MOTION OF THE UNITED STATES POSTAL SERVICE TO STAY ORDER NO. 5151
PENDING JUDICIAL REVIEW
(July 29, 2019)

INTRODUCTION

In Order No. 5151, the Commission affirmed its preliminary determination in Order No. 5055 to unseal the materials filed in non-public Library Reference PRC-LR-ACR2018-NP3 (Library Reference NP3). Those materials consist of the Commission's report and supporting materials that analyze the Inbound Letter Post data that the Postal Service filed in Docket No. ACR2018.\(^1\) Pursuant to 39 C.F.R. § 3001.21, the Postal Service respectfully requests that the Commission stay its Order to preserve the status quo because the Postal Service intends to seek review of the Order before the United States Court of Appeals for the District of Columbia Circuit pursuant to 39 U.S.C. § 3663.\(^2\)

THE COMMISSION'S STANDARD FOR REVIEWING A MOTION TO STAY PENDING JUDICIAL REVIEW

An agency may postpone the effective date of action taken by it, pending judicial review, when justice so requires. 5 U.S.C. § 705. In evaluating motions to stay pending

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\(^1\) Although Order No. 5151 originally set an effective date of August 1, the Commission subsequently postponed it until August 12, 2019. Order No. 5167, Order Granting Motion for Postponement, PRC Docket No. ACR2018 (July 24, 2019).

\(^2\) In the alternative, if the Commission denies this motion for a stay pending judicial review, the Postal Service respectfully requests a temporary administrative stay for a brief reasonable period of time, at least until November 1, 2019, after the scheduled date of the Universal Postal Union's Extraordinary Congress. No participant would be prejudiced by such a brief administrative stay.
judicial review, the Commission has adopted the four-part preliminary injunction test articulated in *Virginia Petroleum Jobbers Ass’n v. Fed. Power Comm’n*, 259 F.2d 921 (D.C. Cir. 1958), because the test “is consistent and overlaps with the factors the Commission has historically considered when determining whether a stay is appropriate.” Order No. 2075, Order Denying Stay and Establishing Schedule for Reporting Requirements, PRC Docket No. R2013-11 (May 2, 2014), at 8. Specifically, the Commission considers the following four factors: (1) likelihood of success on the merits; (2) irreparable harm to the requesting party; (3) irreparable harm to other parties if relief is granted; and (4) the public interest. Id. at 7. No one factor is determinative; the Commission weights them “[o]n balance.” Id. at 10.

As set forth below, the Postal Service believes that each of the four factors supports a stay of Order No. 5151. Even if the Commission does not agree that the Postal Service will succeed on the merits of its appeal, however, such a position is not dispositive of whether an administrative stay should be granted.3 More to the point, immediate disclosure would irreparably prejudice the Postal Service’s rights as a litigant, whereas other parties and the public interest would suffer little, if any, harm from deferring disclosure until a court has resolved the merits. Moreover, as the State Department represented in its recent letter to the Commission, the State Department predicts that the United States will be at a disadvantage in its negotiations if the data are disclosed. Letter from Kevin E. Moley, Assistant Secretary, Bureau of International Organization Affairs, U.S. Dep’t of State, to Robert G. Taub, Chairman, Postal Regulatory Comm’n, July 26, 2014.

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3 Perhaps because of the unlikelihood that the Commission will agree with a movant’s views on the likelihood of successful appeal of a Commission order, the Commission has historically focused less on the merits factor and more on the harm and public-interest factors. See Order No. 2075 at 8.
ARGUMENT

I. The Postal Service Will Succeed on the Merits of Its Forthcoming Appeal.

The Postal Service intends to challenge Order No. 5151 in the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit). The D.C. Circuit will review the Order under the standards set forth in the Administrative Procedure Act (APA), which provides that an agency order must be held unlawful and set aside if, among other things, it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” or is “unsupported by substantial evidence.” *Id.* § 706(2)(A), (E); *see* 39 U.S.C. § 3663. As explained below, the Postal Service is likely to prevail on the merits before the D.C. Circuit because Commission’s Order was contrary to law and was arbitrary and capricious.

A. The Commission’s Order is Contrary to Law Because It Failed to Properly Analyze the Statutory Balancing Test. The Correct Analysis Mandates Keeping Library Reference NP3 Under Seal.

1. The Commission failed to properly apply the applicable statutory test; its resulting analysis was contrary to law.

Section 504(g)(3)(A) of Title 39 requires the risk of commercial injury to the Postal Service to be balanced against “the public interest in maintaining the financial transparency of a government establishment competing in commercial markets.” *Order No. 5151* accurately recites this statutory language numerous times. Order No. 5151 at 3-4.

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4 The Postal Service received a courtesy copy of this letter, which is attached to this motion for reference.
In substance, however, Order No. 5151 lacks analysis tying relevant facts in this matter to the statutory test.

