

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

Before Commissioners:

Robert G. Taub, Chairman;
Michael Kubayanda, Vice Chairman;
Mark Acton;
Ann C. Fisher; and
Ashley E. Poling

Transfer of Inbound Letter Post Small
Packets to the Competitive Product List

Docket No. MC2019-17

Competitive Product Prices
Inbound E-Format Letter Post

Docket No. CP2019-155

FINAL DETERMINATION TO UNSEAL SELF-DECLARED RATES FOR INBOUND
LETTER POST SMALL PACKETS AND BULKY LETTERS

(Issued March 9, 2020)

I. INTRODUCTION

On October 29, 2019, the Postal Service provided notice of specific per-item and per-kilogram self-declared prices that it intends to implement for Inbound Letter Post Small Packets and Bulky Letters on July 1, 2020.¹ The Postal Service filed these rates under seal and requested that the Commission accord these rates non-public treatment. October Notice at 2; *id.* Attachment 1 (October Application). In accordance with

¹ Docket No. CP2019-155, Notice of the United States Postal Service of Effective Date and Specific Rates Not of General Applicability for Inbound E-Format Letter Post, and Application for Non-Public Treatment, October 29, 2019, at 1 (October Notice).

39 U.S.C. § 504(g)(3) and 39 C.F.R. § 3007.103(c), the Commission determines that it is not appropriate to accord non-public treatment to the self-declared rates for Inbound Letter Post Small Packets and Bulky Letters and that these rates should be unsealed seven days after the Universal Postal Union (UPU) publishes these rates.

II. PROCEDURAL HISTORY

On October 29, 2019, the Postal Service provided notice of specific per-item and per-kilogram self-declared prices for Inbound Letter Post Small Packets and Bulky Letters to be effective on July 1, 2020, and filed these self-declared rates under seal. October Notice at 1-2. On November 20, 2019, the Postal Service filed a motion in Docket No. MC2019-17 to request that the Commission approve the addition of Inbound Letter Post Small Packets and Bulky Letters to the Competitive product list, effective January 1, 2020.² The Motion identified two sets of prices that would be in effect in Calendar Year (CY) 2020, including self-declared rates that apply to certain countries after July 1, 2020. See Motion at 4. Again, the Postal Service filed the self-declared rates under seal. Motion at 2; *id.*, Attachment 2 (November Application).

On December 3, 2019, the Commission issued Commission Information Request No. 1.³ The Commission asked whether the Postal Service would consent to unsealing the self-declared rates after all designated operators filed their respective self-declared rates with the UPU International Bureau (IB). CIR No. 1, question 1. The Postal Service stated that it did not consent and largely reiterated the commercial harms

² Docket No. MC2019-17, Motion of the United States Postal Service to Effectuate Transfer on January 1, 2020, and Application for Non-Public Treatment, November 20, 2019, at 1 (Motion).

³ Commission Information Request No. 1, December 3, 2019 (CIR No. 1).

alleged in the October and November Applications.⁴

When the Commission approved the self-declared rates for Inbound Letter Post Small Packets and Bulky Letters and granted the Postal Service's Motion, the Commission noted the concerns raised by commenters⁵ with respect to according non-public treatment to the self-declared rates.⁶ The Commission stated that it would consider the appropriate degree of non-public protection, if any, to be accorded to the specific per-item and per-kilogram self-declared rates for the Inbound Letter Post Small Packets and Bulky Letters product in a future order. Order No. 5372 at 17.

On January 23, 2020, the Commission issued a preliminary determination to unseal the Inbound Letter Post Small Packets and Bulky Letters self-declared rates.⁷ The Commission found that unsealing the self-declared rates after the UPU IB published the rates was not likely to result in the commercial harms identified by the Postal Service. Order No. 5412 at 12-16. After it determined that it is unlikely that unsealing the self-declared rates would result in the alleged commercial harms, the

⁴ Responses of the United States Postal Service to Questions 1-2 of Commission Information Request No. 1, December 6, 2019, question 1 (Response to CIR No. 1). In its Response to CIR No. 1, the Postal Service also raises two arguments that were not included in the October Application or the November Application. However, these arguments were repeated in the Postal Service's response to Order No. 5412 and are summarized in section IV.A.2., *infra*.

