.* at 4-6.

Furthermore, the Postal Service argues that suppliers and designated operators could use the data at issue to the Postal Service’s detriment when negotiating contracts. *Id.* at 12. It adds that cost and contribution data must be shielded from counterparty designated operators because cost and contribution data would give them access to new information that could be utilized during rate negotiations with the Postal Service.<sup>66</sup> It states that designated operators do not ordinarily have access to counterparty designated operators’ costs. Postal Service Response at 12. Although it is unknown whether the United States will remain a member country of the UPU, the Postal Service is continuing its ongoing efforts to plan for the provision of international mail services, which include negotiations with foreign postal operators. *Id.* at 15. The Postal Service asserts that disclosure of the data at issue would limit the Postal Service’s flexibility in negotiating such agreements. *Id.* at 16.

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<sup>65</sup> An ETOE is an office or facility administered by or in connection with a foreign postal operator outside its national territory on the territory of another country. ETOEs perform a wide range of postal functions that include consolidating, documenting, and transporting international mail. United States Postal Service Office of Inspector General, Extraterritorial Offices of Exchange (Audit Report Number MS-WP-17-001), March 31, 2017, at 1, available at <https://www.uspsaig.gov/sites/default/files/document-library-files/2017/MS-WP-17-001.pdf>. U.S. policy provides that if mailpieces originating “from an ETOE in a foreign country . . . are to be delivered by the U.S. Postal Service to addresses in the United States, they must be mailed as domestic U.S. mail charged at domestic U.S. postage rates.” U.S. Department of State, U.S. Policy Toward Extraterritorial Offices of Exchange (ETOE)s, July 14, 2015, available at <https://2009-2017.state.gov/p/io/ipp/65178.htm>.

<sup>66</sup> *Id.* at 5. The Postal Service characterizes the data at issue in Docket No. ACR2017 as volume and revenue data. *Id.* at 4-5. However, only revenue data by country group and by shape for FY 2016 were at issue in Docket No. ACR2017; volume data were not at issue. Order No. 4451 at 6.

The Postal Service observes that going forward, the current terminal dues system, which the Commission analyzes in Library Reference PRC–LR–ACR2018–NP3, will not govern Inbound Letter Post small packets or bulky letters because the Administration has already decided to replace the current terminal dues system. *Id.* at 14. This, according to the Postal Service, reduces the current level of public interest in transparency. *See id.* Additionally, the Postal Service contends that the process for setting rates for Inbound Letter Post small packets and bulky letters will be sufficiently transparent and would allow interested persons to request access to information filed under seal, subject to protective conditions. *Id.* at 18.

Finally, the Postal Service argues that the Commission’s determination to unseal Library Reference PRC–LR–ACR2018–NP3 constitutes an arbitrary and capricious departure from judicial precedent and past Commission practice. *Id.* at 18-24.

## B. Other Participants

TPA, IHA, UPS, the Chamber, NAM, ACI, and LI support unsealing the aggregated historical Inbound Letter Post data, asserting that there is substantial public interest in maintaining financial transparency.<sup>67</sup> Multiple participants state that there is a need for enhanced transparency surrounding the Inbound Letter Post product.<sup>68</sup> For example, TPA and ACI observe that greater transparency of the Inbound Letter Post product is particularly important given the product’s history of poor financial performance.<sup>69</sup> UPS and TPA note that the lack of transparency has hindered ongoing analysis of the Inbound Letter Post product. UPS Response at 1; TPA Response at 1.

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<sup>67</sup> TPA Response at 1; IHA Response at 1; UPS Response at 1; Chamber Response at 1; NAM Response at 2; ACI Response at 2; LI Response at 1.

<sup>68</sup> TPA Response at 1; IHA Response at 1; UPS Response at 1-2; Chamber Response at 1; NAM Response at 2; ACI Response at 1.

<sup>69</sup> TPA Response at 1; ACI Response at 1-2; TPA Reply at 1.

Further, LI asserts that “[k]eeping basic information hidden about a postal service that will soon be overhauled serves no public purpose.” LI Response at 1.

Furthermore, IHA, UPS, the Chamber, NAM, and LI state that greater transparency would help shed light on issues with the current terminal dues system and help stakeholders understand what is at stake as the Postal Service and the U.S. Government attempt to address the problems discussed in the Presidential Memorandum.<sup>70</sup> For example, LI asserts that “[h]aving basic financial information about international mail in the public domain will be a helpful step” towards addressing the losses that the Postal Service has incurred through this product. LI Response at 1. Similarly, NAM asserts that disclosure “will permit more effective oversight over the [Postal Service],” which “will help demystify the extent to which these subsidies encourage importation of counterfeit products.” NAM Response at 2.

IHA, UPS, the Chamber, and NAM contend that unsealing the data will not result in the commercial harm identified by the Postal Service.<sup>71</sup> IHA and the Chamber assert that unsealing the highly aggregated data appearing in Library Reference PRC–LR–ACR2018–NP3 would be unlikely to result in commercial harm to the Postal Service. IHA Response at 1; Chamber Response at 1. UPS agrees and asserts that aggregation, which is commonly used to protect commercially sensitive information, would not reveal any operator-specific information. UPS Response at 2. Additionally, NAM observes that “a private-sector delivery company could only out-compete the [Postal Service] on [Inbound Letter Post items] by losing money themselves—a situation that investors would not tolerate.” NAM Response at 2.

In its reply, UPS states that its suggestion that country group data “could be potentially aggregated to the extent there is a legitimate confidentiality concern and then disclosed” was meant to encourage flexibility and transparency. UPS Reply at 1-2

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<sup>70</sup> IHA Response at 1; UPS Response at 1-2; Chamber Response at 1; NAM Response at 2; LI Response at 1.

<sup>71</sup> IHA Response at 1; UPS Response at 2; Chamber Response at 1; NAM Response at 2.

(internal marks omitted). With respect to the conditional approval of the transfer of Inbound Letter Post small packets and bulky letters from the market dominant to competitive product list, UPS notes that the Postal Service discloses significant competitive product data and that there is no rationale for treating international data differently. *Id.* at 2. UPS observes that the transfer has not taken effect and asserts that the degree of transparency for Inbound Letter Post small packets and bulky letters should reflect their current classification as market dominant. *Id.* UPS asserts that the Presidential Memorandum indicates that the Administration would favor transparency for Inbound Letter Post small packets and bulky letters as disclosure would “accelerate corrective action” towards ensuring that rates charged for such mailpieces do not favor foreign mailers over domestic mailers or designated operators over non-designated operators. *Id.* at 3 (citing Presidential Memorandum § 2(d)). UPS disagrees with the Postal Service’s claim that competition posed by ETOEs requires that the data remain sealed and argues that the activities of ETOEs heighten the need for additional transparency. UPS Reply at 3.

## VI. COMMISSION ANALYSIS

The question before the Commission is whether the Postal Service has fulfilled its burden of persuasion that the aggregated historical data filed by the Postal Service pertaining to the Inbound Letter Post product should be withheld from public disclosure. See 39 C.F.R. § 3007.201(a). For the reasons discussed below, the Commission concludes that the Postal Service has not met its burden and that the public interest in maintaining the financial transparency of the Postal Service, a government establishment operating in commercial markets, outweighs the nature and extent of any likely commercial harm that may result from disclosing the aggregated historical data.

### A. Legal Standard

The PAEA sets forth both a mechanism for the Postal Service to seek non-public treatment of information that it provides to the Commission and the legal standard for

the Commission to evaluate the degree of appropriate confidentiality to be accorded to such information. As a threshold matter, for the Postal Service to seek non-public treatment, the information must be of the type and nature eligible for non-public treatment. Section 3652(f)(1) of title 39 of the United States Code enumerates certain types of information submitted in connection with the ACR for which the Postal Service may seek non-public treatment. This provision includes specific cross-references recognizing that the Postal Service may seek non-public treatment of “information which is described in section 410(c) [of title 39], or exempt from public disclosure under section 552(b) of title 5 [the Freedom of Information Act (FOIA)].”<sup>72</sup>

The Postal Service asserted 2 statutory provisions for withholding the information appearing in its 30 non-public library references. Application at 2. First, 39 U.S.C. § 410(c)(2) provides that the Postal Service shall not be required to disclose “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.”<sup>73</sup> Second, the FOIA exempts from public disclosure “trade secrets and commercial or financial information obtained from a person and privileged or confidential.”<sup>74</sup>

The PAEA establishes the Commission’s specific authority as it relates to evaluating the information that the Postal Service claims to be non-public. Information filed in this proceeding and claimed by the Postal Service to be non-public shall be

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<sup>72</sup> 39 U.S.C. § 3652(f)(1); see 39 C.F.R. § 3007.101(a).

<sup>73</sup> 39 U.S.C. § 410(c)(2). The Postal Service also cites 5 U.S.C. § 552(b)(3), which exempts from public disclosure information that is specifically exempted by another statutory provision, such as 39 U.S.C. § 410(c)(2). Application at 2. The Postal Service does not specify any basis for non-disclosure under 5 U.S.C. § 552(b)(3) that would be independent of its arguments under 39 U.S.C. § 410(c)(2). See *id.*

<sup>74</sup> 5 U.S.C. § 552(b)(4). The breadth of the nature and type of information that would be exempt from disclosure under 5 U.S.C. § 552(b)(3) and 39 U.S.C. § 410(c)(2) are broader than the nature and type of information that would be exempt from disclosure under 5 U.S.C. § 552(b)(4). The Postal Service does not specify any basis for non-disclosure under 5 U.S.C. § 552(b)(4) that would be independent of its arguments under 39 U.S.C. § 410(c)(2). See *generally* Application.

treated subject to the procedures of 39 U.S.C. § 504(g)(2) and (3). 39 U.S.C. § 3652(f)(2). The Commission is not prohibited from publicly disclosing such information as long as two conditions are met. *Id.* § 504(g)(3)(A). First, the Commission must have engaged in a rulemaking to “establish a procedure for according appropriate confidentiality to information identified by the Postal Service [as non-public].”<sup>75</sup> Second, in determining the appropriate degree of confidentiality to be given to information alleged by the Postal Service to be non-public, the Commission must “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); see 39 C.F.R. § 3007.104(a).

Whenever non-public materials are provided to the Commission, an application for non-public treatment must also be provided. 39 C.F.R. § 3007.200(a). In addition to demonstrating that the materials designated as non-public contain information of a type and nature eligible for non-public treatment, the application must contain all of the information and arguments to fulfill the burden of persuasion that the materials should be withheld from the public. *Id.* § 3007.201(a). That application must include a “specific and detailed statement” containing, among other things, “[p]articular identification of the nature and extent of the harm alleged and the likelihood of each harm alleged to result from disclosure.” *Id.* § 3007.201(b)(4). The Commission preliminarily treats those designated materials, and the information contained therein, as non-public.<sup>76</sup> The Commission’s long-standing practice is that it does not *accept* any rationale for non-

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<sup>75</sup> *Id.* In 2009, the Commission satisfied this condition when it established procedures for treatment of materials filed by the Postal Service and claimed to be non-public. Docket No. RM2008-1, Final Rule Establishing Appropriate Confidentiality Procedures, June 19, 2009 (Order No. 225) (codified at 39 C.F.R. pt. 3007). In 2018, these procedures underwent revision through notice-and-comment rulemaking. See Docket No. RM2018-3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018 (Order No. 4679); Non-Public Information, 83 Fed. Reg. 31,258, 31,258-94 (July 3, 2018) (to be codified at 39 C.F.R. pt. 3007).

<sup>76</sup> *Id.* § 3007.102(a). This is consistent with the Commission’s long-standing practice under former § 3007.23. See Order No. 4679 at 11 n.9.

public treatment given in the application for non-public treatment unless the Commission first makes a determination of non-public status, which may occur in response to a motion by an interested person or *sua sponte*. See Order No. 4679 at 11.

Consistent with its practice and because most of the data used in the development of Library Reference PRC–LR–ACR2018–NP3 were provided by the Postal Service under seal, the Commission initially filed Library Reference PRC–LR–ACR2018–NP3 under seal. Concurrently, the Commission issued a “notice of its preliminary determination concerning the appropriate degree of protection, if any, to be accorded to materials claimed by any person to be non-public.” See 39 C.F.R. § 3007.103(c). After allowing an opportunity for interested persons to respond to this preliminary determination, the Commission hereby issues its final determination of what non-public treatment, if any, will be accorded to Library Reference PRC–LR–ACR2018–NP3. This decision follows the applicable standard appearing in 39 C.F.R. § 3007.104.

Section 3007.104(a) incorporates the standard for issuing a determination to publicly disclose materials claimed by the Postal Service to contain non-public information from 39 U.S.C. § 504(g)(3)(A): “the Commission shall balance the nature and extent of the likely commercial injury identified by the Postal Service against the public interest in maintaining the financial transparency of a government entity competing in commercial markets.”<sup>77</sup> In applying this standard, the Commission undertakes a highly fact-specific analysis of the public interest in maintaining the financial transparency of a government entity competing in commercial markets, with a particular focus on the data in Library Reference PRC–LR–ACR2018–NP3, and weighs it against the nature and extent of any likely commercial injury to the Postal Service from disclosure of those data. This requires the Commission to evaluate the likelihood of the potential commercial harm identified by the Postal Service in its Application.