In the Order, the Commission offers various “public interest” rationales that differ from the statutory language. First, the Commission reframes the test, stating generally that the Postal Accountability and Enhancement Act of 2006 (PAEA) “was intended to improve transparency into the Postal Service’s finances.” Id. at 27; see also id. at 28-29. The Order claims that publication is warranted as a general financial-transparency matter because Inbound Letter Post has historically poor financial performance. Id. at 27, 29-31. Then the Commission proffers a different, even broader objective of transparency: “enhanc[ing] the ongoing discussion of potential reforms to the current terminal dues system or establishing self-declared terminal dues.” Id. at 27. Stated in this fashion, the goal is no longer financial transparency, but instead merely a general public interest in an informed policy discussion. Finally, the Commission applies a different, more subjective understanding of the “public interest,” based on the degree to which members of the public have lobbied for publication. Id. at 31-33.

These rationales stray far from Section 504(g)(3)(A) and Commission precedent. As an initial matter, under the plain language of the statute (and the Commission’s rules), the relevant factor is not merely a broad “public interest” in informed policy discussion or

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5 See also id. at 34 (“[A]vailability of this more comprehensive and understandable data will enhance public participation in proceedings related to the Inbound Letter Post product”); id. at 35 (“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.”); id. at 36 (“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.”).

6 In the course of this discussion, the Commission quotes various participants’ asserted public-interest rationales for disclosure. Yet the Commission stops short of adopting any such rationale, instead using the quotes merely as “express[ions of] support for disclosure.” Id. at 31-32.
in financial transparency *per se*, but “the public interest in maintaining the financial transparency of a government establishment competing in commercial markets.” 39 U.S.C. § 504(g)(3)(A) (emphasis added); see also 39 C.F.R. § 3007.104(a). Reading the language as a whole, the most logical reading is that Congress intended the underlined phrase to clarify the nature of the financial transparency interest at stake. Government-establishment status is not merely a threshold triggering any and all possible financial transparency; since the sole entity to which Section 504 applies (the Postal Service) is a government establishment, such a tautological construction would effectively consign the underlined language to mere surplusage. As such, that construction is unlikely. See 2A Sutherland Statutes & Statutory Construction § 46:6 (7th ed. 2018). To give the underlined language its proper substantive effect, financial transparency must be aimed at concerns specific to a government establishment competing in commercial markets, such as protecting against competitive abuse of a statutory monopoly or of some other incident of governmental status.

This reading draws support from Section 504(g)(3)(A)’s history. Early versions of the PAEA did not include a balancing test for public disclosure, instead protecting any materials that the Postal Service designated as non-public under relevant authorities. See, e.g., S. 1285, 108th Cong., sec. 602 (39 U.S.C. § 504(g)) (2003); H.R. 3717, 104th Cong., sec. 603 (39 U.S.C. § 3604(g)) (1996). The 2004 Senate bill was the first to include a balancing test: indeed, the same one that would eventually become law. S. 2468, 108th Cong., sec. 602 (39 U.S.C. § 504(g)) (2004). In 2006, the House amended its bill with an alternative test, balancing the risk of commercial injury to the Postal Service against the “public interest, as required by section 101(d) of this title for
financial transparency of a government establishment.” H.R. 22, 109th Cong., sec. 502 (39 U.S.C. § 504(g)(3)(A)) (2006) (as reported). That Section 101(d), in turn, would have read as follows: “As an establishment that provides both market-dominant and competitive products, the Postal Service shall be subject to a high degree of transparency, including in its finances and operations, to ensure fair treatment of customers of the Postal Service’s market-dominant products and companies competing with the Postal Service’s competitive products.” Id., sec. 103(a). While broadly similar to the Senate’s version, the House bill would have framed the balancing-test prong in broader terms of “financial transparency of a government establishment,” with a goal of “fair treatment” for customers and competitors. Had this language been enacted, it might have come closer to supporting Order No. 5151’s reliance on broad financial transparency and procedural fairness. Ultimately, however, the final bill rejected the House’s approach in favor of the Senate’s focus on “financial transparency of a government establishment competing in commercial markets.” This choice between competing alternatives demonstrates Congress’s intent to place a specific frame around the financial-transparency prong in Section 504(g)(3)(A).

In advancing the language that would become Section 504(g)(3)(A), the Senate committee disclaimed any intent that annual compliance reporting should “serve as an unlimited opportunity to access any and all Postal Service data including that which may be, at best, tangentially-related to evaluating compliance with the rate and service

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7 The Senate bill contained a similar provision, but it did not tie Section 504(g)(3)(A) to it. See S. 662, 109th Cong., sec. 105 (39 U.S.C. § 101(d)) (2006). The final, compromise bill did not include either the Senate’s or the House’s version of proposed Section 101(d). See 39 U.S.C. § 101 (2008). There was no conference committee report for the PAEA, and the floor statements prior to enactment of the final bill do not address the provisions discussed here.
provisions of this title.” S. Rep. No. 108-318, at 20 (2004). Consistent with the language of Section 504(g)(3)(A), the Senate committee’s overall concern for “effective oversight and accountability” was focused on potential abuse of the Postal Service’s monopoly.

Competitive products, by contrast, should be “subject to minimal Regulatory Commission oversight.” Id. at 7.