⁵ The U.S. Chamber of Commerce (the Chamber), the International Mailers Advisory Group (IMAG), the Association for Postal Commerce (PostCom), and the National Association of Manufacturers (NAM) oppose the Postal Service's application for non-public treatment for the specific per-item and per-kilogram self-declared rates for Inbound Letter Post Small Packets and Bulky Letters. Docket No. CP2019-155, Comments of the U.S. Chamber of Commerce, November 6, 2019 (Chamber Comments); Docket No. CP2019-155, Comments of the International Mailers Advisory Group, November 6, 2019 (IMAG Comments); Docket No. CP2019-155, Comments of the Association for Postal Commerce, November 6, 2019 (PostCom Comments); Docket No. CP2019-155, Comments of National Association of Manufacturers, November 7, 2019 (NAM Comments). No other commenters addressed the Postal Service's application for non-public treatment in their comments. Concerns raised by commenters are discussed in section IV.B.1., *infra*.

⁶ Order Granting Postal Service's Motion and Approving Prices for Inbound Letter Post Small Packets and Bulky Letters, December 19, 2019, at 16-17 (Order No. 5372).

⁷ Notice of a Preliminary Determination to Unseal Self-Declared Rates for Inbound Letter Post Small Packets and Bulky Letters, January 23, 2020 (Order No. 5412).

Commission outlined why unsealing the self-declared rates furthers the public interest of maintaining financial transparency. *Id.* at 16-18. Specifically, small packets and bulky letters have a long history of poor financial performance⁸ resulting from the terminal dues system,⁹ which has caused market dominant mailers to subsidize these mailpieces and distorted the international flow of small packets and bulky letters. Order No. 5412 at 16-17. The Commission found that there is public interest in the self-declared rates being transparent to ensure that the self-declared rates address the weaknesses of the terminal dues system. *Id.* at 17. In addition, the Commission stated that there is an interest in financial transparency “because these rates are only accessible to designated operators and there is potential for price discrimination.” *Id.* at 18.

In accordance with 39 C.F.R. § 3007.103(c), the Commission allowed interested persons to file responses to its preliminary determination to unseal the self-declared rates. Order No. 5412 at 18. On January 30, 2020, IMAG, PostCom, the Public Representative, and the Postal Service filed responses to Order No. 5412.¹⁰

⁸ See Docket No. ACR2019, United States Postal Service FY 2019 Annual Compliance Report, December 27, 2019, at 7-8 (FY 2019 ACR).

⁹ The prices designated operators pay each other for the delivery of UPU letter post mailpieces are called terminal dues. The terminal dues system is the rules adopted by the UPU that determines the specific rates designated operators pay each other for the delivery of UPU letter post mailpieces. UPU letter post mailpieces consist of letters, postcards, printed papers, and small packets weighing up to 2 kilograms. Universal Postal Convention, Article 17 (adopted by the 2016 UPU Congress), available at: http://www.upu.int/uploads/tx_sbdownloader/actsActsOfThe26ThCongressIstanbul2016En.pdf. The UPU divides letter post mail into three shapes: (1) letters and cards (format P); (2) large letters or “flats” (format G); and (3) bulky letters and small packets (format E). 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 [Universal Postal Union] on its territory.” Convention Manual, Article 1.12, 2018, available at: http://www.upu.int/uploads/tx_sbdownloader/actInThreeVolumesManualOfConventionEn.pdf.

¹⁰ Comments of the International Mailers Advisory Group, January 30, 2020 (IMAG Response); Comments of the Association for Postal Commerce in Response to Order No. 5412, January 30, 2020 (PostCom Response); Public Representative Comments on Preliminary Determination to Unseal Self-Declared Rates for Inbound Letter Post Small Packets and Bulky Letters, January 30, 2020 (PR Response); Response of the United States Postal Service to Notice of Preliminary Determination, January 30, 2020 (Postal Service Response). These responses are discussed in further detail in section IV.A.2. and IV.B.2., *infra*.

III. DATA AT ISSUE

In the instant order, the Commission considers the appropriate degree of non-public protection, if any, to be accorded to the specific per-item and per-kilogram self-declared rates for the Inbound Letter Post Small Packets and Bulky Letters product. Specifically, the Commission considers whether it is appropriate to unseal the rate chart the Postal Service provided with its October Notice. See October Notice, Attachment 2.