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<sup>77</sup> 39 C.F.R. § 3007.104(a). As discussed in section VI.C.6, *infra*, the Postal Service does not contest the application of this standard.

In the sections that follow, the Commission first discusses the public interest in maintaining financial transparency, followed by a discussion of the nature and extent of any likely commercial harm.

#### B. Public Interest in Maintaining Financial Transparency

In this section, the Commission discusses the first part of the balancing test, the public interest in maintaining the financial transparency of the Postal Service, a government entity competing in commercial markets. The PAEA was intended to improve transparency into the Postal Service's finances. Consistent with this intent, the PAEA authorized the Commission to prescribe the contents of the Postal Service's reports and to determine the degree of confidentiality, if any, to be accorded to information identified as non-public by the Postal Service.

The Inbound Letter Post product, which is subject to terminal dues, has a long documented history of poor financial performance resulting in negative contribution for the past several years. Consequently, the lack of transparency surrounding this product is a matter of ongoing public interest. Library Reference PRC-LR-ACR2018-NP3 contains the Commission's analysis of trends and patterns within the Inbound Letter Post product and identifies drivers of the product's poor financial performance. See Library Reference PRC-LR-ACR2018-NP3. Unsealing this analysis and the underlying data would provide transparency into the underlying causes of the negative contribution and how the current terminal dues system contributes to the product's poor financial performance. It would also enhance the ongoing discussion of potential reforms to the current terminal dues system or establishing self-declared terminal dues.

Contrary to the Postal Service's suggestion, deferring this strong public interest in transparency to a future rate docket would be insufficient because such proceedings are narrower in scope than the annual compliance review and analysis of the data in question is more appropriate for the annual compliance review proceeding than the pre-implementation review of rates. Additionally, merely granting access to Library Reference PRC-LR-ACR2018-NP3, subject to protective conditions, is not appropriate

because the Postal Service did not carry its burden of persuasion to demonstrate that disclosing the underlying data would be likely to result in harm.

1. The PAEA intended for the Commission to improve transparency into the finances of the Postal Service.

Enacted in 2006, the PAEA significantly changed the regulation of the Postal Service, which included increased transparency and accountability by enhancing the authority and responsibilities of the Commission.<sup>78</sup> Although there was no committee or conference report issued for the version of the bill that was enacted into law, the legislative history underlying the PAEA confirms that enhanced transparency was a key motivation in the enactment of postal reform. For example, both the committee report accompanying S. 2468, the Senate's 2004 postal reform bill, and the committee report accompanying H.R. 22, the House of Representatives' 2005 postal reform bill, noted that enhanced transparency and accountability were essential aspects of postal reform.<sup>79</sup> Both reports emphasized that transparency is necessary to ensure fair treatment of Postal Service customers and its competitors. S. Rep. No. 108-318 at 5; H.R. Rep. No. 109-66 at 46. Consistent with Congress's intent to enhance accountability through increased transparency, the PAEA grants the Commission authority to disclose materials identified as non-public by the Postal Service.<sup>80</sup>

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<sup>78</sup> See, e.g., 39 U.S.C. §§ 3622, 3652, 3653, 3662. For an extended discussion of the differences between the PAEA and its predecessor legislation, see Docket No. RM2017-3, Order on the Findings and Determination of the 39 U.S.C. § 3622 Review, December 1, 2017, at 23-45 (Order No. 4257).

<sup>79</sup> S. Rep. No. 108-318 at 5 (2004), H.R. Rep. No. 109-66, pt. 1 at 43 (2005).

<sup>80</sup> 39 U.S.C. § 504(g)(3). Although transparency related to 39 U.S.C. § 504(g)(3) is central to the issue in this Order, many of the PAEA's provisions sought to enhance transparency. For example, the Postal Service must file extensive financial reporting information with the Commission and the information must comply with several reporting requirements required by "registrants" before the U.S. Securities and Exchange Commission. *Id.* §§ 3654(a)-(b). Additionally, the PAEA enhanced transparency by including "increase the transparency of the ratemaking process" as one of the nine objectives of the market dominant ratemaking system. *Id.* § 3622(b)(6). In Docket No. RM2017-3, the Commission found that the system "increased transparency . . . if comprehensive and understandable material relating to each rate proceeding was available to stakeholders." Order No. 4257 at 81.

The Commission's role and authority in this particular docket, which facilitates review of the Postal Service's ACR and the issuance of the Commission's ACD report pursuant to 39 U.S.C. §§ 3652 and 3653, is a key part of the PAEA's objective to increase transparency. Section 3652(a)(1) established new reporting requirements for the Postal Service that the Senate committee report described as a method to improve transparency. S. Rep. No. 108-318 at 19-20. To ensure the Commission and interested participants have sufficient information, the PAEA grants the Commission authority to prescribe, by regulation, the content and form of the public reports the Postal Service shall provide with its ACR. 39 U.S.C. § 3652(e)(1). The PAEA also requires the Commission to consider the provision of timely, adequate information to the public when prescribing the content and form of the ACR. *Id.* § 3652(e)(1)(A). This requirement further highlights the importance of postal transparency, particularly with regard to this docket.

2. The Commission has recognized the importance of improving transparency for non-compensatory products.

During its review of the Postal Service's ACR, the Commission has repeatedly identified products that have failed to generate revenue sufficient to cover their attributable costs, among them Inbound Letter Post. Non-compensatory products are of special concern to the Commission because they threaten the financial integrity of the Postal Service. Order No. 4257 at 274. As part of its authority to remedy non-compliance with regard to market dominant domestic products under the PAEA, the Commission directed the Postal Service to increase cost coverage through above-average price adjustments, cost reductions, or both. *See, e.g.*, FY 2018 ACD at 47. The Commission increased its efforts to obtain information on flat-shaped mail, citing the persistent failure of this type of mail to cover attributable costs. *See* FY 2015 ACD at 50, 160-62, 180-82.

For Inbound Letter Post, the issues related to non-compensatory products are further complicated by their impact on domestic mailers and manufacturers. In its first ACD, the Commission stated:

Since the Commission began issuing its Reports to Congress on the revenues, volumes and costs of international mail in FY 1998, the revenues for inbound mail have been problematic. The non-compensatory nature of market dominant inbound mail means that domestic mailers are subsidizing foreign mailers who use the same postal infra-structure, but bear none of the burden of contributing to its institutional cost. This problem stems primarily from the rate-setting procedure for inbound letter post, the largest inbound category of mail.

FY 2007 ACD at 116 (internal footnote omitted).

The Commission has reiterated its concerns about the non-compensatory and discriminatory nature of these terminal dues.<sup>81</sup>

In its FY 2016 and FY 2017 ACRs, the Postal Service stated that:

The Postal Service has been collaborating with other federal agencies, including the Department of State, which has lead responsibility for representation of the United States in the UPU, to improve cost coverage on inbound international Letter Post mail. Based on outcomes at the UPU Istanbul Congress, the Postal Service expects significant increases in Inbound Letter Post terminal dues revenues based on the new Convention cycle effective in January 2018. In the meantime, in calendar year 2017, the Postal Service will benefit from scheduled increases in terminal dues for Inbound Letter Post mail . . . [.]<sup>82</sup>

Despite these increases, however, the product remained non-compensatory. Finding that “providing enhanced data for the purposes of conducting a trend analysis across a period of years is appropriate, particularly where the prices for a product or products have routinely been non-compensatory,” the Commission amended its reporting requirements to require the Postal Service to provide Inbound Letter Post

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<sup>81</sup> FY 2015 ACD at 70; FY 2016 ACD at 66; see FY 2017 ACD at 68; FY 2018 ACD at 85.

<sup>82</sup> United States Postal Service FY 2016 Annual Compliance Report, December 29, 2016, at 12-13; United States Postal Service FY 2017 Annual Compliance Report, December 29, 2017, at 9.

revenue, volume, attributable cost, and contribution data by UPU country group and by shape for the fiscal year subject to review and each of the four preceding fiscal years. Order No. 4836 at 15. Understanding the underlying cause and extent of the non-compensatory and discriminatory nature of Inbound Letter Post prices, including data on volume, revenue, cost, and contribution, is crucial to developing viable solutions. Given the broad impact of these potential solutions, the need for transparency is vital.

3. There is a lack of adequate transparency concerning the Inbound Letter Post product's poor financial performance.

In recent Commission proceedings, participants have repeatedly requested greater transparency into the Inbound Letter Post product. For example, in Docket No. IM2016-1, FedEx requested Inbound Letter Post volume, cost, and revenue data by UPU country group and by shape.<sup>83</sup> In Docket No. R2018-1, the Chamber requested that the Commission unseal data to calculate Inbound Letter Post revenue by UPU country group. Docket No. R2018-1 Motion for Leave at 2 n.2. Stating that such information could improve transparency related to international mail prices, the Commission encouraged the Postal Service “to provide *publicly* available Inbound Letter Post revenue data by country group and shape in its [FY 2017 ACR][.]” Order No. 4215 at 36 (emphasis added).

The Postal Service provided this data under seal in Docket No. ACR2017. Order No. 4451 at 8-9. The Commission issued a preliminary determination to unseal the aggregated historical Inbound Letter Post revenue data in Docket No. ACR2017. The Commission observed that numerous participants filed responses in support of unsealing the data and enhancing transparency of the Inbound Letter Post product. See Order No. 4451 at 15-17, 29. The participants expressing support for disclosure

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<sup>83</sup> Docket No. IM2016-1, Motion of Federal Express Corporation Requesting Appropriate Data and Explanations, June 16, 2016, at 6. Ultimately, the Commission denied FedEx's motion because the procedural rules applicable to IM dockets do not provide for discovery. See Docket No. IM2016-1, Order Granting, in Part, Request for Data and Explanations, July 14, 2016, at 7 (Order No. 3427); see 39 C.F.R. pt. 3017.

were UPS, the Chamber, NAM, IHA, PostCom, Congressman Kenny Marchant, and James Smaldone, Founder and CEO of Mighty Mug Inc. *Id.* UPS, the Chamber, and NAM argued that there is substantial public interest in maintaining financial transparency related to this product. *Id.* at 15. For example, the Chamber stated, “[t]ransparency is acutely important in the context of international inbound shipments that are the result of a network of government enterprises that work together in a ‘special arrangement’ that distorts competition with the private sector and places domestic competitors at a disadvantage to foreign competition.”<sup>84</sup> Asserting that there is a lack of transparency surrounding the Inbound Letter Post product and the current terminal dues system, UPS expressed support for unsealing aggregated revenue, volume, and cost data.<sup>85</sup>

In the instant proceeding, multiple participants reiterate these concerns, which further demonstrates that the public interest in transparency is strong. UPS, the Chamber, TPA, ACI, IHA, NAM, and LI support additional transparency surrounding the Inbound Letter Post product.<sup>86</sup> IHA, UPS, NAM, LI, and the Chamber assert that greater transparency would help stakeholders to understand the problems with the current terminal dues system as the U.S. Government attempts to address these problems.<sup>87</sup> TPA states “[t]o ultimately forge long-term financial viability of the nation’s Postal System, depends on regularly obtaining targeted data, including product-specific costs in addition to the volume variable costs that are used to determine attributable costs for respective lines of service.” TPA Response at 1. ACI states “[g]iving regulators, lawmakers, and the general public the ability to understand the financial

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<sup>84</sup> Docket No. ACR2017, Comments of the U.S. Chamber of Commerce, February 23, 2018, at 2.

<sup>85</sup> Docket No. ACR2017, Comments of United Parcel Service, Inc. in Response to Notice of Preliminary Determination to Unseal the Postal Service’s Response to Chairman’s Information Request No. 15, February 23, 2018, at 3, 5 (Docket No. ACR2017 UPS Response).

<sup>86</sup> UPS Comments at 19; UPS Response at 1-2; Chamber Response at 1; TPA Response at 1; ACI Response at 1; IHA Response at 1; NAM Response at 2; LI Response at 1; TPA Reply at 1.

<sup>87</sup> IHA Response at 1; UPS Response at 1-2; NAM at 2; LI Response at 1; Chamber Response at 1.

inner workings of under-water products on an individual basis is essential for ultimately rooting out below-cost pricing and identifying where and how to control costs.” ACI Response at 2. Echoing its prior remarks, UPS supports the release of aggregated revenue, volume, and cost data, asserting that “[t]he Postal Service has long sought to claim all international competitive data as non-public.” UPS Comments at 19. Therefore, the Commission’s determination in this proceeding furthers the public interest in enhanced transparency into the Inbound Letter Post product generally and these data specifically.

4. Public disclosure of the Commission’s analysis of the financial problems with the Inbound Letter Post product furthers the public interest of maintaining transparency.