In light of plain language and legislative history, then, the question is not whether public disclosure would promote a general “interest” in informed public policy discussion or broad financial transparency, but rather whether disclosure would check a potential risk of abuse of the Postal Service’s governmental status and monopoly. Despite casting the necessary analysis as “highly fact-specific,” Order No. 5151 at 26, 41, 58, the Order is devoid of any particularized analysis of how publication of detailed Inbound Letter Post cost and contribution data – at a more granular level than for any other product – would address any such purported abuse.

Nor is it clear how such a conclusion could be drawn here. In the past, the Commission has claimed that financial transparency for Inbound Letter Post is needed to guard against abuse of the Postal Service’s market-dominance.

Financial transparency regarding market dominant products . . . is particularly important when a government establishment competes in commercial markets. Because market dominant and competitive products have different regulatory requirements, including those related to pricing, customers and competitors have an interest in financial transparency for accountability purposes. For example, both market dominant customers

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8 Id. at 6 (“This legislation makes that long overdue revision by establishing a regulatory structure that balances the Postal Service’s need for increased pricing and product flexibility with the need for effective oversight and accountability. The Committee has considered that the Postal Service faces little or no competition in providing many products and, for some products, has been granted a legal monopoly which prohibits private sector firms from providing alternative services.”).

9 See also Order No. 4451, Determination to Unseal the Postal Service’s Response to Chairman’s Information Request No. 15, PRC Docket No. ACR2017 (Mar. 28, 2018), at 19 (same, and noting “a particular focus on the specific data at issue”).
and competitors have a public interest in being able to confirm that the Postal Service has not used its market dominant revenue in ways that violate the law (e.g., using market dominant revenues to subsidize competitive products in violation of 39 U.S.C. § 3633). This financial transparency [regarding market-dominant products] allows competitors to monitor whether the Postal Service competes fairly in competitive markets, while allowing captive, market dominant customers to ensure their rates are not subsidizing competitive products.

Order No. 4451, Determination to Unseal the Postal Service’s Response to Chairman’s Information Request No. 15, PRC Docket No. ACR2017 (Mar. 28, 2018), at 22-23.

The Commission noted [in Order No. 4451] that market dominant and competitive products are subject to different statutory and regulatory schemes. Thus, the Commission found that it was more appropriate for the Commission to look to the type of data that the Postal Service generally provides publicly for other market dominant products when determining what Inbound Letter Post data should be publicly available for transparency purposes.

Order No. 4707, Order Denying Motion for Reconsideration of Order No. 4451 as Moot, PRC Docket No. ACR2017 (July 12, 2018), at 9-10 (citations omitted). That rationale no longer applies to Inbound Letter Post Small Packets and Bulky Letters, however, for which the Commission has determined that the Postal Service lacks market power. The statutory criteria for competitive products require compliance at a product level, 39 U.S.C. § 3633(a)(1)-(2), not at the level of subsets of a product’s customers, such as would be analogous to the disaggregated country-group data here. And yet the Commission’s historical practice shows that it is capable of providing effective oversight for international competitive products without public disclosure at even the product level. E.g., Postal Regulatory Comm’n, Financial Analysis of United States Postal Service Financial Results and 10-K Statement, Fiscal Year 2018, at 63-64 (Apr. 19, 2019). Order No. 5151 is devoid of any explanation as to why “financial transparency of a government establishment competing in commercial markets” should demand public disclosures for Inbound Letter
Post at a more granular level than for even for market-dominant products, let alone for other international competitive products.

2. **Had the Commission applied the statutory test correctly to weigh harm to the Postal Service against the public interest, it would have reached a different conclusion regarding the cost and contribution data.**

   On one side of the scale, the Commission substituted a general public “interest in transparency” in place of the statutorily-required concerns raised by a government establishment competing in commercial markets, such as abuse of a statutory monopoly or of some other incident of governmental status. On the other side of the scale, the Commission arbitrarily failed to credit the potential commercial harm to the Postal Service, as discussed in section I.B.1 below. Had the Commission conducted the balancing test in accordance with Section 504(g)(3)(A), it would have had little in the way of governmental abuse to place on the scale weighing in favor of public disclosure. On the other side of the balance, the likelihood of harm to the Postal Service posed by publicly releasing the cost and contribution data would have tipped the scale in favor of shielding that data from public disclosure.

**B. The Commission's Decision to Disclose Library Reference NP3 is Arbitrary and Capricious.**

The Postal Service will also succeed on the merits in its appeal because the Commission’s analysis was arbitrary and capricious. As explained below, the Commission failed to properly take into account the substantial risks of commercial harm to the Postal Service and failed to respond to the dissenting opinions of two Commissioners. Moreover, the Commission’s Order fails to provide a clear standard articulating how the Commission will determine when commercially sensitive data should be unsealed in future cases.
1. The Commission’s discounting of likely commercial harm to the Postal Service was arbitrary and capricious.