In Attachment 2 of its October Notice, the Postal Service provides the following rate chart for the Inbound Letter Post Small Packets and Bulky Letters product:

**Inbound Letter Post Small Packets and Bulky Letters Effective July 1, 2020
Rates Not of General Applicability for Mail Classification Schedule § 2340.6**

	Per Piece in USD	Per Kilogram in USD
Inbound Letter Post Small Packets and Bulky Letters, unless exception applies	\$X.XX	\$X.XX

The instant order is limited to the self-declared rates provided in the rate chart referenced above.

Pursuant to the recently adopted UPU proposals, the Postal Service must provide its self-declared rates for inbound small packets and bulky letters to the UPU IB no later than March 1, 2020.¹¹ UPU regulations require the IB to publish the self-declared rates no later than April 1, 2020. UPU IB Circular No. 158, September 30, 2019, at 3. Self-declared rates will become effective on July 1, 2020. October Notice at 4.

¹¹ Universal Postal Convention, Article 28bis.6quater (adopted by the 2019 UPU Congress), available at: http://www.upu.int/uploads/tx_sbdownloader/actsActsOfTheExtraordinaryCongressGenevaEn.pdf.

IV. SUMMARY OF ARGUMENTS

A. Postal Service Arguments

1. Applications for Non-Public Treatment

The Postal Service asserts that the self-declared rates and supporting workpapers filed under seal with its October Notice and Motion contain commercial information “that, under good business practice, would not be disclosed to the public.” October Application at 1; November Application at 1. Furthermore, the Postal Service maintains that it “does not believe that any commercial enterprise would voluntarily publish . . . non-public settlement rates or information pertaining to country-specific volumes, costs, and revenues.” October Application at 1-2; November Application at 1. The Postal Service argues that, pursuant to 39 U.S.C. § 410(c)(2) and 5 U.S.C. § 552(b)(3) and (4), the materials it filed under seal with its October Notice and Motion are exempt from mandatory disclosure. October Application at 2; November Application at 2.

The Postal Service claims that if the materials filed with the October Notice and the Motion are disclosed publicly, it is likely that it will suffer commercial harm. October Application at 4; November Application at 4. Specifically, the Postal Service identifies six potential commercial harms and provides one hypothetical illustrative example for each alleged commercial harm. October Application at 7-10; November Application at 7-10. The Postal Service claims that three of these six alleged commercial harms will result only if the financial workpapers are disclosed. *See id.* Accordingly, unsealing the self-declared rates alone does not implicate these three alleged commercial harms.

The remaining three alleged commercial harms discuss potential commercial

injury to the Postal Service if the self-declared rates are publicly disclosed.¹² First, the Postal Service alleges that designated operators would use public disclosure of the self-declared rates to their advantage and to the detriment of the Postal Service. October Application at 7; November Application at 7. For example, the Postal Service claims that if the self-declared rates are disclosed then other designated operators could adjust their reciprocal self-declared rates. *Id.* Additionally, the Postal Service asserts that public disclosure of self-declared rates could harm the negotiating position of the Postal Service when it attempts to negotiate alternative rates for Inbound Letter Post Small Packets and Bulky Letters with these designated operators. October Application at 7-8; November Application at 7-8. Relatedly, the Postal Service claims that if designated operators know the self-declared rates, then they could determine if remail opportunities exist in particular markets,¹³ which could result in revenue loss for the Postal Service. October Application at 8; November Application at 8.