The Postal Service has provided a myriad of explanations for the poor financial performance of the Inbound Letter Post product, including increasing costs, increasing volume, increasing weight, and failing to meet UPU quality-of-service standards.<sup>88</sup> In its notice proposing revisions to the annual reporting rules that would require the Postal Service to provide historical Inbound Letter Post revenue, volume, cost, and contribution by UPU country group and by shape, the Commission explained that its recent ACD reports “conducted trend analysis for products for which the Commission has identified ongoing issues.” Order No. 4706 at 17. The Commission announced that it “plan[ne]d to use the aggregated Inbound Letter Post revenue, volume, attributable cost, and contribution data . . . to analyze trends that may result in lower contribution from certain UPU country groups.” *Id.* at 18. The Commission noted that this analysis could help it to “more accurately identify issues within the Inbound Letter Post product and identify appropriate remedial actions.” *Id.*

In adopting the revised annual reporting requirements, the Commission noted that reviewing revenue, volume, attributable cost, and contribution data from previous

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<sup>88</sup> See Order No. 4706 at 16-17 (citing FY 2017 ACD at 66; FY 2015 ACD at 69; FY 2013 ACD at 60; FY 2012 ACD at 145; FY 2009 ACD at 109; FY 2008 ACD at 82).

fiscal years (even under a previous UPU terminal dues structure) would be valuable in the Commission's annual compliance review. Order No. 4836 at 16. This approach comports with the Commission's review of products with long-standing financial problems. See *id.* at 14. As discussed above, the Postal Service has recognized that factors other than the existing UPU terminal dues structure contribute to the product's poor financial performance. Moreover, the Commission has acknowledged that price structure is not singularly determinative of a product's financial performance. *Id.* at 16. If under a new price structure, the product continues to display similar trends, analysis of the historical revenue, volume, costs, and contribution data assists the Commission's efforts to identify the challenges facing the product, and to make appropriate recommendations to remediate the poor financial performance. *Id.*

The analysis and data in Library Reference PRC-LR-ACR2018-NP3 identify particular aspects of the terminal dues system that are responsible for most of the negative contribution associated with the Inbound Letter Post product and assist in determining the appropriate remedial actions. Moreover, the analysis and data provide interested persons useful information when commenting on the compliance of Postal Service products or commenting on changes to the terminal dues system. Public interest in the transparency of a government establishment competing in a competitive market weighs in favor of unsealing the analysis and data in question because availability of this more comprehensive and understandable data will enhance public participation in proceedings related to the Inbound Letter Post product.

Furthermore, although the Postal Service argues that the current national and international focus on the terminal dues system weighs in favor of affording non-public treatment to the analysis and data in question, the Presidential Memorandum and the Administration's efforts to reform the terminal dues system heighten the need for enhanced transparency into the Inbound Letter Post product. The Presidential Memorandum detailed how the current terminal dues system does not align with the United States' economic interests. Presidential Memorandum § 2(c). Specifically, the memorandum highlighted some of the problems resulting from terminal dues that are

less than comparable postage rates. *Id.* The analysis and data at issue provide additional context to this discussion regarding the current terminal dues system. The analysis identifies and sheds light for the public on several drivers of the poor financial performance of the Inbound Letter Post product and identifies areas where there has been improvement. The analysis also discusses the impacts of the change, effective January 1, 2018, requiring designated operators to pay higher terminal dues for Inbound Letter Post small packets and bulky letters. As efforts to move from the current terminal dues system to a system of self-declared rates continue, the public has a strong interest in having a transparent discussion of the strengths and weaknesses of the current terminal dues system.

5. Deferring the transparency concerns to a future rate adjustment proceeding or to the Commission's process to access non-public materials, subject to protective conditions, is inadequate to cure the lack of transparency.

The Postal Service argues that disclosing the analysis and data in Library Reference PRC–LR–ACR2018–NP3 “is unnecessary to promote any general interest in ‘transparency[.]’” because the future rate-setting process “will already be inherently transparent.” Postal Service Response at 17-18. Additionally, the Postal Service claims that the Commission may grant “limited access under appropriate protective conditions under its rules so that interested persons can investigate and comment on such matters[.]” *Id.* (footnote omitted). However, deferring the public interest in transparency to a future rate adjustment proceeding or to the Commission's process to access non-public materials is inadequate to cure the lack of transparency concerning the Inbound Letter Post product's poor financial performance.

With respect to the prospect of deferring the transparency concerns to a future rate adjustment proceeding, the nature and purpose of a rate adjustment proceeding is different than the nature and purpose of an annual compliance review proceeding. To allow the Postal Service to adjust market dominant rates with 45 days' advance notice as contemplated under 39 U.S.C. § 3622(d)(1)(C), the Commission imposes strict

timeframes to focus its review on whether proposed price adjustments will comply with the applicable statutory and regulatory requirements.<sup>89</sup> With respect to pre-implementation review of rates for competitive products, the Commission focuses its review on monitoring compliance with the requirements of 39 U.S.C. § 3633. See 39 C.F.R. § 3015.7. By contrast, the purpose of the annual compliance review proceeding is far broader. The Commission must determine “whether any rates or fees in effect during [the past fiscal year] (for products individually or collectively) were not in compliance with applicable provisions of [chapter 36 of title 39] (or regulations promulgated thereunder)[.]” 39 U.S.C. § 3653(b)(1).

When revising the annual reporting regulations to require the Postal Service to report Inbound Letter Post revenue, volume, cost, and contribution data by country group and by shape, the Commission explained that reporting data at the product level made it difficult to determine which particular aspect or aspects of the terminal dues system were responsible for Inbound Letter Post’s negative contribution. Order No. 4836 at 16-17. Analysis of historical trends that would be evident below the product level—now made possible through the enhanced reporting by the Postal Service—are relevant to determining the nature and extent of the product’s poor financial performance and to develop recommendations to improve performance. Such analysis is more appropriate for the annual compliance review proceeding rather than during the pre-implementation review of rates. See Order No. 43 at 11-13.

Furthermore, disclosure of the analysis and data at issue will enhance transparency of the Inbound Letter Post product by presenting more comprehensive and understandable data. As several participants observe, the ongoing efforts to reform the terminal dues system heighten the need for transparency into the problems with the existing system.<sup>90</sup>

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<sup>89</sup> See 39 C.F.R. §§ 3010.11(d)-(f) and (k), 3010.44(b); see also Order No. 43 at 11-13.

<sup>90</sup> See TPA Response at 1; IHA Response at 1; UPS Response at 1-2; Chamber Response at 1; NAM Response at 2; ACI Response at 1-2; LI Response at 1; TPA Reply at 1.

Additionally, as the Commission explained in Order No. 4451, merely receiving access to non-public material under 39 C.F.R. § 3007.301 does not achieve the transparency associated with public disclosure. Receiving access and public disclosure are two different courses of action dependent on whether the material at issue should be withheld from public disclosure in accordance with 39 U.S.C. § 504(g).

If material is treated as non-public, 39 C.F.R. § 3007.301 permits participants to file a motion requesting access to that information. If the motion is granted, access to non-public material is subject to certain restrictions and obligations that include a prohibition on disclosing the materials and limitations on those who can access competitive information.<sup>91</sup> Furthermore, once granted access, participants may only view non-public materials for a limited time and purpose. See 39 C.F.R. §§ 3007.302, 3007.304.

On the other hand, if the Commission determines, following the procedures of 39 C.F.R. § 3007.103 and applying the standard appearing in 39 C.F.R. § 3007.104, that the material should be publicly disclosed, then it would be improper to maintain the materials under seal and require parties to seek access, subjecting them to the restrictions and obligations associated with requesting access to non-public information. Although these restrictions and obligations are necessary to protect truly non-public material, they unfairly burden participants and hinder the PAEA's increased transparency when the material should be public. Given that the Postal Service has not carried its burden of persuasion to demonstrate likely commercial injury would result from disclosure of the sealed data, the public interest in disclosure of Library Reference PRC-LR-ACR2018-NP3 is more than sufficient to justify unsealing.

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<sup>91</sup> See 39 C.F.R. §§ 3007.301, 3007.302; see also Appendix A to pt. 3007.

### C. Nature and Extent of Alleged Injury

In this section, the Commission discusses the second part of the balancing test, the nature and extent of any likely commercial injury to the Postal Service from disclosure. The Commission focuses on and assesses the likelihood of the specific alleged commercial harms identified by the Postal Service.<sup>92</sup> As discussed below, the Postal Service has not met its burden of persuasion to show that the alleged commercial injury is likely to result if Library Reference PRC–LR–ACR2018–NP3 is disclosed to the public.

In its Application, the Postal Service asserts that two overarching types of commercial harms would be likely to result from disclosure of the information filed by the Postal Service under seal: harm to the competitive or negotiation interest of the Postal Service and its business partners. See Application at 16-30. However, the Application, which requests the non-public treatment of more than 30 library references containing more than 650 individual files, does not cite or reference any specific library reference or file when discussing these alleged commercial harms. See *id.*; see also Order No. 5055 at 9-10. Several of the broad allegations of harms appearing in the Application do not apply to Library Reference PRC–LR–ACR2018–NP3. See Order No. 5055 at 10. The Postal Service has not challenged the Commission's specific preliminary determination that any alleged harm relating to the disclosure of Special Cost Studies data, competitive product billing determinant data, data related to NSAs, or facility-specific service performance results does not apply to the public disclosure of Library Reference PRC–LR–ACR2018–NP3. Compare *id.*, with Postal Service Response.

In its response, the Postal Service argues that the Commission should not disclose the information in question because that information relates to a product that has been conditionally approved for transfer to the competitive product list. Postal

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<sup>92</sup> The Postal Service has not argued that any alleged harms would result from unsealing the Commission's analysis that would be distinct from unsealing the underlying data appearing in Library Reference USPS–FY18–NP9, on which the Commission's analysis is based. See *generally* Postal Service Response.

Service Response at 3-4, 9-13. The mere classification of the product and the existence of competition are not the end of the inquiry before the Commission; the Postal Service must meet its burden of persuasion to demonstrate that disclosure would be likely to result in commercial injury. The commercial harms alleged by the Postal Service rest on its arguments that country group level aggregation would be insufficient to mask operator-specific data and that speculation based on historical data would be useful to competitors, suppliers, and designated operators making business decisions in the rapidly evolving marketplace. However, the Postal Service provides inadequate support for these arguments.

Moreover, the Postal Service does not provide adequate support for its allegations that disclosure would result in harm to its competitive or negotiation interests (or to the competitive or negotiation interests of the Postal Service's business partners). After thoroughly considering the nature of the analysis and data at issue and the alleged commercial harms, the Commission finds that it is unlikely that unsealing the data at issue would result in the commercial harms alleged by the Postal Service.

1. The existence of competition and product classification are not the end of the inquiry before the Commission.

The Postal Service argues that unsealing Library Reference PRC-LR-ACR2018-NP3 would be inconsistent with the Commission's conditional approval of the transfer of Inbound Letter Post small packets and bulky letters from the market dominant to the competitive product list. Postal Service Response at 9.

Stating its belief that no commercial enterprise would voluntarily publish the type of data at issue for its products that are subject to competition, the Postal Service asserts that such information is exempt from mandatory disclosure pursuant to 39 U.S.C. § 410(c)(2) and 5 U.S.C. § 552(b)(3). *Id.* at 11. No participant disputed the Postal Service's assertion that 39 U.S.C. § 410(c)(2) encompasses the type of data at issue. See Application at 2; Postal Service Response at 11. However, this is not the end of the inquiry pending before the Commission. Although under 39 U.S.C.

§ 504(g)(1) the Postal Service may seek non-public treatment for materials that contain information described in 39 U.S.C. § 410(c)(2), the PAEA and the Commission's rules impose additional analysis to determine the degree of confidentiality, if any, to be accorded to such materials. The Application must fulfill the burden of persuasion to show the nature and extent of the alleged commercial harm and the likelihood of such harm. 39 C.F.R. § 3007.201(a). Further, the Commission must "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); see 39 C.F.R. § 3007.104(a). There is no dispute that the Postal Service has not, as a matter of routine, publicized these data. However, the Postal Service has not shown the extent of commercial injury that would be likely to result from the disclosure of these data.

The Postal Service characterizes the Commission's determination in Order No. 4451 to unseal FY 2016 Inbound Letter Post revenue data (separated by country group and by shape) as being "in the context of a market dominant product."<sup>93</sup> However, the Commission's determination in Order No. 4451 did not rest on the market dominant classification of the Inbound Letter Post product. See Order No. 4707 at 10-11. Furthermore, the instant determination that it is unlikely that unsealing Library Reference PRC-LR-ACR2018-NP3 would result in the commercial harms alleged by the Postal Service also does not rest on the competitive or market dominant classification of the Inbound Letter Post product (or parts thereof).

The Postal Service argues "[b]ecause 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." Postal Service

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<sup>93</sup> Postal Service Response at 10. To clarify, the data in Library Reference PRC-LR-ACR2018-NP3 provide Inbound Letter Post product volume, revenue, cost, and contribution for FY 2014 through FY 2018 (October 1, 2013, through September 30, 2018); therefore, the data at issue also pertain to a market dominant product.