In its balancing analysis in the Order, the Commission rejects any risk of commercial harm to the Postal Service from the disclosure of Library Reference NP3. The Commission’s grounds for doing so are arbitrary on their face, however. Absent a valid reason for discounting the Postal Service’s assertions of commercial harm, what is left is the facial validity of those assertions, which the dissenting Commissioners rightly credit as substantial.

The Commission’s first rationale is that, in light of the impending shift to another rate system, data concerning the existing terminal dues system “is too stale to use as a basis for commercial decision-making, now and in the future.” Order No. 5151 at 42-43. Such data are hardly stale; they consist of the most recently concluded fiscal year. And trends of recent data over the course of the past few fiscal years would provide valuable insights, such as by revealing growth patterns in volumes from certain markets. Once disclosed, information of this nature can prove to be haunting. Indeed, statements made in connection with the Annual Compliance Report docket regarding the financial performance of Inbound Letter Post already filtered into discussions at the Universal Postal Union (UPU) earlier this year. Based on this experience, efforts to persuade foreign postal operators to accept higher rates in the interest of meeting the Presidential Memorandum’s policy goals would become more challenging, if those foreign postal operators or their governments knew the average cost behavior of its country group. See State Department Letter at 1; Order No. 5151, Concurrence in Part, Dissent in Part at 3-4; Presidential Memorandum, Modernizing the Monetary Reimbursement Model for the Delivery of Goods Through the International Postal System and Enhancing the Security
and Safety of International Mail, 83 Fed. Reg. 47,791 (2018). Thus, there is a genuine fear that disclosure of this information would lead to challenges to the position of the United States in deliberations. The Commission’s staleness argument does not address the data’s importance and utility in negotiations with foreign postal operators.

Beyond these practical considerations, the justification that the data are somehow too “stale” to be useful in commercial decision-making does not pass muster. The arguments and concerns that other UPU member countries have been expressing during UPU deliberations on the terminal dues system make it clear that the recent data will not be considered stale. To the contrary, foreign postal operators are likely to regard the data as highly relevant to their commercial decision-making. Moreover, the mistaken belief that data from the most recent fiscal year are “stale” and therefore not useful for competitive decision-making is inconsistent with the Commission’s own judgments about the appropriate time period for the extension of protection of sealed information. Specifically, Commission Rule 3007.401(a) reflects a default expectation that nonpublic materials filed with the Commission retain their nonpublic status for ten years, although subsection (c) contemplates that disclosure of some materials may threaten commercial injury even after a ten-year period. See Order No. 225, Final Rule Establishing Appropriate Confidentiality Procedures, PRC Docket No. RM2008-1 (June 19, 2009), at 13 (describing the rule as aligning with the Commission’s historical standard for public

10 That foreign postal operators might, based on past practice, theoretically agree to revenue-enhancing value-added features or to cost-reducing measures, Order No. 5151 at 54, says nothing about such parties’ willingness to agree to such measures after a Commission revelation of the Postal Service’s baseline unit cost and contribution for their mail. To the extent that the Commission asserts that the cost data here would give foreign postal operators no insight into the cost of other value-added services for which they could negotiate, id. at 54-55, that is immaterial to the insight that they would gain about the services at issue here.
disclosure of “trade secrets and commercially or financially sensitive materials” and as “adequately protecting the commercial interest of the Postal Service”). Thus, the Commission made a judgment about commercial harm and deemed a 10-year period suitable to allow the passage of time to discontinue the presumption of sensitivity of information filed under seal. To suggest that data for the most recent fiscal year is now somehow “stale” belies a longstanding Commission practice of according confidentiality for a much more substantial period of time. Order No. 5151’s departure from that standard introduces a host of concerns and, unlike the 2008 rulemaking, is not accompanied by a reasoned explanation. As such, it is arbitrary and capricious. See *CBS Corp. v. FCC*, 785 F.3d 699, 708-10 (D.C. Cir. 2015) (stating the rule that “[w]hen an agency departs from past practice, it must provide a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored,” and rejecting the FCC’s “substantive and important departure from prior [FCC] policy” on confidential information without analysis or even acknowledgment (internal quotation marks and citation omitted)).

Second, the Commission asserts that aggregating the data by country group “does not provide actionable commercial information to actors in the present or future environment, which is undergoing rapid change.” Order No. 5151 at 43-44. As noted above, however, the Postal Service’s negotiating interests can be harmed by disclosure of even country-group-level cost and contribution data. And as the State Department has

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11 To be clear, the Postal Service understands that materials of less than ten years’ vintage can be disclosed if they are determined not to merit nonpublic treatment. But Order No. 5151 casts staleness as a standalone reason why disclosure “is unlikely to result in harm.” Order No. 5151 at 42-43. It is as an independent grounds for termination of nonpublic treatment that Order No. 5151’s not-even-one-year approach to staleness collides with Rule 3007.401’s ten-year-plus standard for staleness.
explained, “[b]ecause such data, particularly cost data, are not routinely made available to UPU members for their use in negotiations, the Department of State predicts that the United States would be at a serious disadvantage in its negotiations if these data were made accessible to other UPU member countries before or during the upcoming Extraordinary Congress.” State Department Letter at 1. Since the relevant costs are restricted to domestic activities that do not depend on foreign postal operators’ costs or international transportation, see Order No. 5151 at 50, a foreign postal operator might deem it reasonable (accurately or not) to treat the country-group-level average cost as a proxy for the Postal Service’s cost to process and deliver items from the foreign postal operator’s country. With these data in hand, the foreign postal operator would feel emboldened to harden its negotiating stance, relative to its position if the Commission did not publish the data. Country-group-level aggregation is therefore a red herring and fails to justify the Commission’s basis for disclosure.