Second, the Postal Service alleges that competitors could analyze the self-declared rates and the supporting financial workpapers to determine what the Postal Service must charge its customers to comply with the requirements applicable to competitive products. *Id.* The Postal Service posits that competitors could then set their own rates for similar products under that threshold to freeze the Postal Service out of the market. *Id.*

¹² See October Application at 7-9; November Application at 7-9. See *also* Response to CIR No. 1, question 1. The commercial harms alleged in the Postal Service's Response to CIR No. 1 mirror commercial harms alleged in the October Application and November Application (*i.e.*, the Postal Service alleges that unsealing the self-declared rates before March 1, 2020, would give designated operators an advantage when establishing their own self-declared prices; that unsealing the self-declared rates before the UPU IB publishes them would give designated operators an advantage when negotiating rates with the Postal Service; and that unsealing self-declared rates would provide advantages to customers and to other competitors through disclosure of Postal Service rates that would not ordinarily be available publicly). *Id.*

¹³ For example, an opportunity for remail exists when two designated operators are charged different rates for the delivery of mail by a third designated operator in its country. The first designated operator could send its UPU letter post small packets and bulky letters through the second designated operator that is charged a lower rate for delivery in the third country.

Third, the Postal Service asserts that competitors could analyze the “rates, revenues, volumes, and weights,” provided under seal to determine what products and rates to offer in the competitive domestic and international markets. October Application at 9; November Application at 9. Furthermore, the Postal Service claims that customers could use the same information to negotiate better terms in contracts with the Postal Service or its competitors. *Id.*

2. Response to Order No. 5412

a. Reverse Preliminary Determination

The Postal Service states that the Commission should reverse its preliminary determination and presents several arguments to support its view.¹⁴ First, the Postal Service asserts that the UPU accords limited non-public treatment to similar rates and presumably will treat the self-declared rates likewise. The Postal Service states that when the UPU IB publishes the self-declared rates by April 1, 2020, it is likely that they will be published by IB circular. Postal Service Response at 3-4 (citing Universal Postal Convention, Article 28bis.1). The Postal Service asserts that IB circulars are generally posted on a password protected portion of the UPU website, which the UPU calls its “documentation centre,” and are only accessible by other designated operators, not the public or competitors. *Id.* at 4. Therefore, the Postal Service claims that publication by the UPU IB is not equivalent to public disclosure. *Id.* at 3-4.

Second, the Postal Service asserts that beyond providing an unfair advantage to designated operators, it identified “additional harms and concerns about public disclosure of its competitive self-declared rates in its applications for non-public

¹⁴ Postal Service Response at 1. In its Response to CIR No. 1, the Postal Service outlined why the Commission should accord non-public treatment to the self-declared rates and it later repeats these arguments in its response to Order No. 5412 (*i.e.*, the Postal Service argues that unsealing the self-declared rates is inconsistent with UPU treatment of that data and Commission treatment of similar rates for competitive international products). Response to CIR No. 1, question 1. These arguments are repeated and discussed in greater detail in the Postal Service’s response to Order No. 5412.

treatment.” *Id.* at 4. Specifically, the Postal Service alleges that disclosing the self-declared rates would provide advantages to competitors and customers.¹⁵ The Postal Service asserts that these harms would result if the self-declared rates alone were disclosed. *Id.* The Postal Service states that it would be disadvantaged by a Commission determination to unseal the self-declared rates because it does not have access to similar competitor rates. Postal Service Response at 4.

Third, the Postal Service asserts that the Commission should accord self-declared rates the same non-public treatment as similar competitive UPU rates. *Id.* at 2. The Postal Service states that UPU publishes Postal Service rates for Inbound Express Mail Service (EMS) and Inbound Parcel Post and that the Commission “has consistently afforded [these rates] non-public treatment.” *Id.* at 5-6. The Postal Service argues that unsealing self-declared rates for Inbound Letter Post Small Packets and Bulky Letters would constitute arbitrary and capricious decision-making as it would be inconsistent with the Commission’s own longstanding practice. *Id.* at 2-3, 5.

Fourth, the Postal Service states that the preliminary determination “relies on a general interest in preventing price discrimination” as a basis for unsealing the self-declared rates. *Id.* at 6 (internal marks omitted). The Postal Service asserts that the proper mechanism for vetting claims of discrimination is through the complaint procedure outlined in 39 U.S.C. § 3662, and not through preventative measures. *Id.* Thus, the Postal Service argues that by unsealing the self-declared rates, the Commission would be acting inconsistently with its own reasoning earlier in Docket No. CP2019-155. *Id.* at 7.