Response at 10. Similarly, the Postal Service alleges that because Inbound Letter Post small packets face considerable competition, disclosing data separated by shape would result in commercial harm. *Id.* at 6. Classification of the product and the existence of competition<sup>94</sup> are among the several factors considered when the Commission applies the fact-specific balancing test of 39 U.S.C. § 504(g)(3)(A). As the Commission has previously explained, when weighing the extent and nature of the potential commercial injury, the Commission does not end its commercial harm analysis after determining whether the data relates to a market dominant or a competitive product. See Order No. 4707 at 10-11. Not all information relating to competitive products is likely to result in commercial harm if disclosed, which is evidenced by the fact that the Postal Service provides data relating to competitive products publicly. See UPS Reply at 2. As explained below, the Postal Service's arguments that the highly aggregated historical data appearing in Library Reference PRC-LR-ACR2018-NP3 would result in commercial harm are wholly conclusory and lack support.

2. The Postal Service has not met its burden of persuasion to show the nature of and extent to which disclosing aggregated historical data would be likely to result in commercial harm in the rapidly evolving market.

Contrary to the Postal Service's argument,<sup>95</sup> recent efforts to replace the existing terminal dues system heighten the public interest in transparency into the analysis and data and mitigate the nature and extent of the alleged commercial harm. The Postal Service observes that, as evidenced by the Presidential Memorandum and the

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<sup>94</sup> The Postal Service asserts that it competes with private companies and ETOEs. *Id.* at 3-4. To the extent that an ETOE competes with the corresponding designated operator, the competition would be for outbound (rather than inbound) market share. ETOEs located in the United States do not enter Inbound Letter Post mail but rather send international mail to destination countries outside the United States. Order No. 4451 at 13 n.29. Therefore, ETOEs located in the United States would compete with the Postal Service for outbound items and do not compete with the Postal Service for inbound items.

<sup>95</sup> See Postal Service Response at 14-16.

Statement of the Press Secretary, “[t]he Administration has already decided, as a matter of policy, that the presently problematic terminal dues will be replaced.” Postal Service Response at 14. The Presidential Memorandum states that it should be the policy of the Executive Branch to “support efforts that further the policies in [the] memorandum, including supporting a system of unrestricted and undistorted competition between [the] United States and foreign merchants.” Presidential Memorandum § 2(d). Such efforts include plans to adopt self-declared rates no later than January 1, 2020.<sup>96</sup> These self-declared rates should not favor foreign mailers over domestic mailers or favor designated operators over non-designated operators. Presidential Memorandum § 2(d)(i)-(ii).

If adopted, self-declared rates will significantly change the inbound shipping market. Given that the environment is rapidly changing, the historical data at issue would not provide any useable insights into future market size and market shares. Accordingly, it is unlikely that unsealing the analysis and data at issue will give competitors, suppliers, and designated operators, with whom the Postal Service plans to negotiate, an advantage moving forward from the current terminal dues system.

As the Postal Service notes, the annual compliance review proceeding looks backwards to determine whether the Postal Service complied with the applicable statutory and regulatory requirements. See Postal Service Response at 14; see also 39 U.S.C. § 3653(b). Accordingly, the data requested by the Commission and upon which the Commission based its analysis are from previous fiscal years and represent the market size and market share under prior terminal dues.<sup>97</sup> Therefore, unsealing Library Reference PRC–LR–ACR2018–NP3 serves the public interest by providing insight into

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<sup>96</sup> Statement from the Press Secretary, October 17, 2018, available at <http://www.whitehouse.gov/briefings-statements/statement-press-secretary-38/>.

<sup>97</sup> New terminal dues went into effect on January 1, 2019. See UPU Convention, Articles 29 and 30. According to the Postal Service, overall, these terminal dues represent a 7.337 percent increase over the terminal dues that were in effect for Quarters 2 through 4 of FY 2018 and a large portion of that increase is attributable to increased terminal dues for Inbound Letter Post small packets and bulky letters. Docket No. R2019-1, United States Postal Service Notice of Market-Dominant Price Change, October 10, 2018, at 9.

the problems with the prior terminal dues system and is unlikely to result in harm because the data is too stale to use as a basis for commercial decision-making, now and in the future. The Postal Service has not supported its conclusion that unsealing the Commission's analysis of historical data would enable competitors to divert business and enable business partners to negotiate rates that are more favorable. Indeed, the Postal Service previously asserted that "the Commission's conclusions in previous ACR dockets [are] inapplicable to the current and future financial performance of Inbound Letter Post."<sup>98</sup>

Although the data and analysis in Library Reference PRC-LR-ACR2018-NP3 provide some insight into overarching historical trends, the data are a small piece in a much larger picture and will likely have a nominal effect, if any, on competition and negotiations concerning inbound mailpieces sent to the United States. For example, if a single designated operator "overwhelmingly dominates its UPU country group,"<sup>99</sup> it is likely that competitors and suppliers are already aware that this specific operator sends a disproportionate number of Inbound Letter Post items to the United States.<sup>100</sup> Furthermore, analyzing historical cost data aggregated by country group, while useful for the Commission's evaluation of what contributed to the product's past financial

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<sup>98</sup> Docket No. RM2018-2, United States Postal Service Comments Regarding Order No. 4706, August 17, 2018, at 8.

<sup>99</sup> See Postal Service Response at 5.

<sup>100</sup> Actors involved in the market of shipping items from foreign countries inbound to the United States already have established operational hubs in particular countries. See, e.g., United Parcel Service, Inc., Form 10-K for the Fiscal Year Ended December 31, 2018, February 21, 2019, at 3, available at <http://www.sec.gov/Archives/edgar/data/1090727/000109072719000006/ups-12312018x10k.htm> ("Our European air hub is located in Cologne, Germany, and we maintain Asia Pacific air hubs in Shanghai, China; Shenzhen, China and Hong Kong. Our regional air hub in Canada is located in Hamilton, Ontario and our regional air hub for Latin America and the Caribbean is in Miami, Florida."); FedEx Corporation, Form 10-K for the Fiscal Year Ended May 31, 2018, July 16, 2018, at 11, available at [http://www.sec.gov/Archives/edgar/data/1048911/000156459018016877/fdx-10k\\_20180531.htm](http://www.sec.gov/Archives/edgar/data/1048911/000156459018016877/fdx-10k_20180531.htm) ("Facilities in Anchorage, Paris, Cologne/Bonn, Guangzhou and Osaka serve as sorting facilities for express package and freight traffic moving to and from Asia, Europe and North America. Additional major sorting and freight handling facilities are located at Narita Airport in Tokyo, Stansted Airport outside London and Pearson Airport in Toronto. The facilities in Paris, Cologne/Bonn, Guangzhou and Osaka are also designed to serve as regional hubs for their respective market areas. A facility in Miami — the Miami Gateway Hub — serves our South Florida, Latin American and Caribbean markets.").

problems, does not provide actionable commercial information to actors in the present or future environment, which is undergoing rapid change. Accordingly, the data in Library Reference PRC–LR–ACR2018–NP3 would not add significant insight into the market analysis of inbound mailpieces sent to the United States.

The Postal Service does not explain how competitors, suppliers, or anyone else would be able to identify opportunities to divert business from or extract more favorable terms in negotiations with the Postal Service (or anyone else) that the actors might never have contemplated but for disclosure of the data. Accordingly, the Commission finds the Postal Service’s argument that Library Reference PRC–LR–ACR2018–NP3 would result in any type of commercial harm is speculative at best.

3. The Postal Service has not met its burden of persuasion to show the nature of and extent to which disclosing country group data would be likely to result in commercial harm.

In Order No. 5055, the Commission notified the Postal Service of the deficiencies arising from the lack of particularity in its Application. Order No. 5055 at 10; see 39 C.F.R. § 3007.201. The Commission found that the Application did not clearly indicate whether the Postal Service was asserting that particular alleged commercial harms (and the corresponding hypotheticals) would be likely to result from the disclosure of the revenue, volume, cost, and contribution data at the country group level of aggregation. Order No. 5055 at 10.

The Postal Service alleges that the commercial harms would result from disclosure of data aggregated by UPU country group for one of the four country groups in which a single designated operator “overwhelmingly dominates its UPU country group,” which the Postal Service argues would be tantamount to disclosing country-specific data.<sup>101</sup> The Postal Service asserts that the competitors, including other

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<sup>101</sup> Postal Service Response at 5. The Postal Service does not address how the aggregation at the country group level would be insufficient to adequately mask foreign postal operator revenue, volume, cost, and contribution data for the other three country groups.

designated operators, and suppliers could use the country group data to gauge market size and market share for this specific designated operator. *Id.* at 6. This argument was extensively litigated in Docket No. ACR2017.<sup>102</sup> The Commission found no basis to conclude that disclosure of aggregated UPU country group revenue data, even when dominated by one designated operator, would necessarily reveal operator-specific data. Order No. 4451 at 33. The Commission determined that the UPU country groups are too broad and diverse to allow participants to infer operator-specific revenue from revenue data aggregated by country group. *Id.* The Commission observed that any analysis of the aggregated revenue data would require assumptions and conjecture because the specific percentage of revenue generated by specific foreign postal operators would not be revealed. *Id.* at 34.

Similarly, in the instant proceeding, the likelihood of disclosure resulting in the commercial harms posed by competitors identified by the Postal Service is contingent upon the assumption that disclosing the data at issue will reveal at least one designated operator's data. The Court of Appeals for the District of Columbia Circuit (Court of Appeals) previously considered the viability of such an assumption applied to facts similar to those at issue in this Order.

In *Mudge Rose Guthrie Alexander & Ferdon v. U.S. Int'l Trade Comm'n*, the data at issue included aggregated information relating to the production, sales, and revenues of 9 domestic producers and 22 importers of top-of-the-stove cookware.<sup>103</sup> The ITC collected and included this data in a report detailing the threat the top-of-the-stove cookware from Korea and Taiwan presented to domestic producers. *Id.* at 1529. When

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<sup>102</sup> Similar to its arguments in Docket No. ACR2017, the Postal Service argues that separation of the data by shape would result in commercial harm, yet provides no support or explanation for this premise. Compare Postal Service Response at 6-8, with Order No. 4451 at 36.

<sup>103</sup> *Mudge Rose Guthrie Alexander & Ferdon v. U.S. Int'l Trade Comm'n*, 846 F.2d 1527, 1528 (D.C. Cir. 1988). In *Mudge Rose*, the Court of Appeals remanded a decision by the U.S. International Trade Commission (ITC) to redact aggregated data collected from nine domestic producers of top-of-the-stove cookware. *Id.* at 1532.

preparing the public version of the report, the ITC determined that “the aggregate data in dispute could be associated with or used to disclose the operations of particular firms[,]” and withheld the data.<sup>104</sup> Representatives of the Korean producers and exporters investigated by the ITC filed a FOIA request for the redacted data. *Id.* at 1529. In denying the request, the Secretary of the ITC contended that, because of the small number of domestic companies in the industry, releasing the aggregated data “would have the effect of revealing the operations of individual firms[.]” *Id.* (internal marks and citation omitted).

The Court of Appeals noted that underlying this decision was the ITC’s “unexplained assumption that in industries dominated by one or two firms, aggregate data *necessarily* reveals confidential business information concerning the major producer or producers.” *Id.* at 1531 (internal marks and citation omitted) (emphasis in the original). The Court of Appeals found that the ITC failed to provide reasoned justification for its assumption. *Id.* at 1531-32. Absent such justification or explanation, the court held that there is no basis to conclude that disclosure of aggregated figures automatically exposes individual company information. *Id.* at 1531. The court concluded that “[e]ven assuming that it is apparent to everyone that one company accounts for a major portion of the industry production, it is unclear how a party not privy to the specific company data could discern from industry-wide totals . . . the production breakdown[.]” *Id.*

The Postal Service argues that because one designated operator “overwhelmingly dominates its UPU country group[,]” disclosing the aggregated Inbound Letter Post data will expose operator-specific data. Postal Service Response at 5. Consistent with the Court of Appeals’ rationale in *Mudge Rose*, the Commission finds that there is no basis to conclude that disclosure of aggregated UPU country group

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<sup>104</sup> *Id.* The ITC investigators based their determination on the following two guidelines: “3. In the case of three firms, one of which produces 75 percent of the domestic production, all business data will be deleted. 4. In the case of two firms producing 90 percent of the domestic production, all business data will be deleted.” *Id.* at 1531.

data, even when dominated by one designated operator, necessarily reveals operator-specific data. The Commission finds that the UPU country groups are too broad and diverse to allow participants to infer operator-specific data from aggregated data. The UPU has 192 members. Each of the four UPU country groups consists of at least 34 countries or territories, which include multiple continents and geographic areas.

Even if it is apparent that one designated operator generates more revenue within its country group than other operators, it does not follow that individuals could determine its share of the total revenue for that country group.<sup>105</sup> Additionally, despite the Postal Service's conclusory claims that disclosure will expose operator-specific data, the Postal Service does not identify how individuals can determine operator-specific data from the aggregated country group data.