The Commission also points out that individuals cannot use country-group-level data to discern a given foreign postal operator’s share of country-group revenue, volume, cost, or contribution. Order No. 5151 at 47-48. This observation is true but irrelevant. Public disclosure would expose the data not only to individuals, but also to foreign postal operators, competitors, and other market actors. A foreign postal operator, for instance, would already know its volume and remuneration to the Postal Service, would be able to determine its share of country-group volume and revenue and could therefore estimate its share of country-group cost and contribution. Other firms could perform a similar exercise, using as a proxy “proprietary and non-proprietary data on international mail and parcel volume, global trade flows, and other economic data.” Order No. 5151,
Concurrence in Part, Dissent in Part at 3. While this estimation may still be inexact, it would likely be much less so, and more dangerous, than the level of conjecture in which individuals could engage without the cost and contribution data from the Commission.

The Commission goes on to fault the Postal Service for failing to “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.” Id. at 44 (emphasis added). The issue here is not the identification of abstract possibilities, however, but the provision of actionable data and insight to third parties that do business with the Postal Service or with which the Postal Service competes. Telling a competitor or vertically-integrated customer that the Postal Service spends a specific amount to deliver Inbound Letter Post from a given bloc of countries, and that it earns a specific margin on the average item from those countries, would certainly give that competitor or customer quantitative benchmarks for its own pricing, marketing, and purchasing decisions. No other firm in this market appears to make such data similarly available to its competitors. Unilateral disclosure would therefore upset the informational equilibrium in the United States’ delivery market to the detriment of the Postal Service. Order No. 5151, Concurrence in Part, Dissent in Part at 3-4.

The Commission claims that competitors could not use the data to harm the Postal Service because the data does not specify any number of sub-product-level details (e.g., specific origin and destination locations or customer identities), because it is not ordered on a calendar-year basis, and because it concerns only the cost of domestic carriage, not of the entire shipping chain from foreign acceptance to domestic delivery. Order No. 5151
at 49-50. All three critiques are irrelevant. To the first, even if more-granular data would be more helpful to a competitor, the data at issue is nonetheless granular enough to give the competitor fresh insight into the feasibility of market entry with respect to certain countries. To the second critique, most firms' financial reporting does not sync neatly with price changes, yet that fact does not appear to lull competitors or foreign postal operators into publishing similarly specific data. To the third critique, the domestic leg of the inbound international shipping chain for items containing goods is itself a competitive market. The concern is not so much that a competitor could use the data to market end-to-end services to foreign shippers, but that it could better market its domestic-delivery services to foreign postal operators, shipping companies, and large corporate shippers capable of contracting separately for various legs of the supply chain. Order No. 5151 does not address any of these concerns.

Moreover, the Commission claims that because the data do not include weight, “competitors would not be able to determine an average cost per kilogram for Inbound Letter Post . . . , which would be helpful for competitors to target the Postal Service's customers or specific markets.” Id. at 51. Not so. The UPU publishes the per-item and per-kilogram terminal dues rates for each country group for each calendar year in the Convention cycle. E.g., Universal Postal Conv. art. 29-30, in Universal Postal Union, Decisions of the 2016 Istanbul Congress (2017) at 159-62, http://tiny.cc/kxebaz. With those rates reasonably weighted by the calendar year periods that they cover, plus the country-group-level revenue, volume, and cost data at issue here, a party would have the values needed to derive a reasonable approximation of average cost per kilogram.¹²

¹² Specifically, if total revenue (for a given country group or shape) equals total volume times the per-item rate plus total weight times the per-kilogram weight, all of the data would be available to solve for total
Thus, public disclosure of the data would produce, not stem, the ability to reasonably estimate the very harm that the Commission identifies.

Finally, the Commission claims that the Postal Service will suffer no informational disadvantages because “detailed financial data, including volume, revenue, cost, and profit data, are available in the form of financial reports for many of the UPU countries.” Order No. 5151 at 53. That claim is not well substantiated. First, despite the breadth of its claim, the Commission cites financial reports for only one relatively small foreign postal operator: the Republic of Ireland’s An Post. Id. at 53 n.122. In fact, a review of the annual reports of other, larger foreign postal operators reveals none with the level of information at issue here.13 If anything, the Postal Service is aware of examples of foreign postal regulators treating cost information as confidential, even for regulated services analogous to market-dominant products and even at a more highly aggregated level.14


Second, not even An Post’s reports include cost information at a shape or country-group level: rather, they aggregate data across all non-universal-service inbound international items, not unlike the Postal Service’s well-established practice of aggregating all competitive international data in a single line item. What the Commission seeks to disclose here, therefore, goes well beyond what other postal regulators and operators, including even the one cited by the Commission, deem safe to publish.