¹⁵ *Id.* n.11 (citing October Application at 8 (competitor could use knowledge of the self-declared rates to help it set its own rates for competing products at lower prices) and 9 (customers and potential customers could gain an advantage in negotiating contracts with the Postal Service)).

b. Defer Determination Until UPU Publishes the Rates

In the alternative, the Postal Service requests that the Commission refrain from issuing a final order to unseal the self-declared rates until after the UPU IB publishes the rates. *Id.* at 1. It offers two arguments in support of this request. *Id.* at 7-8. First, the Postal Service argues that it is possible, although unlikely, that the self-declared rates could change. *Id.* at 7. The Postal Service explains that after it notifies the UPU IB of its self-declared rates, the IB could determine that the rates are inconsistent with the applicable regulations that apply to the establishment and calculation of the rates. *Id.* at 7-8. The Postal Service claims that premature determination on disclosure could lead to confusion. *Id.* at 7.

Second, the Postal Service notes that not all designated operators will pay self-declared rates starting on July 1, 2020, and that some designated operators will continue to pay default terminal dues. *Id.* at 8. The Postal Service posits that it is possible that the UPU IB will only provide notice of the self-declared rates to those operators that will be subject to them. *Id.* at 4, 8. If the UPU IB limits notice of self-declared rates to only those designated operators subjected to them, the Postal Service argues that unsealing self-declared rates could disadvantage the Postal Service when negotiating bilateral rates with designated operators that will continue to pay default terminal dues. *Id.* at 8.

B. Other Participants

1. Comments on the October Notice

The Chamber, IMAG, PostCom, and NAM oppose the Postal Service's October application for non-public treatment for the self-declared rates. The Chamber, PostCom, and NAM assert that there is a public interest in unsealing the self-declared rates. For example, PostCom explains that there is a public interest in unsealing the self-declared rates because market dominant products have been subsidizing Inbound

Letter Post for years. PostCom Comments at 3. In addition, NAM states that unsealing these self-declared rates is in the public interest because there are “important considerations of fairness to American businesses who are paying for comparable service within the United States,” and if these self-declared rates are set improperly, they could distort the market. NAM Comments at 1. Furthermore, the Chamber posits that there is potential for price discrimination because these rates are only accessible by designated operators. Chamber Comments at 2. Thus, the Chamber states that if the rates are accorded non-public treatment, it would be difficult for users of the mail to evaluate whether there is undue or unreasonable discrimination or preference in violation of section 403(c). *Id.*

The Chamber, IMAG, and PostCom also argue that unsealing the self-declared rates will not result in commercial harm.¹⁶ For example, because the UPU IB will publish the self-declared rates, PostCom asserts that “there is no justification for keeping these rates non-public after March 1, 2020,” when designated operators provide their self-declared rates to the UPU. PostCom Comments at 2. In addition, IMAG asserts that disclosing the self-declared rates would not result in designated operators having an advantage over the Postal Service when negotiating alternative rates for Inbound Letter Post Small Packets and Bulky Letters because designated operators would not enter into negotiations without knowing the other operator’s self-declared rates. IMAG Comments at 2-3. Furthermore, the Chamber, IMAG, PostCom, and NAM observe that the Postal Service publicly publishes rates for domestic competitive products and services for which it negotiates service agreements with customers.¹⁷

¹⁶ Chamber Comments at 2-3; IMAG Comments at 2-3; PostCom Comments at 2-3.

¹⁷ Chamber Comments at 3; IMAG Comments at 3; PostCom Comments at 3; NAM Comments at 1.

2. Responses to Order No. 5412

IMAG and PostCom support unsealing the self-declared rates for Inbound Letter Post Small Packets and Bulky Letters. IMAG Response at 1; PostCom Response at 1. PostCom states that two of the three potential harms would be realized only if the workpapers are disclosed in addition to the self-declared rates. PostCom Response at 1. Additionally, PostCom asserts that the Commission “correctly recognizes that there is little, if any difference between publishing the self-declared rates and publishing rates for competitive products such as Priority Mail, Priority Mail Express, and First-Class Package Service.” *Id.*

IMAG agrees that the commercial harms alleged by the Postal Service are not likely to result if the self-declared rates are unsealed after the UPU IB publishes them. IMAG Response at 1. In its response, IMAG requests that the Commission direct the Postal Service to unseal the self-declared rates a set number of days after the UPU IB publishes these rates. *Id.* at 2. IMAG also requests that the Commission allow interested parties to comment on the compliance of the self-declared rates with applicable statutes and regulations after the rates are unsealed. *Id.* IMAG asserts that it and other interested parties have been commenting on rates they have not seen. *Id.*