For example, UPU country Group II consists of 34 UPU member countries and territories. Because individuals do not know the percentage of revenue generated by the 34 specific Group II designated operators, there is no way to determine the revenue earned by the Postal Service for the delivery of Inbound Letter Post from any one designated operator. For example, the Republic of Korea (South Korea) is in Group II. Because individuals do not know the specific percentage of Inbound Letter Post revenue generated by Korea Post, the designated operator for South Korea, they cannot determine the Inbound Letter Post revenue, volume, cost, or contribution data associated with Inbound Letter Post mailpieces originating from South Korea. Rather, all that individuals can glean from the data at issue is the total Inbound Letter Post revenue, volume, cost, and contribution associated with all 34 countries and territories in Group II. It is impossible to know whether Korea Post generates 20 percent, 45 percent, 55 percent, or 75 percent of Group II's Inbound Letter Post revenue, volume, cost, or contribution (or some percentage falling well above or below that range). As a

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<sup>105</sup> In FY 2018, the Inbound Letter Post product did not earn sufficient revenue to cover its cost. The FY 2018 ACR reported that the Inbound Letter Post product had a negative contribution of \$81 million in FY 2018. FY 2018 ACR at 9. NAM asserts that private sector competitors "could only out-compete the [Postal Service] on this product by losing money themselves—a situation that investors would not tolerate." NAM Response at 2.

result, individuals could analyze Group II's Inbound Letter Post data if the data were publicly disclosed, but without knowledge regarding the specific percentage of revenue generated by specific designated operators, any analysis would require assumptions and conjecture.

The Court of Appeals in *Mudge Rose* acknowledged that aggregated data “coupled with knowledge already publicly available about the makeup of the industry[] could lead to identification of the shares of particular companies in that data.” 846 F.2d at 1531. However, as the Postal Service concedes, participants “do not know the specific percentages individual countries represent within their country groups . . . .” Postal Service Response at 8. The Postal Service posits that participants would be able to approximate operator-specific cost and revenue. *Id.*

Accordingly, the Commission finds that there is no convincing evidence that disclosing the aggregated Inbound Letter Post data will reveal operator-specific data. Because unsealing Library Reference PRC–LR–ACR2018–NP3 will not expose operator-specific data, the Commission finds that it is unlikely that disclosure will result in the potential commercial harm identified by the Postal Service.

The Commission does not need to consider the potential for further aggregation of the data<sup>106</sup> because the Postal Service has not carried its burden of persuasion to show the extent to which disclosing country group data would be likely to result in commercial harm. Moreover, the speculative and conclusory assertions of commercial harm do not outweigh the substantial public interest in transparency concerning the past problems with the terminal dues scheme, which is furthered by disclosing historical country group data. Below, the Commission addresses additional layers of speculation that are specific to each of the three harms identified by the Postal Service: harm to the Postal Service's competitive interest; harm to the Postal Service's negotiation interest; and commercial harm to the Postal Service's business partners.

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<sup>106</sup> See UPS Comments at 18.

4. The Postal Service has not met its burden of persuasion to show the nature of and extent to which disclosure would be likely to result in harm to the competitive interests of the Postal Service.

In general, the Postal Service asserts that a competitor could formulate an analysis of the sealed information that would inform the competitor's decision-making, to the detriment of the Postal Service. See Postal Service Response at 4-6, 12. The Postal Service contends that competitors would be able to focus their sales and marketing efforts based on the contents of Library Reference PRC-LR-ACR2018-NP3. *Id.* at 4, 12. The likelihood of disclosure resulting in the commercial harms identified by the Postal Service is contingent upon the unsupported assumption that disclosing the data at issue will reveal at least one designated operator's data. Additionally, the Postal Service does not explain how the aggregated historical data would be useful for a competitor in the rapidly evolving market.

Moreover, Library Reference PRC-LR-ACR2018-NP3 does not provide competitors with data useful to target specific customers or markets because there are too many unknown variables related to the origination, international transportation, and destination of the mailpieces. For instance, Library Reference PRC-LR-ACR2018-NP3 does not disclose: the identity of customers sending Inbound Letter Post mailpieces from individual countries; the location within specific countries in which these mailpieces are originating; the month or quarter when the customers are sending these mailpieces; the mode of international transit (*i.e.*, by air or by surface); the location within the United States at which the Inbound Letter Post mailpieces arrive; or the final destination of the mailpieces in the United States.

Moreover, Library Reference PRC-LR-ACR2018-NP3 does not provide sufficient information to determine a specific designated operator's terminal dues. Terminal dues for all four UPU country groups operate and increase on a calendar year basis, whereas the data at issue are compiled according to Postal Service fiscal years. For example, FY 2018 (from October 1, 2017, through September 30, 2018) encompasses the terminal dues under Calendar Year 2017 (from October 1, 2017,

through December 31, 2017)<sup>107</sup> and the terminal dues under Calendar Year 2018 (from January 1, 2018, through September 30, 2018). Therefore, because new terminal dues go into effect on January 1 each year, data for each fiscal year include data under two different terminal dues. For each fiscal year, fiscal Quarter 1 revenue, volume, cost, and contribution are associated with mailpieces sent under different terminal dues than fiscal Quarters 2 through 4. Additionally, terminal dues for all four UPU country groups are based, at least in part, on weight, and the weight data corresponding to the data appearing in Library Reference PRC–LR–ACR2018–NP3 are not publicly available.

The cost data represent the total U.S. domestic processing, transportation, and delivery costs and do not include international processing and transportation costs. The cost data at issue are not disaggregated by cost segment<sup>108</sup> or even by leg (processing, transportation, and delivery). Therefore, the competitor would not be able to determine the total cost of shipping an Inbound Letter Post mailpiece to the United States, including international processing or transportation costs from the country of origin to the United States. Moreover, the Postal Service uses data relating to the mode of transportation by which designated operators send Inbound Letter Post mailpieces to the United States (air or surface) to calculate costs for the Inbound Letter Post product.<sup>109</sup> Mode of transportation is a significant driver of costs because there are different costs associated with mailpieces that arrive by air versus those that arrive by surface. Library Reference PRC–LR–ACR2018–NP3 does not include the data corresponding to the mode of transportation by which designated operators send

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<sup>107</sup> Notably, this period corresponds with the high-volume holiday shipping season.

<sup>108</sup> A cost segment refers to 1 of 20 groupings of postal costs that are derived from and generally correspond with the postal system of accounts to develop volume-variable and product-specific costs. Each cost segment represents different cost functions of the Postal Service. For example, there are distinct cost segments for costs such as city and rural in-office costs, Postmaster and supervisor costs, and city and rural clerk and carrier costs.

<sup>109</sup> Docket No. RM2018-8, Petition of the United States Postal Service for the Initiation of a Proceeding to Consider Proposed Changes in Analytical Principles (Proposal Five), June 26, 2018, Proposal Five at 5-6, 7-8.

Inbound Letter Post mailpieces to the United States. Therefore, the competitor would not be able to assess the impact of the mode of transportation on the average cost for the domestic processing, transportation, and delivery of Inbound Letter Post mailpieces.

Furthermore, as discussed above, the data at issue do not include weight data, which factors into Inbound Letter Post domestic transportation costs.<sup>110</sup> Therefore, competitors would not be able to determine an average cost per kilogram for Inbound Letter Post. Such data would be necessary to explain differences in costs for letters and flats versus the cost associated with small packets and bulky letters, which would be helpful for competitors to target the Postal Service's customers or specific markets.

Neither the analysis nor the underlying data appearing in Library Reference PRC-LR-ACR2018-NP3 provides useful insights into the Postal Service's strengths or weaknesses relative to any competitors. Accordingly, the Postal Service's allegations concerning how the disclosure of Library Reference PRC-LR-ACR2018-NP3 to competitors would result in harm are wholly conclusory and unsupported. See Postal Service Response at 4-5.

5. The Postal Service has not met its burden of persuasion to show the nature of and extent to which disclosure would be likely to result in harm to the negotiation interests of the Postal Service.

The Postal Service asserts that business partners (such as a designated operator negotiating as a counterparty) or suppliers could formulate an analysis of the sealed information that would inform their decision-making when negotiating rates, to the detriment of the Postal Service. Postal Service Response at 12. As discussed above, the Postal Service does not explain how the aggregated historical data would be useful for a supplier or a business partner in the rapidly evolving market. Additionally, as discussed above, Library Reference PRC-LR-ACR2018-NP3 lacks the specificity necessary for targeting customers or markets.

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<sup>110</sup> See Library Reference USPS-FY18-NP2, December 28, 2018, folder "ICRA Core Files," Excel file "Reports (Unified).xls," tab "CS 14 Staging," row 14.

Additionally, because suppliers would be negotiating with the Postal Service for services associated with the *domestic* processing and delivery of Inbound Letter Post mailpieces, providing country group revenue and volume data would not provide such suppliers with information that harms the Postal Service's negotiation interests. All Inbound Letter Post mailpieces are processed through the same machines, transported by the same trucks and planes, and delivered by the same mail carriers regardless of where the mailpiece originated. Therefore, revenue, volume, cost, and contribution data by country group would not advantage the supplier in its negotiations with the Postal Service. Additionally, Inbound Letter Post represents a small fraction of the total letters, flats, and small packets that the Postal Service processes, transports, and delivers in the United States. Thus, knowing the revenue, volume, cost, and contribution by shape would not advantage the supplier in its negotiations with the Postal Service.

Moreover, the Postal Service acknowledges that there is no commercial harm to disclosing Inbound Letter Post volume and revenue data by country group and by shape to designated operators.<sup>111</sup> Instead, the Postal Service argues that designated operators would be able to estimate the cost of delivering their mailpieces within the United States, and, when negotiating rates with the Postal Service, these designated operators would "push for agreements to keep the rates they would pay as close as possible to the Postal Service's estimated costs." *Id.* The Postal Service claims that at least one designated operator would get a "very precise [cost] estimate[.]" *Id.* at 8 n.12. The Postal Service asserts that it does not have access to similar cost data from designated operators with whom it negotiates and, as a result, disclosing the cost data at issue "compromis[es] the Postal Service's bargaining power in negotiating agreements." *Id.* at 17. However, the Postal Service acknowledges that it has "longstanding and deep familiarity with the postal and communications businesses and

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<sup>111</sup> Postal Service Response at 5 (" . . . 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.").

markets generally, and . . . knowledge of many firms, including competitors, mailers, and suppliers.” Postal Service Response at 11. In addition, detailed financial data, including volume, revenue, cost, and profit data, are available in the form of financial reports for many of the UPU countries.<sup>112</sup> Therefore, it is conceivable that the Postal Service could develop a very precise estimate of the cost incurred to process and deliver mail originating in the United States within many, if not all, of the countries with whom it negotiates.

Furthermore, the alleged commercial harm is not likely to result from disclosure of the cost data at issue. The cost data at issue are aggregated at a level (UPU country group) that would not be useful to designated operators negotiating rates with the Postal Service. The actual per unit cost for a specific country would vary from the average per unit cost for the country group.

Additionally, the Presidential Memorandum instructs the Executive Branch to support efforts to negotiate bilateral or multilateral agreements for prices that meet other policy objectives in addition to negotiating prices that cover costs. See Presidential Memorandum § 2(d). For example, the Presidential Memorandum includes policy objectives to set prices that do not favor foreign mailers over domestic mailers nor favor designated operators over non-designated operators. See *id.* § 2(d)(i)-(ii). Accordingly, in negotiations, the Secretary of State and the Postal Service can rely on the Presidential Memorandum to resist any efforts by a designated operator to set a price that would merely cover costs and would not meet the other policy objectives.

Further, it is unlikely that disclosing the cost data will result in designated operators gaining an advantage in their negotiations with the Postal Service because past NSAs related to Inbound Letter Post include other services, such as tracking or

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<sup>112</sup> See, e.g., An Post, Summary Financial Statements 2016, at 13-14, available at [http://www.anpostmedia.com/Media/An\\_Post\\_2016\\_Regulatory\\_Accounts\\_Summary.pdf](http://www.anpostmedia.com/Media/An_Post_2016_Regulatory_Accounts_Summary.pdf); An Post, Summary Financial Statements 2017, at 17-18, available at [http://www.anpostmedia.com/Media/An\\_Post\\_Regulatory\\_Financial\\_Statements\\_2017.pdf](http://www.anpostmedia.com/Media/An_Post_Regulatory_Financial_Statements_2017.pdf).

registered mail service. The Postal Service has negotiated bilateral agreements with designated operators in the past.<sup>113</sup> Many of these negotiated agreements included services beyond what are included in the Inbound Letter Post product. For example, these previous NSAs included prices for inbound small packets with delivery scanning.<sup>114</sup> Delivery scanning is not part of the Inbound Letter Post product. Therefore, it is likely that NSAs that the Postal Service will negotiate with designated operators will include service beyond those that are included in the Inbound Letter Post product. Accordingly, the cost data at issue would not accurately represent the Postal Service's costs to provide the services included in the NSA.