In conclusion, the Commission draws on no “actual evidence, economic theory, or claims of special knowledge based upon its experience with the [relevant] industry.” Order No. 5151 at 59 (citing McDonnell Douglas Corp. v. U.S. Dep’t of the Air Force, 375 F.3d 1182, 1190-91 (D.C. Cir. 2004)). It invokes only its general experience with postal regulation and policy, id., but reviewing courts require more. Am. Petroleum Inst. V. EPA, 661 F.2d 340, 349 (5th Cir. 1981) (courts “are no longer content with mere administrative ipse dixits based on supposed administrative expertise”) (quoting Appalachian Power Co. v. EPA, 477 F.2d 495, 507 (7th Cir. 1973)). Lacking the foundation necessary to support dismissal of the Postal Service’s concerns, the Commission’s critiques more closely resemble “rather casual observations” that it is unpersuaded by the Postal Service’s arguments of commercial harm. McDonnell Douglas Corp., 375 F.3d at 1190. That is not enough to pass muster under the APA, and the Commission’s Order is therefore arbitrary and capricious.

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15 This is not even as close a case as McDonnell Douglas Corp. In that case, the court adverted to the Air Force’s firsthand transactional experience as a purchaser in government contracting, yet found that the Air Force had failed “to explain how its knowledge or experience [in regulation and policy] supports” its decision. McDonnell Douglas Corp., 375 F.3d at 1191 (emphasis added). Here, by contrast, not only did the Commission fail to connect its “experience” with its decision, the Commission also does not meet the threshold criterion of firsthand transactional experience of the sort that might enable it to credibly opine on the palpability of the Postal Service’s concerns (e.g., designing marketing strategies or negotiating with other businesses).
2. The majority opinion failed to respond to the arguments presented by the dissenting Commissioners.

The Commission’s Order is also arbitrary and capricious because it fails to mention, let alone consider, the arguments made by the dissenting Commissioners who agreed with the Postal Service that the cost and contribution data should not be unsealed.

The D.C. Circuit has consistently held that, as part of an agency’s duty under the APA to carry out reasoned and principled decision-making, the agency must consider any reasonable alternatives to the position that it ultimately adopts. *American Gas Ass’n v. FERC*, 593 F.3d 14, 19 (D.C. Cir. 2000). Among other things, that rule applies to arguments made or alternatives proposed by dissenting Commissioners. Although the Commission “is not required to agree with arguments raised by a dissenting Commissioner, it must, at a minimum, acknowledge and consider them.” *Id.* at 20 (citation omitted) (remanding decision for further proceedings where Commission “provided no direct response” to points raised by dissenting Commissioner that were neither frivolous nor out of bounds”). *Accord Chamber of Commerce of U.S. v. SEC*, 412 F.3d 133, 144 (D.C. Cir. 2005) (SEC had obligation to consider arguments raised by dissenting Commissioners).

In Order No. 5151, the two dissenting Commissioners explained in detail why unsealing the cost and contribution data severely harms the Postal Service, and they set forth precisely how this data could be used to “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.” See Order No. 5151, Concurrence in Part, Dissent in Part, at 3. Specifically, the dissenting Commissioners discussed the ways in which competitors, customers, and contractors to the Postal Service could use
the cost and contribution data to their advantage. *Id.* at 3-4. First, they could combine such data with “proprietary and non-proprietary data on international mail and parcel volume, global trade flows, and other economic data” to “build accurate cost models of e-commerce packets coming from these largest markets to the Postal Service.” *Id.* at 3. Such models “would give competitors, customers, and contractors additional negotiating leverage against the Postal Service.” *Id.*

Regarding the upcoming negotiations with foreign postal operators in the UPU, the dissenting Commissioners explained:

*Id.* at 4. The dissenting Commissioners noted that because the Postal Service is currently in the process of exiting “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.” *Id.* The dissenting Commissioners said that such use of the cost and contribution data by competitors and counter-parties to “estimate the commercially sensitive costs for the Postal Service’s most lucrative individual markets” would be “highly feasible.” *Id.* at 4-5. Moreover, “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 matter.” *Id.* at
5. Finally, the dissenting Commissioners rejected the majority’s view that the cost and contribution data’s historical nature negates any risk:

   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.

   Id. at 6.

   Despite these persuasive arguments, the majority stayed silent rather than attempt to address, let alone rebut, the dissenting Commissioners’ points. The majority’s failure to do so renders Order No. 5151 arbitrary and capricious.