The Public Representative does not make a recommendation regarding the “balanc[ing of] 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.” PR Response at 2, (citing 39 U.S.C. § 504(g)(3)(A)). However, she suggests that the Commission consider the impact of disclosure on other designated operators. *Id.* Specifically, she alleges that the self-declared rates may be equivalent to prices vendors charge designated operators to transport mail and the designated operators may consider these rates to be commercially sensitive. *Id.* She suggests that the Department of State work within the UPU system to make self-declared rates public because she argues that this would

allow member countries to have an opportunity to comment on the impact of disclosing these rates. *Id.*

V. COMMISSION ANALYSIS

The question before the Commission is whether the Postal Service has fulfilled its burden of persuasion that the self-declared rates for the Inbound Letter Post Small Packets and Bulky Letters 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 self-declared rates.

A. Balancing Test Under 39 U.S.C. § 504(g)(3)(A)

In this section, the Commission outlines its authority under 39 U.S.C. § 504(g)(3) to publicly disclose information the Postal Service filed under seal. The Commission also discusses the balancing test it applies when determining whether information filed under seal with the Commission should be disclosed. It then applies the balancing test to the self-declared rates. First, the Commission analyzes the nature and extent of the commercial injuries the Postal Service alleged would likely result if the self-declared rates are disclosed. Second, the Commission discusses how unsealing the self-declared rates would further the public interest in maintaining the financial transparency of a government establishment competing in commercial markets.

1. Legal Standard

The Postal Accountability and Enhancement Act of 2006 (PAEA)¹⁸ 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.

The Postal Service has asserted two statutory provisions it claims support withholding the self-declared rates for Inbound Letter Post Small Packets and Bulky Letters and the supporting workpapers it filed with its October Notice and its Motion. October Application at 2; November 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.”¹⁹ Second, the Freedom of Information Act (FOIA) exempts from public disclosure “trade secrets and commercial or financial information obtained from a person and privileged or confidential[.]” 5 U.S.C. § 552(b)(4).

After the Postal Service has identified its basis for seeking non-public treatment of the materials that it provides to the Commission, the PAEA also establishes the Commission’s specific authority as it relates to 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 treated subject to the procedures of 39 U.S.C. § 504(g)(2) and (3). The Commission is not prohibited from publicly disclosing such

¹⁸ Pub. L. 109-435, 120 Stat. 3198 (2006).

¹⁹ 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). October Application at 2; November Application at 2.

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].”²⁰ 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).

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.²¹ 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

²⁰ *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) (codified at 39 C.F.R. pt. 3007).

²¹ *Id.* § 3007.102(a). This is consistent with the Commission’s long-standing practice under former § 3007.23. See Order No. 4679 at 11.

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. 4679 at 11.

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.” 39 C.F.R. § 3007.104(a). 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 self-declared rates, and weighs it against the nature and extent of any likely commercial injury to the Postal Service from disclosure of the rates. This requires the Commission to evaluate the likelihood of the potential commercial harm identified by the Postal Service in its applications for non-public treatment.

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

2. Nature and Extent of Alleged Commercial Injury

In this section, the Commission discusses the first 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. 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 the self-declared rates are disclosed to the public.

In the applications for non-public treatment, the Postal Service alleged three commercial harms would result if the self-declared rates are publicly disclosed. See

October Application at 7-9; November Application at 7-9. First, the Postal Service alleges that designated operators would use public disclosure of the self-declared rates to their advantage and to the detriment of the Postal Service. October Application at 7; November Application at 7. Second, the Postal Service alleges that competitors could analyze the self-declared rates and the supporting financial workpapers to determine what the Postal Service must charge its customers to comply with the requirements applicable to competitive products. October Application at 8; November Application at 8. Third, the Postal Service asserts that competitors could analyze the “rates, revenues, volumes, and weights,” provided under seal to determine what products and rates to offer in the competitive domestic and international markets. October Application at 9; November Application at 9. Furthermore, the Postal Service claims that customers could use the same information to negotiate better terms with the Postal Service or its competitors. *Id.*