It is possible for these NSAs to include mail preparation requirements that will lower costs. For example, previous NSAs included provisions that facilitate the efficient processing of inbound small packets, including requiring a specific label and barcode on individual mailpieces, separating such mailpieces from other inbound mail from the country of origin, applying specific barcodes on receptacles, and presorting mailpieces.<sup>115</sup> Therefore, the cost data at issue do not accurately reflect the costs to deliver inbound mailpieces under NSAs that include these or similar mail preparation requirements.

The Postal Service states that it "needs fair flexibility to negotiate contracts with designated postal operators[.]" Postal Service Response at 17. Disclosing the cost data at issue does not impair the Postal Service's flexibility to negotiate with designated

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<sup>113</sup> See, e.g., Dockets Nos. R2017-4, R2017-5, R2017-6, and R2018-2, in which the Postal Service requests Commission approval of NSAs with China Post Group, HongKong Post, Korea Post, and Canada Post, respectively.

<sup>114</sup> Docket No. R2017-4, Notice of United States Postal Service of Type 2 Rate Adjustment, and Notice of Filing Functionally Equivalent Agreement, February 9, 2017, Attachment 2 at 11 (China Post NSA); Docket No. R2017-5, Notice of United States Postal Service of Type 2 Rate Adjustment, and Notice of Filing Functionally Equivalent Agreement, and Notice of Application for Non-Public Treatment, February 10, 2017, Attachment 2 at 9 (HongKong Post NSA); Docket No. R2017-6, Notice of United States Postal Service of Type 2 Rate Adjustment, and Notice of Filing Functionally Equivalent Agreement, and Notice of Application for Non-Public Treatment, February 13, 2017, Attachment 2 at 9 (Korea Post NSA).

<sup>115</sup> China Post NSA at 14-16, 19-22; HongKong Post NSA at 9, 11-13, 15; Korea Post NSA at 11-12, 15.

operators. If an NSA includes additional services or specific mail preparation requirements such as described above, any advantage designated operators could gain from the cost data at issue would be negated. Therefore, providing public information (total Inbound Letter Post revenue, volume, cost, and contribution, by country group and by shape) does not provide suppliers or business partners with data that can be used to the Postal Service's detriment during negotiations.

6. The Postal Service has not met its burden of persuasion to show the nature of and extent to which disclosure would be likely to result in harm to the competitive or negotiation interests of the Postal Service's business partners.

The Application generally alleges that disclosure of the sealed information would result in harm to competitive and negotiation interests of the Postal Service's business partners. See Application at 15, 22-25, 27-30. Pursuant to 39 C.F.R. § 3007.201(b)(2), the application for non-public treatment must identify any person other than the submitter that has a proprietary interest in the non-public materials. The Application identifies two entities with an interest in Library Reference USPS–FY18–NP9, the source of the data used by the Commission to develop Library Reference PRC–LR–ACR2018–NP3: Canada Post and Federal Express Corporation (FedEx). As explained in Order No. 5055, such data were excluded from the development of Library Reference PRC–LR–ACR2018–NP3. Order No. 5055 at 10 n.31. The Postal Service does not assert that any other entities have a proprietary interest in any of the data appearing in Library Reference PRC–LR–ACR2018–NP3. Nor does the Postal Service not contest the application of the standard appearing in 39 C.F.R. § 3007.104(a). *Compare id.* at 9, *with* Postal Service Response at 2-3.

The Postal Service separately alleges that disclosure of Inbound Letter Post revenue data aggregated by UPU country group and by shape would result in commercial harm to at least one foreign postal operator. Application at 27-30. The Postal Service Response does not amplify these allegations other than to reference the Postal Service's application for non-public treatment filed in Docket No. ACR2017.<sup>116</sup> The Postal Service characterizes its Docket No. ACR2017 Application as detailing the commercial harm that would result for at least one foreign postal operator. Postal Service Response at 6 n.8 (citing Docket No. ACR2017 Application at 2).

However, the Postal Service has not explained in Docket Nos. ACR2017 or ACR2018 how the aggregated historical data would be used to the detriment of the foreign postal operator. With respect to the cost data specifically, which represent U.S. processing, transporting, and delivery costs, rather than international processing and transportation costs, the Postal Service does not explain how disclosure would result in a commercial harm to any foreign postal operator. Nor does the Postal Service explain how a competitor, supplier, or business partner would be able to identify opportunities to divert business or extract more favorable rates from any foreign postal operator based on the revenue and volume data. Given that the revenue and volume data are provided at the country group level, a competitor or supplier would only be able to discern the maximum revenue collected and volume sent from a foreign postal operator in past years under prior terminal dues. As discussed above, the Postal Service's arguments concerning targeting of customers or markets are unpersuasive. The data do not reveal which cities, types of customers, or seasons a competitor could target to lure away business from any foreign postal operator. Therefore, the Commission cannot conclude

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<sup>116</sup> Postal Service Response at 6 n.8 (citing Docket No. ACR2017, United States Postal Service Notice of Filing Nonpublic Folder USPS-FY17-NP40 and Application for Nonpublic Treatment, February 14, 2018, at 2 (Docket No. ACR2017 Application)).

that any person other than the Postal Service has a proprietary interest in any of the data at issue.<sup>117</sup>

Additionally, the Commission observes that no designated operator has expressed opposition to unsealing the aggregated Inbound Letter Post data at issue.<sup>118</sup> Before filing its FY 2018 ACR, the Postal Service notified designated operators through the UPU that, pursuant to U.S. law, it was required to file certain information about its international mail revenues, costs, and volumes to the Commission and that designated operators could “address any confidentiality concerns directly with the Postal Regulatory Commission.”<sup>119</sup> This notification cited 39 C.F.R. part 3007 as the regulations applicable to the treatment of material filed under seal. *Id.* at 2. This UPU notification and its specific instruction that designated operators address any confidentiality concerns directly with the Commission indicate that designated operators had adequate notice of this proceeding and were provided the information needed to participate in this proceeding. Consistent with its prior rulings, the Commission does not rest its determination to unseal Library Reference PRC–LR–ACR2018–NP3 on the absence of a filing from a foreign postal operator. See Order No. 4451 at 40-41; Order No. 4707 at 11-12.

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<sup>117</sup> If the Commission determines any person other than the Postal Service has a proprietary interest in the materials, then the standard for unsealing the materials would “balance the interests of the parties consistent with the analysis undertaken by a federal court when applying the protective conditions appearing in Federal Rule of Civil Procedure 26(c).” 39 C.F.R. § 3007.104(b). Nothing in this record indicates that unsealing would annoy, embarrass, oppress, or unduly burden a foreign postal operator. See Fed. R. Civ. P. 26(c)(1) (“The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . .”). The strong interests of the parties supporting disclosure outweigh any potential third-party interest, in addition to the conclusory harms alleged by the Postal Service. Thus, applying the standard appearing in 39 C.F.R. § 3007.104(b) would not alter the Commission’s determination to unseal Library Reference PRC–LR–ACR2018–NP3.

<sup>118</sup> In some instances, third parties have relayed concerns to the Postal Service, which in turn has formally notified the Commission of such concerns. See, e.g., Docket No. R2018-1 Canada Post Letter.

<sup>119</sup> UPU IB Circular No. 166, November 19, 2018, at 2. This notification also identified Docket No. ACR2018 as the relevant proceeding. *Id.* at 1.

## VII. REVIEW OF PRECEDENT REFERENCED BY THE POSTAL SERVICE

The Postal Service argues that the Commission's determination to unseal Library Reference PRC–LR–ACR2018–NP3 constitutes an arbitrary and capricious departure from judicial precedent and past Commission practice. Postal Service Response at 18. Except for the issues raised in the Docket No. ACR2017 proceeding relating to the unsealing of FY 2016 revenue data, aggregated by country group and shape,<sup>120</sup> the unsealing of the analysis and data at issue before the Commission is a matter of first impression. Moreover, the application of the balancing test is necessarily fact-specific. Below, the Commission addresses the specific prior statements raised by the Postal Service.

### A. Judicial Precedent

With respect to its position that unsealing Library Reference PRC–LR–ACR2018–NP3 would conflict with judicial precedent, the Postal Service refers to two cases. Postal Service Response at 3 n.5 and 19 n.29.

First, the Postal Service references the U.S. Air Force's erroneous decision to release vendor pricing Contractor Line-items (CLINs) contained in a contract for aircraft maintenance and repairs.<sup>121</sup> In *McDonnell Douglas Corp.*, the prime contractor argued that the release of vendor pricing CLINs, which are composed of the costs of materials and services that the prime contractor procures from other vendors, would enable its competitors to derive the percentage by which the contractor marks up the bids it receives from subcontractors. 375 F.3d at 1190. The Air Force reasoned that release of the vendor pricing CLINs would not likely result in commercial harm to the prime contractor because it was “‘entirely possible,’ indeed ‘not uncommon,’ for a subcontractor to ‘quote different prices ... to different prime contractors.’” *Id.* The Air

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<sup>120</sup> See Order No. 4707; Order No. 4451.

<sup>121</sup> See Postal Service Response at 19 n.29 (citing *McDonnell Douglas Corp. v. U.S. Dep't of the Air Force*, 375 F.3d 1182, 1190-91 (D.C. Cir. 2004)).

Force did not provide an explanation supporting these “rather casual observations” with actual evidence, economic theory, or claims of special knowledge based upon its experience with the government contracting industry. See *id.* at 1190-91.

While the Postal Service has made generalized allegations of commercial harm with respect to the disclosure of Library Reference PRC–LR–ACR2018–NP3, the Commission has provided a detailed response based upon its knowledge and expertise, which is distinguishable from *McDonnell Douglas Corp.* The Commission, and its predecessor agency, have decades of experience specific to international mail products. The Commission is among the agencies consulted by the Secretary of State concerning U.S. foreign policy relating to international mail.<sup>122</sup> As discussed in section VI.B.5, *supra*, the Commission reviews rates for international mail products both pre- and post-implementation. The Commission’s authority to prescribe the content of the Postal Service’s reports and to determine the non-public status of any information that the Postal Service files under seal encompasses international mail products. See 39 U.S.C. §§ 504(g), 3652(e)-(f).

Additionally, *McDonnell Douglas Corp.* does not repudiate the disclosure of a single firm’s disaggregated cost data in all cases. Notably, the Air Force’s decision to disclose Over and Above Work CLINs was affirmed because the contractor failed to carry its burden of showing that such disclosure would enable a competitor to derive the

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<sup>122</sup> See 39 U.S.C. §§ 407(b)-(c). The Secretary of State has “primary authority for the conduct of foreign policy with respect to international postal services and international delivery services, including the determination of United States positions and the conduct of United States participation in negotiations with foreign governments and international bodies.” *Id.* § 407(b)(2). In exercising this authority, the Secretary of State “shall coordinate with other agencies as appropriate, and in particular, shall give full consideration to the authority vested by law or Executive order in the Postal Regulatory Commission . . . .” *Id.* § 407(b)(2)(A). Before concluding any treaty, convention, or amendment establishing a rate or classification for an international product classified as market dominant, “the Secretary of State shall request the Postal Regulatory Commission to submit its views on whether such rate or classification is consistent with the standards and criteria established by the Commission under section 3622.” *Id.* § 407(c)(1). Generally, unless there are foreign policy or national security interests, the Secretary of State shall ensure that the treaty, convention, or amendment is consistent with the Commission’s views. *Id.* § 407(c)(2). Additionally, the Chairman of the Commission is among the persons to whom the Presidential Memorandum is specifically addressed. See Presidential Memorandum.

contractor's Labor Pricing Factor using publicly available information. *McDonnell Douglas Corp.*, 375 F.3d at 1192. This aspect of the case is similar to the inquiry pending before the Commission: the failure of the proponent of sealing (the Postal Service) to show that the alleged harm would likely result from disclosure.

Second, the Postal Service references that the Court of Federal Claims granted a protective order concerning an Intellectual Property Valuation Report prepared by a provider of concession services in Yosemite National Park.<sup>123</sup> That report contained the provider's operating margin for 2005 through 2009 along with a detailed listing of revenues by location and operational category. *DNC Parks & Resorts*, 127 Fed. Cl. at 440. Accordingly, the Court of Federal Claims found that this report could be used by a competitor to prepare bids for future concession contracts within Yosemite National Park. *Id.* In contrast with the rather localized geographic nature of that case, the analysis and data before the Commission are aggregated at the country group level rather than operator-specific. Moreover, the Court of Federal Claims did not reference any reason to believe that the relevant industry was undergoing rapid change that would render the data at issue stale for use by a competitor. *See generally id.*

#### B. Commission Precedent

With respect to its position that unsealing Library Reference PRC-LR-ACR2018-NP3 would conflict with past Commission and Postal Rate Commission treatment of inbound international mail data, the Postal Service raises four arguments. Postal Service Response at 18-24.

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<sup>123</sup> See Postal Service Response at 3 n.5 and 19 n.29 (citing *DNC Parks & Resorts at Yosemite, Inc. v. United States*, 127 Fed. Cl. 435, 440 (2016)).