   **3. The Commission’s Order presents no meaningful standard for confidentiality and raises the prospect that all future filings of commercially sensitive data will be released publicly.**

   The Commission’s Order leaves the Postal Service in the unfair position of having no reasonable guidance about the future release of other non-public documents that the Postal Service has filed or will file with the Commission. While the Order details at length what arguments will not persuade the Commission of a risk of commercial injury to the Postal Service, the Order offers no guidance as to when such a risk would exist. Indeed, if the standard is not met by recent unit-cost and contribution data for discrete groups of competitive-product customers in the midst of negotiations with the Postal Service, it is reasonable to wonder whether the Commission would ever find a risk of commercial injury. On the other side of the balancing test, the broadly-framed interests in financial transparency and public participation (while statutorily invalid, as explained in section I.A.1 above) would apply to any financial data filed in a Commission proceeding. Order No. 5151 therefore fails to provide the Postal Service with any guidance on which to rely
when deciding how to file information in the future or when participating in a future Commission proceeding on termination of non-public treatment.

As the D.C. Circuit has recognized in striking down past Commission orders, the APA demands more than this. In particular, the Court held the Commission to have acted arbitrarily and capriciously when it failed “to articulate a comprehensible standard for the circumstances in which a change to mail preparation requirements . . . will be considered a ‘change in rates’;” while the Commission had, unlike here, purported to announce a standard, that standard was fatally indiscriminate and offered “no meaningful guidance to the Postal Service or its customers on how to treat future changes to mail preparation requirements.”  

U.S. Postal Serv. v. Postal Regulatory Comm’n, 785 F.3d 740, 754 (D.C. Cir. 2015); see also U.S. Postal Serv. v. Postal Regulatory Comm’n, 886 F.3d 1253, 1255 (D.C. Cir. 2018) (vacating the Commission’s subsequent order on remand because the Commission’s “potential authority depends on its articulating and applying a test consistent with the statute. Its present orders have failed to do so.”). In another case, the Court rebuked the Commission for its lack of a “reasoned rationale” distinguishing one product that the Commission treated as “nonpostal” from similar products that it treated as “postal.”  

LePage’s 2000, Inc. v. Postal Regulatory Comm’n, 642 F.3d 225, 230-32 (D.C. Cir. 2016) (“The Commission’s order is rife with anomalies, any one of which is sufficient to justify a remand, and all of which, when considered together, demonstrate the Commission was proceeding in a slapdash manner.”). As in those and other cases,\(^{16}\)

\(^{16}\) See, e.g., NetworkIP, LLC v. FCC, 548 F.3d 116, 127 (D.C. Cir. 2008) (when agency discretion is not restrained by more than a “we-know-it-when-we-see-it” standard, “the danger of arbitrariness (or worse) is increased”); Pearson v. Shalala, 164 F.3d 650, 660-61 (D.C. Cir. 1999) (even where an agency proceeds on a case-by-case basis, it must pour “some definitional content” into a vague term – there, “significant scientific agreement” – by “defining the criteria it is applying”); City of Vernon, Cal. v. FERC, 845 F.2d
Order No. 5151’s lack of a reasoned rationale provides no meaningful guidance about what the Commission deems sufficient to protect non-public information, and renders the Commission’s Order arbitrary and capricious.

II. The Postal Service Will Suffer Irreparable Harm from Public Disclosure of Library Reference NP3.

The Commission’s Order would inflict irreparable harm on the Postal Service by hindering the Postal Service’s ability to compete in the inbound shipping services market and by giving foreign postal operators undue leverage in ongoing negotiations. The Order would also irreparably disadvantage ongoing efforts to negotiate potential terms for remaining within the Universal Postal Union. See State Department Letter at 1. If the information at issue is disclosed publicly, there is no way to recapture it and place it back under seal, even if the Order were later found to be erroneous. Immediate publication of the data would also prejudice the Postal Service’s statutory right to appeal the Commission’s order. Should the D.C. Circuit eventually hold that the Commission erred in issuing the Order, the ruling would have no practical effect if the information had already been in the public domain and potentially accessed or downloaded by competitors and counter-parties.

The harm the Postal Service seeks to forestall by this request for a stay is a quintessential instance of irreparable harm. As the D.C. Circuit has recognized, maintaining confidentiality of information pending a merits decision “makes sense given that review can be effective only if it occurs before confidential information is disclosed to third parties. ‘Disclosure followed by appeal after final judgment is obviously not adequate

\[1042, 1048 \text{(D.C. Cir. 1988)}\] (the “’know-it-when-we-see-it’ approach . . . does not provide a reasoned explanation of an agency decision”).
in such cases – the cat is out of the bag.” CBS Corp. v. FCC, 785 F.3d 699, 708 (D.C. Cir. 2015) (quoting In re Papandreou, 139 F.3d 247, 251 (D.C. Cir. 1998), and citing Ruckelshaus v. Monstanto Co., 463 U.S. 1315, 1317 (1983)). The same is evident here. Order No. 5151, Concurrence in Part, Dissent in Part at 6 (“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.”).

Because public access to the material at issue will irreparably damage the interests of the Postal Service, the opportunity for meaningful appellate review is necessary. There is no possibility that adequate corrective relief could be provided absent a stay because such relief would come too late.

III. A Stay Will Cause No Harm To Other Parties.

A stay of the Order during the pendency of the forthcoming appeal would cause no harm to any third parties. As a general matter, and as argued above, Order No. 5151 misconceives of the “public interest” at stake in Section 504(g)(3)(A), and it is far from clear how that public interest, properly understood, is implicated by the data at issue. There is, therefore, no particular segment of the public or parties whose interests would be harmed by a temporary stay of the Commission's Order.