In Order No. 5412, the Commission preliminarily determined that it was unlikely that unsealing the self-declared rates after the UPU IB publishes the rates would result in the three alleged commercial harms. Order No. 5412 at 12-16. Specifically, the Commission stated that the potential for designated operators to adjust their reciprocal self-declared rates or gain an advantage during bilateral negotiations would conclude when the UPU IB publishes these rates as the designated operators would learn the specific self-declared rates from the UPU. *Id.* at 13. The Commission also found that disclosing the self-declared rates would not help designated operators to determine if remail opportunities exist because designated operators already know that remail opportunities exist wherever designated operators are charged default terminal dues rather than self-declared rates. *Id.* at 14. Unsealing the self-declared rates alone would not help designated operators identify which designated operators pay self-declared rates versus those that pay default terminal dues. *Id.* The Postal Service does not contest the Commission’s conclusions or further address this alleged harm in its response. See *generally* Postal Service Response.

With regard to the second and third alleged harms, in Order No. 5412, the Commission noted it appeared that the second and third alleged commercial harms “would only result if financial workpapers are disclosed in addition to the self-declared rates.” Order No. 5412 at 15. If the Postal Service believed that the second or third alleged commercial harm is likely to result if just the self-declared rates are disclosed, the Commission instructed the Postal Service to “provide an illustrative example of how the harm would occur if just the self-declared rates are unsealed.” *Id.* n.22.

In its response, the Postal Service asserts that unsealing the self-declared rates would provide advantages to competitors (not limited to other designated operators) and customers. Postal Service Response at 4. In support, the Postal Service points to alleged commercial harms included in its October Application and November Application that the Commission concluded were not likely to result if only the self-declared rates were disclosed.²² Without any further support, the Postal Service claims that “these types of harms could result from public disclosure of the self-declared rates even without disclosure also of the related financial workpapers.” Postal Service Response at 4 n.11. The Postal Service did not provide any illustrative examples of how these harms would occur if just the self-declared rates are unsealed.

Without illustrative examples, the Commission is left to guess how the alleged commercial harms would result from disclosing the self-declared rates alone. The Postal Service asserts that competitors who are not designated operators could set their own rates for competing products at lower prices. *Id.* However, it is unclear from the applications for non-public treatment how unsealing the self-declared rates alone would result in this commercial harm. If the Postal Service is concerned that foreign customers could choose similar products offered by competitors, such as United Parcel Service, Inc. (UPS) or Federal Express (FedEx), who are not designated operators, then these competitors are competing with outbound prices for designated operators

²² See *id.* n.11; Order No. 5412 at 15.

operating abroad and these outbound prices are published. For example, customers mailing small packets or bulky letters from the United Kingdom to the United States may use the International Standard service offered by Royal Mail, the designated operator in the United Kingdom, or a similar service offered by UPS or FedEx. The International Standard service rates to send small packets and bulky letters to the United States are public.²³ Thus, unsealing self-declared rates would not benefit competitors because the competitors compete with the rates for outbound products offered by other designated operators, which are already public, not the self-declared rates charged to designated operators for Inbound Letter Post Small Packets and Bulky Letters processing and delivery in the United States.

The Postal Service also alleges that unsealing the self-declared rates would provide “customers and potential customers an outside-the-market-advantage in negotiating contracts with the Postal Service[.]” Postal Service Response at 4 n.11. Again, it is unclear from the applications for non-public treatment how unsealing the self-declared rates alone would result in this commercial harm. The Inbound Letter Post Small Packets and Bulky Letters product is only available to designated operators, thereby making designated operators the customers to which the Postal Service appears to be referring.²⁴ Unsealing the self-declared rates would not give designated operators an advantage because designated operators will know what the self-declared rates are when the UPU IB publishes them.

Furthermore, it is unclear who the potential customers are because, again, the product is only available to designated operators. If the Postal Service is concerned that unsealing the self-declared rates would give private delivery companies or domestic companies an advantage when negotiating service agreements for services similar to

²³ Royal Mail, Postage to the USA, available at: <https://www.royalmail.com/sending/international/country-guides/usa>.