First, the Postal Service asserts that the Commission has not reconciled Order No. 5055 with prior statements that accorded non-public treatment to operator-specific Inbound Letter Post revenue data.<sup>124</sup> It argues that the Commission fails to recognize that it would be disclosing operator-specific revenue data and instead relies “solely on the mistaken premise that the disclosure in this case is not specific to at least one foreign postal operator.” *Id.* at 19. However, as discussed above, the Commission finds disclosing aggregated Inbound Letter Post volume and revenue data by country group and by shape does not reveal operator-specific data. Moreover, Order No. 4215 denied the Docket No. R2018-1 Motion to Unseal due to failure to adhere to the Commission’s rules and encouraged the Postal Service to publicly file Inbound Letter Post revenues aggregated by country group and shape. Order No. 4215 at 34-36. Order No. 4409 recognized that aggregation of Inbound Letter Post revenue by country group and shape would mask operator-specific data. Order No. 4409 at 7. Accordingly, unsealing Library Reference PRC–LR–ACR2018–NP3 is consistent with Order No. 4409 and Order No. 4215. See *id.* (citing Order No. 4215 at 34).

Second, the Postal Service contends that the Commission’s preliminary determination to unseal the data at issue conflicts with three previous Commission orders recognizing the commercially sensitive nature of similar inbound mail data.<sup>125</sup> Past Commission orders recognizing the commercial sensitivity of more detailed inbound mail data do not preclude the Commission from unsealing Library Reference PRC–LR–ACR2018–NP3. Aside from the Commission’s prior ruling related to FY 2016 Inbound Letter Post revenue data, aggregated by country group and by shape,<sup>126</sup> the question of whether Inbound Letter Post volume, revenue, cost, and contribution data,

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<sup>124</sup> Postal Service Response at 19 n.28 (citing Order No. 4409 at 7).

<sup>125</sup> Postal Service Response at 19 n.30 (citing Docket No. RM2016-10, Order Granting Motion for Access to Non-Public Materials Filed Under Seal, October 11, 2016 (Order No. 3560)); Order No. 3427; Docket No. ACR2015, Order Granting Revised Second Motion for Access, January 22, 2016 (Order No. 3044).

<sup>126</sup> See Order No. 4707; Order No. 4451.

aggregated by country group and shape, is a matter of first impression. Moreover, as discussed above,<sup>127</sup> the issue of whether the analysis and data in Library Reference PRC–LR–ACR2018–NP3 is commercially sensitive under 39 U.S.C. § 410(c)(2) is only the first step of the inquiry before the Commission. The Commission must 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[,]” under 39 U.S.C. § 504(g)(3)(A). Acknowledging that some inbound mail data are commercially sensitive does not preclude the instant determination that the public interest in maintaining the financial transparency of a government establishment competing in commercial markets outweighs the nature and extent of the likely commercial injury to the Postal Service if Library Reference PRC–LR–ACR2018–NP3 is unsealed. The following discussion addresses in detail each of the three orders referenced by the Postal Service.

With respect to Order No. 3427, the Commission’s denial of a request from FedEx for “high-level summaries” of the inbound and outbound “volume, cost, and revenue data for each proposed rate schedule or sub-schedule” did not rest on the commercially sensitive nature of these data. Order No. 3427 at 2. The Commission denied FedEx’s request to compel the Postal Service to disclose data because the regulations applicable to IM proceedings do not permit interested parties to seek discovery, not because of the alleged commercial nature of the data requested. *Id.* at 7. Because the summaries requested by FedEx had not been filed in the IM proceeding, no participant had lodged a non-public application nor challenged the non-public status of those summaries. *Id.* at 7 n.8.

With respect to Order No. 3044, the Commission granted a request from UPS seeking non-public access to disaggregated Inbound Letter Post data. Order No. 3044 at 3. The Commission noted that although no participant challenged the non-public

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<sup>127</sup> See section VI.C.1, *supra*.

status of the disaggregated data at issue in that proceeding, UPS requested that certain persons be given access to the disaggregated data, subject to protective conditions for limited purposes.<sup>128</sup> The Postal Service opposed that request and attached letters from a counterparty to an NSA and from Canada Post also expressing opposition. Order No. 3044 at 2-3 (internal citation omitted). Subsequently, UPS filed a notice stating that it had conferred with the Postal Service and had reached an agreement to limit the scope of the request to a single library reference. *Id.* at 3 (internal citation omitted). Because no party opposed granting access for the remaining library reference, the Commission granted UPS access to that document. *Id.*

With respect to Order No. 3560, the Commission resolved a contested access request concerning Inbound Letter Post data that were more detailed and more disaggregated in nature than the analysis and data in Library Reference PRC–LR–ACR2018–NP3. In that order, the Commission observed that UPS requested access to Library Reference USPS–RM2016–10/NP1, which included detailed data associated with several cost segments and identified data for Canada versus the rest of the world.<sup>129</sup> The parties did not dispute that the materials requested contain commercially sensitive information and that the materials were designated by the Postal Service as non-public; instead, UPS requested that certain persons be given access to the

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<sup>128</sup> *Id.* at 2 n.3 (internal citation omitted). The international data sought in Docket No. ACR2015 was the International Cost and Revenue Analysis (ICRA) report, which includes detailed data specific to designated operators and counterparties to NSAs as well as cost data disaggregated by cost segment, in contrast with the highly aggregated data appearing in Library Reference PRC–LR–ACR2018–NP3. See Docket No. ACR2015, United Parcel Service, Inc.’s Second Motion for Access, January 11, 2016, at 2; Docket No. ACR2015, United States Postal Service FY 2015 Annual Compliance Report, December 29, 2015, Attachment Two at 9, 12, 15-21.

<sup>129</sup> Order No. 3560 at 1 (internal citation omitted); see Docket No. RM2016-10, Library Reference PRC–LR–RM2016-10/NP1, August 22, 2016, Excel file “Prop.Two.Impact.xlsx.” The international data sought in Docket No. RM2016-10 included ICRA report material of the same type provided in Docket No. ACR2015 and Postal Service analysis of that material. See Docket No. RM2016-10, United Parcel Service, Inc.’s Motion for Access, September 23, 2016, at 1; Docket No. RM2016-10, Notice of Filing of USPS-RM2016-10/NP1 and Application for Nonpublic Treatment, August 22, 2016, at 1. Thus, the level of detail and disaggregation in Docket No. RM2016-10 was far more refined than the highly aggregated data appearing in Library Reference PRC–LR–ACR2018–NP3.

disaggregated data, subject to protective conditions for limited purposes. Order No. 3560 at 1 (internal citation omitted). The Postal Service opposed that request and attached a letter from Canada Post also expressing opposition. *Id.* at 2-3 (internal citations omitted). In balancing the interests of the parties in that proceeding, the Commission granted access on the condition that parties execute an indemnification agreement regarding inadvertent disclosure. *Id.* at 4-5.

The Commission's standard for granting access to non-public materials balances the need of the requesting party to have access so as to participate effectively in a Commission proceeding against the Postal Service or third party's interest in protecting proprietary information, consistent with Fed. R. Civ. P. 26(c).<sup>130</sup> This standard for granting access differs from the standard for determining the appropriate degree of confidentiality (public disclosure). *Compare* 39 U.S.C. § 504(g)(3)(B), *and* 39 C.F.R. § 3007.301(e), *with* 39 U.S.C. § 504(g)(3)(A), *and* 39 C.F.R. § 3007.104.

Third, the Postal Service contends that the preliminary determination to unseal the data at issue is inconsistent with Commission treatment of ICRA report data in recent annual compliance review proceedings. Postal Service Response at 20-21. The Postal Service asserts that because the Commission filed its corrections to the ICRA report under seal, the Commission accepted the Postal Service's rationale for non-public treatment for that data. *See id.* Additionally, the Postal Service states that the ICRA reports filed with the Postal Service's ACRs prior to FY 2017 aggregated inbound international mail data by target system and transition system countries. *Id.* at 21. The Postal Service claims that because the Commission previously filed international mail data, at a higher level of aggregation, under seal, that now determining to unseal the data at issue represents an arbitrary departure. *Id.*

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<sup>130</sup> Order No. 3560 at 4 n.6. When Order No. 3560 was issued, this standard was codified at 39 C.F.R. § 3007.42. Effective August 2, 2018, the Commission recodified this standard at 39 C.F.R. § 3007.301(e). 83 Fed. Reg. 31,258, 31,285 (July 3, 2018) (to be codified at 39 C.F.R. § 3007.301(e)).

However, the Postal Service's argument misconstrues 39 C.F.R. part 3007. Upon receiving an application for non-public treatment, the Commission preliminarily treats those designated materials, and the information contained therein, as non-public.<sup>131</sup> The Commission's long-standing practice is that it does not *accept* any rationale for non-public treatment given in the application for non-public treatment unless the Commission makes a determination of non-public status, which may occur in response to a motion by an interested person or *sua sponte*. See Order No. 5055 at 8 (citing Order No. 4679 at 11).

Because the Commission did not make a determination of non-public status of the ICRA report data under its own initiative or in response to a motion for early termination of non-public status in the cited ACR proceedings, the Commission has not accepted any of the Postal Service's rationales for non-public treatment of the ICRA report data.<sup>132</sup> Accordingly, unsealing the data at issue is consistent with the Commission's treatment of ICRA report data in Docket Nos. ACR2015 and ACR2016.<sup>133</sup>

Fourth, the Postal Service contends that Order No. 5055 departs from longstanding Postal Rate Commission treatment of similar international mail data in Docket No. IM99-1 and in a FOIA matter. Postal Service Response at 21-24.

Specifically, the Postal Service notes that, in Docket No. IM99-1, the Postal Rate Commission denied UPS's request for access to international cost, volume, and revenue data. *Id.* at 21-22. However, the Postal Rate Commission did not deny UPS's request for access based on the nature of the information to which it requested

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<sup>131</sup> *Id.* § 3007.102(a). This is consistent with the Commission's long-standing practice under former § 3007.23. See Order No. 5055 at 8 (citing Order No. 4679 at 11).

<sup>132</sup> Because the Commission did not make a determination of non-public status of the ICRA data, it filed a non-public annex with its corrections to the Postal Service's ICRA data under seal, which is consistent with 39 C.F.R. § 3007.102.

<sup>133</sup> Additionally, the data appearing in the ICRA report are more disaggregated than the highly aggregated data appearing in Library Reference PRC-LR-ACR2018-NP3.

access.<sup>134</sup> Instead, the Postal Rate Commission denied the request because the motion requested that the “Commission fashion an ad hoc disclosure policy with respect to data elicited under § 3663,” which the Postal Rate Commission declined to do. Order No. 1245 at 4.

Moreover, the Postal Service fails to acknowledge that the Postal Rate Commission operated under a different statutory and regulatory scheme than the Postal Regulatory Commission. As discussed above, the PAEA provided for increased transparency and accountability and enhanced the authority and responsibilities of the Commission. Significantly, as part of its mission to increase transparency, the PAEA grants the Commission authority to disclose materials identified as non-public by the Postal Service. 39 U.S.C. § 504(g)(3).

Additionally, the PAEA requires the Postal Service and the Commission to file annual reports related to the compliance of the Postal Service’s products. *Id.* §§ 3652, 3653. The Senate report noted that the annual reporting requirements would ensure that Congress, the Commission, and all interested participants would have sufficient information to evaluate the compliance. S. Rep. No. 108-318 at 19-20. The PAEA also requires the Commission to provide an opportunity for postal stakeholders to comment on the Postal Service’s ACR. 39 U.S.C. § 3653(a). Accordingly, an essential function of the annual reporting requirements is to inform the public and to invite comments on whether the Postal Service is complying with the applicable statutory and regulatory provisions.

In contrast, in Order No. 1245, the Postal Rate Commission observed that UPS requested access to data in the context of the requirement that the Postal Rate Commission submit a report on international mail to Congress.<sup>135</sup> The Postal Rate Commission noted that “[i]n this context, [it] is not functioning in its usual role as a

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<sup>134</sup> See Docket No. IM99-1, Order Denying United Parcel Service Motion to Provide Public Access to International Mail Data, May 21, 1999, at 3-4 (Order No. 1245).

<sup>135</sup> Order No. 1245 at 3-4; see Division A—Omnibus Consolidated Appropriations, Pub. L. 105-277, § 101(h), 112 Stat. 2681, 527 (1998) (codified in former 39 U.S.C. § 3663).

quasi-judicial body applying the record hearing procedures of the [Administrative Procedure Act (APA)].” Order No. 1245 at 4. This meant that Congress did not impose the public participation procedures of the APA (public hearing, discovery, or cross-examination) on the international mail reporting process. *Id.* In contrast to the annual reporting requirements under the PAEA, it was not an essential function of the international mail report to inform the public or to invite public comment.

With respect to the 1999 FOIA matter, the Postal Service references the Postal Rate Commission’s prior statements concerning the intent of 39 U.S.C. § 410(c)(2).<sup>136</sup> As discussed above, the application of 39 U.S.C. § 410(c)(2) is undisputed. Instead, the pertinent inquiry pending before the Commission is whether the nature and extent of the likely commercial injury to the Postal Service would outweigh the public interest in maintaining the financial transparency of a government establishment competing in commercial markets. 39 U.S.C. § 504(g)(3)(A); see 39 C.F.R. § 3007.104(a). As the Postal Service concedes, the market for inbound international mail has evolved considerably over the past 20 years. See Postal Service Response at 22. Therefore, the Postal Rate Commission’s fact-specific determination concerning whether to withhold data concerning outbound international mail under the FOIA in 1999 would not control the pending inquiry.