Nor would a temporary stay harm even a broader range of “public interests,” such as in informed participation in Commission proceedings or public-policy discussions. The participants in the relevant Commission proceeding have either sought and received access under protective conditions, such as would inform their counsel's and consultants'
development of comments, or else decided to forgo such access and file comments on the basis of public information. Therefore, a delay in public disclosure pending the outcome of this case will not hinder any party's participation in Commission proceedings.

Given the Commission’s rules for access under protective conditions, non-public status withholds access only from persons in a position to make competitive decisions that might harm the Postal Service. While a stay might temporarily mean that these persons are unable to view the proprietary Postal Service information, that “harm” is an illegitimate one. Giving Postal Service competitors and customers a unilateral informational advantage against the Postal Service would tilt the competitive playing field in a way that would not serve the public interest.

IV. The Public Interest Supports Granting a Stay.

While “the public interest in maintaining the financial transparency of a government establishment competing in commercial markets” is important, 39 U.S.C. § 504(g)(3)(A), the public interest is not served by a rushed review, analysis, and judgment concerning the sensitivity and confidentiality of the information in question. The goal of transparency is not time sensitive. The Postal Service recognizes the public interest in maintaining an appropriate balance of public and sealed commercial information, but there is also public interest in avoiding hasty outcomes that could irreversibly and materially impede the Postal Service’s ability to maintain a sustainable enterprise, frustrate its relationships with its trading partners, and interfere with the State Department’s effectuation of the President’s foreign-policy goals.

17 The non-public status of underlying information does not “chill” participants’ ability to comment, because portions of comments describing the non-public information can themselves be filed with the Commission, and reviewed by other appropriate parties, under seal.
The Commission has effectively conducted its review in the ACR2018 docket without regard to the public or non-public status of the materials at issue here, and the Commission can continue these efforts. Participants before the Commission are likewise capable of accessing the data under protective conditions and providing the Commission with informed comment; in no other context has the Commission asserted that this protocol deprives it of valuable input. As discussed in the preceding section, the only parties unable to access the data under protective conditions are business decision-makers for the Postal Service’s competitors, counterparties in contractual negotiations, and customers, and the public interest does not lie in distorting the informational balance of a competitive market. A stay is necessary to afford the Postal Service an opportunity for judicial review, while allowing a full and fair vetting of the underlying controversy presented here. In sum, the public interest lies in granting a stay.

**CONCLUSION**

For the reasons stated above, the Commission should temporarily stay its Order requiring the public release of Library Reference NP3 pending a decision by the D.C. Circuit on the merits of the Order, pursuant to 39 U.S.C. § 3663.
Respectfully submitted,

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July 29, 2019
Honorable Robert G. Taub  
Chairman of the Postal Regulatory Commission  
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Dear Chairman Taub:

As the Commission is aware, the United States expects to withdraw from the Universal Postal Union (UPU) by October 17, 2019, unless a solution that accommodates the concerns of the United States and other countries with the terminal dues system is adopted by an Extraordinary Congress to be held in Geneva beginning September 24. The Department of State is aware that in conjunction with the issuance of the Annual Compliance Determination Report for Fiscal Year (FY) 2018 on April 12, 2019, the Commission prepared a nonpublic library reference PRC-IR-ACR2018-NP3, FY 2018 Inbound Letter Post Data by Country Group and Shape (Nonpublic), and the contents of this library reference include disaggregated letter post cost, revenue, and volume data separated by shape and country group. The State Department is further aware of the Commission’s determination to disclose the contents of this document (per its Order 5151 dated July 12, 2019) effective August 12, 2019 (per its Order 5167 dated July 24, 2019).

Proposals affecting inbound letter post E format items, including small packets and bulky letters in the letter post category, are the sole focus of various proposals that are being considered by the upcoming Extraordinary Congress to be held in Geneva. These proposals are available to the Commission and the public in Docket No. IM2019-1. Negotiations with other countries in advance of the Congress are sensitive and involve intense diplomacy. Because a key focus of the upcoming Congress concerns the willingness of the other countries to negotiate a solution that would be satisfactory to the particular policy objectives of the United States, the Department of State recommends that the Commission proceed cautiously before making cost, revenue, and volume data of letter post mail available to the other member countries, as such data would undoubtedly factor into other member countries’ negotiations and arguments regarding the future of the terminal dues system. Because such data, particularly cost data, are not routinely made available to UPU members for their use in negotiations, the Department of State predicts that the United States would be at a serious disadvantage in its negotiations if these data were made accessible to other UPU member countries before or during the upcoming Extraordinary Congress.
The Department of State therefore recommends that the Commission place implementation of Order 5151 in abeyance, at least pending the outcome of the Extraordinary Congress, and revisit the merits of its decision after that time.

Thank you for your consideration of these views.

Sincerely,

Kevin E. Moley  
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Bureau of International Organization Affairs  
United States Department of State

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