Additionally, the Postal Service references the Postal Rate Commission’s prior statement concerning the indirect disclosure of *outbound* country-specific data through the disclosure of country group data.<sup>137</sup> In its FOIA decision letter, the Postal Rate Commission explained that a table presented outbound volume and revenue data separately for Canada and Mexico, but aggregated the data for other countries in two groups (the European Bilateral Group and all remaining UPU countries). July 28, 1999 FOIA Letter at 8. Accordingly, the Postal Rate Commission provided an unredacted

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<sup>136</sup> Postal Service Response at 22 (citing Letter from Margaret P. Crenshaw, Postal Rate Commission Secretary, to Katherine P. Muth, July 28, 1999, at 3 (July 28, 1999 FOIA Letter)).

<sup>137</sup> Postal Service Response at 23 (citing July 28, 1999 FOIA Letter at 8).

version of country groups' data, "except where redaction is needed to prevent country-specific data from being disclosed indirectly." *Id.* As the Postal Rate Commission explained, "[f]or [International Surface Air Lift] and [International Priority Airmail], country-specific amounts can be identified as residual amounts when group figures are subtracted from product totals available elsewhere in the report." *Id.* (internal marks omitted).

The Postal Service argues that this reasoning would apply in the instant proceeding, on the basis that country-specific information can be inferred for at least one foreign postal operator. Postal Service Response at 23. However, the situations are not comparable. The Postal Rate Commission was preventing the requester from subverting the decision to redact the country-specific data by subtracting the group figures from the publicly available total figures.<sup>138</sup> By contrast, in the instant proceeding, the Postal Service's argument rests on its unsupported conclusion that an actor's "assumptions" concerning aggregated historical data would be sufficiently valuable to its business decisions that would result in commercial harm to the Postal Service. Postal Service Response at 8.

#### VIII. ADMINISTRATIVE ACTIONS

The Postal Service requests that any determination by the Commission to unseal Library Reference PRC-LR-ACR2018-NP3, in whole or in part, be made "effective only following some reasonable period of time after its issuance (e.g., 20 days)." Postal Service Response at 24. The Postal Service states that this would allow it time to consider the final order and, if appropriate, seek a stay from the Commission pending appeal. *Id.* The Postal Service states that denial of its request would risk "irreparable harm to the Postal Service through immediate public disclosure that later could not be undone." *Id.* No participant has opposed this request. Although the Commission

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<sup>138</sup> See, e.g., *McDonnell Douglas Corp.*, 375 F.3d at 1188 (rejecting the Air Force's decision to release nominal option year prices because the index applied to determine the final option price in each of the eight option years was publicly available).

disagrees that the Postal Service has shown that commercial harm would result from disclosure, the Commission acknowledges that disclosure is irreversible. Accordingly, the Commission grants the Postal Service's unopposed request.

## IX. CONCLUSION

For the above reasons, the Commission determines that it is not appropriate to accord non-public treatment to the data and analysis appearing in Library Reference PRC-LR-ACR2018-NP3. The Commission finds that the Postal Service did not meet its burden of persuasion to show that the data should be withheld from the public. The public interest in maintaining the financial transparency of the Postal Service, a government establishment operating in commercial markets, outweighs the nature and extent of any likely commercial harm that may result from public disclosure of the aggregated Inbound Letter Post data and analysis provided in Library Reference PRC-LR-ACR2018-NP3.

Specifically, the Commission finds that there is substantial public interest in maintaining the financial transparency of the Postal Service. Considering the extent and nature of the discussion surrounding the Inbound Letter Post product and the current terminal dues system, the Commission finds that disclosure of the aggregated Inbound Letter Post data and analysis will substantially further the public interest in maintaining the financial transparency of the Postal Service. Additionally, after considering the commercial harms identified in the Application and the additional rationale provided in the Postal Service Response, the Commission finds that it is unlikely that disclosing Library Reference PRC-LR-ACR2018-NP3 will result in the commercial harms identified by the Postal Service. The public has a legitimate interest in the information in question. The Postal Service's unsupported allegations of commercial harm are not enough to justify concealing this information from the public.

Library Reference PRC-LR-ACR2018-NP3 will be unsealed via posting on the Commission's website (<http://www.prc.gov>) as a public library reference on August 1, 2019.

X. ORDERING PARAGRAPH

*It is ordered:*

Library Reference PRC–LR–ACR2018–NP3 will be unsealed via posting on the Commission’s website (<http://www.prc.gov>) as a public library reference on August 1, 2019.

By the Commission.

Ruth Ann Abrams  
Acting Secretary

Commissioner Michael Kubayanda and Vice Chairman Nanci E. Langley concurring in part and dissenting in part.

CONCURRENCE IN PART, DISSENT IN PART OF COMMISSIONER MICHAEL  
KUBAYANDA AND VICE CHAIRMAN NANJI E. LANGLEY

We concur with the majority's decision to unseal the Commission's analysis of revenue and volume data aggregated by country group and shape. We dissent, however, from the portion of the order that unseals cost and cost contribution data.

The Commission's rules rightly place a burden on the Postal Service to demonstrate why information should remain under seal. When requested, the Commission uses a balancing test to determine whether arguably sensitive information should remain under seal by weighing the risk of commercial harm against the public interest in financial transparency of a government entity that competes in commercial markets. Given the acknowledged e-commerce market distortions related to this product, and the resulting intense focus from businesses and two branches of the federal government, the benefits to shining additional light on this issue are clear.

*Concurrence.* Previously in Docket No. ACR2017, the Commission appropriately ruled that aggregated Inbound Letter Post revenue data contained in the Postal Service's response to Chairman's Information Request No. 15 should be unsealed.<sup>1</sup> The Commission determined that the public interest in maintaining the financial transparency of a government entity competing in commercial markets outweighed the nature and extent of any commercial harm likely to result from public disclosure of such data.

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<sup>1</sup> Docket No. ACR2017, Determination to Unseal the Postal Service's Response to Chairman's Information Request No. 15, March 28, 2018, at 2, 44 (Order No. 4451).

In this docket, as in Docket No. ACR2017, the Postal Service's assertions of commercial harm again do not meet its burden of proving that such harms outweigh the clear public interest in viewing and analyzing certain data. In particular, the Commission's analysis of volume and revenue data provides transparency for terminal dues and trade issues that are of concern to a broad and growing group of stakeholders and observers. It is relevant that private sector companies, including Postal Service competitors, report international volume and revenue data at varying levels of aggregation.

The United States is moving to extricate itself from the terminal dues system as it exists today. While this fact partially mitigates future commercial harms to the Postal Service from disclosing revenue data based on a changing pricing regime, it is important to remember that the data contained in Library Reference PRC-LR-ACR2018-NP3 goes well beyond the revenue-only data that the Commission determined to unseal in the Postal Service's response to Chairman's Information Request No. 15.

*Dissent.* For a subset of the data at issue, the calculus is different. For cost and contribution data by shape and Universal Postal Union (UPU) country group, the potential harms are clear and more acute. This data could be combined with known or readily ascertainable information about the structure of the international mail and parcel markets to model the Postal Service's costs in serving particular large markets. This would undermine the Postal Service's ability to conduct arm's length negotiations effectively, and could have the unintended result of weakening the Postal Service's competitive position relative to foreign posts and other entities.

Releasing this data could damage the Postal Service as a competitor for international business, as a service provider negotiating with current and potential customers, and as a customer purchasing services. In some cases, an entity could gain an advantage from all three perspectives: as a competitor, customer, and contractor to the Postal Service.<sup>2</sup> The path to potential commercial harm involves a few predictable steps:

- For large markets, the country's share of UPU country group volume can be estimated with a reasonable degree of accuracy by Postal Service competitors, customers, and contractors. They can do so by using proprietary and non-proprietary data on international mail and parcel volume, global trade flows, and other economic data.
- Releasing cost data by country group and shape would allow competitors, customers, and contractors to build accurate cost models of e-commerce packets coming from these largest markets to the Postal Service.
- These models would give competitors, customers, and contractors additional negotiating leverage against the Postal Service.
- The change in leverage would be analogous to that of an employer-employee salary negotiation. If an employer knows an interviewee's previous salary, or if a potential employee knows their predecessor's salary, this clearly changes the balance of power in the negotiation. While both parties would still negotiate the best terms possible, few would disagree that the party armed with salary information is likely to receive a better deal than they would without the additional data.

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<sup>2</sup> The e-commerce and logistics markets appear to be attracting entry and investment by vertically integrated organizations. In theory a vertically integrated organization that supplies inputs to its downstream competitors could have an incentive to leverage its networks and competitive data in order to make its own end to end services more attractive than those of its competitors. This is another reason for the Commission to exercise caution with this data.

- In the case of the Postal Service, if a foreign postal operator knows the cost to the Postal Service of Inbound Letter Post, including the average cost of its UPU country group, it can use this information for negotiating leverage. On the other hand, the Postal Service does not know the cost the foreign postal operator incurs, and is at a relative disadvantage. Moreover, the Postal Service's competitors could prepare stronger offers by knowing the limit of the Postal Service's bargaining power, consistently undercutting the Postal Service and reducing its revenues. The likely outcome is the Postal Service reaching fewer, weaker, more costly, and less profitable deals than it would without the unsealing of this data.

In this sector of the economy, it does not appear that any commercial organization publishes such disaggregated unit cost data about its products or services, and for good reason. In short order, third parties, including foreign posts and other Postal Service competitors, should be able to use this data to calculate the Postal Service's costs in serving the largest and fast growing e-commerce markets and strategize to undercut the Postal Service in pricing and service offerings.

Many parties – including foreign entities – doing business with the Postal Service could use the cost and contribution data by shape and country group to obtain undue leverage in negotiations with the Postal Service. As the United States prepares to exit the terminal dues system and possibly leave the UPU, the Postal Service faces a multitude of bilateral negotiations with foreign governments as well as ongoing dealings with domestic and foreign businesses, all of whom would be armed with this newly public cost and contribution data. The Postal Service notes that the information balance would be asymmetrical, as its foreign counterparts do not make this information publicly available. Depending on the UPU country group being analyzed, it appears to be highly feasible for competitors and counterparties to use this newly public data to estimate the

commercially sensitive costs for the Postal Service's most lucrative individual markets, once the Commission makes this cost data public.

In the coming months and years, a worst case scenario based on the release of this data could undermine specific aspects and general pillars of postal policy, including the goal that the Postal Service operate in a businesslike manner and the market dominant/competitive products split devised by Congress in the Postal Accountability and Enhancement Act. In addition, making this cost data public could inadvertently light the path for arbitrage among different country groups with different costs. Such arbitrage distorts markets and undermines the Postal Service's finances.

The Commission and other parties have worked hard to identify and address postal market distortions harmful to America's interests. It is surely not the intention of the Commission in this proceeding to allow possible new distortions to emerge while providing foreign entities with negotiating leverage against an establishment of the United States government, and we should maintain reasonable safeguards against such possibilities, according to the policies currently in place.

With Inbound Letter Post set to move from the market dominant to the competitive category with Commission approval,<sup>3</sup> it is instructive – if not determinative – to examine the type of data that is publicly available on competitive products. For Priority Mail, which includes flat-shaped and parcel-shaped pieces, unit cost data is only available for the domestic product as a whole. For Inbound Letter Post, the equivalent level of transparency and aggregation would be to make public unit cost data for the product as a whole, not by shape or country group. This data for Inbound Letter Post is already available in the public Cost and Revenue Analysis.

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<sup>3</sup> Docket No. MC2019-17, Order Conditionally Approving Transfer, January 9, 2019 (Order No. 4980). See also Docket No. CP2019-155, Notice of the United States Postal Service of Rates Not of General Applicability for Inbound E-Format Letter Post, and Application for Non-Public Treatment, May 20, 2019.

It is important to note that the usefulness of market data is not necessarily extinguished by its circulation and reuse. In contrast to the likely changes in revenue, at this time there is no firm reason to believe that unit costs for Inbound Letter Post will change appreciably regardless of the pricing regime in effect in the future. Once the damage is done to the Postal Service in this sphere, it does not appear that there would be any way to put the genie back in the bottle. Notably, the majority of commenters seeking transparency in this matter requested the unsealing of Inbound Letter Post volume and/or revenue data only. See IHA Response at 1; NAM Response at 1; Chamber Response at 1; and LI Response at 1.

*Conclusion.* The additional benefits from transparency do not outweigh these acute harms with respect to cost and contribution data. Unsealing revenue and volume data only would provide interested parties with ample information about the scope of the applicable market, and the Commission can assess and publicly report on whether this product covers its costs without releasing cost and contribution data. For information that remains under seal, it is important to remember that interested parties may gain access to this information, but under protective conditions. The established procedure for information under seal provides the appropriate balance for cost and contribution data in this competitive market.

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