²⁴ 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, at 13.

those provided under the Inbound Letter Post Small Packets and Bulky Letters product, the Commission notes that default rates for domestic competitive products for which the Postal Service negotiates service agreements are published. In Order No. 5412, the Commission found that “it is difficult to distinguish the alleged commercial injury posed by competitors and by customers by unsealing the self-declared rates and the commercial injury posed by competitors and by customers by publishing rates for competitive products such as Priority Mail, Priority Mail Express, and First-Class Package Service.” Order No. 5412 at 15-16. The Postal Service does not address this in its response. See Postal Service Response. Instead, the Postal Service simply asserts that the Commission should accord non-public treatment to self-declared rates because the Postal Service treats this information as non-public. Postal Service Response at 3 n.9. Ultimately, the Postal Service fails to persuade the Commission that it “should extend exceptional non-public protection to the self-declared rates when prices for other competitive products are publicly available.”²⁵

The Postal Service must meet its burden of persuasion to demonstrate that disclosure is likely to result in commercial injury. In this proceeding, the Postal Service provides inadequate support for its allegations of commercial injury. Moreover, the Postal Service ignores specific requests for additional information and explanation, and instead repeats the same arguments that the Commission considered in its preliminary determination. After thoroughly considering the nature of the self-declared rates at issue and the commercial harms alleged by the Postal Service, the Commission finds that it is unlikely that unsealing the self-declared rates after the UPU IB publishes the rates would result in the commercial harms alleged by the Postal Service.

²⁵ See Postal Service Response; Order No. 5412 at 16.

3. Public Interest

In this section, the Commission discusses the second part of the balancing test, the public interest in maintaining the financial transparency of the Postal Service, a government entity competing in commercial markets. 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.²⁶ 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.²⁷ 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.²⁸

²⁶ 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).

²⁷ S. Rep. No. 108-318, at 5 (2004), H.R. Rep. No. 109-66, part 1 at 43 (2005).

²⁸ 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.

In Order No. 5412, the Commission discussed how disclosing the self-declared rates furthers the public interest in maintaining the financial transparency for a government establishment competing in commercial markets. Prior to its January 1, 2020 transfer to the Competitive product list, Inbound Letter Post Small Packets and Bulky Letters was part of the Market Dominant Inbound Letter Post product. The Inbound Letter Post product has a long history of poor financial performance. Order No. 5412 at 16-17. This poor financial performance has been a cause of concern for over 20 years. The Commission has repeatedly stated that, as a result of the UPU terminal dues system, domestic mailers have been subsidizing the entry of Inbound Letter Post items by designated operators.²⁹ In recent years, participants have expressed similar concerns related to the financial performance of the Inbound Letter Post product and the terminal dues system. For example, several U.S. Representatives and a U.S. Senator expressed concerns that because terminal dues are less than domestic rates, U.S. mailers pay more than foreign mailers to mail items within the U.S. and U.S. companies are on an uneven playing field when competing with foreign companies.³⁰ These concerns were shared by numerous U.S. businesses that compete against foreign businesses.³¹ In a presidential memorandum, President Donald J. Trump notes that the Postal Service is not fully reimbursed for the cost of delivering inbound small packets and bulky letters and that the terminal dues system distorts the

²⁹ *Id.* at 17; see Docket No. ACR2018, Annual Compliance Determination Report, Fiscal Year 2018, April 12, 2019, at 85 (FY 2018 ACD).

³⁰ Docket No. IM2018-1, Comment Received from U.S. Representative Daniel W. Lipiniski, July 5, 2018, at 1; Docket No. IM2018-1, Comments Received from U.S. Representatives Kenny Marchant and Ralph Abraham, July 3, 2018, at 2-3; Docket No. IM2018-1, Comment Received from U.S. Senator Bill Cassidy, M.D., July 3, 2018, at 1.

³¹ Docket No. IM2018-1, Comments of Small Business & Entrepreneurship Council, July 2, 2018, at 1; Docket No. IM2018-1, Public Comment from Honey-Can-Do International, LLC, June 21, 2018, at 2; Docket No. IM2018-1, Comment Received from Range Kleen, June 19, 2018, at 2; Docket No. IM2018-1, Comment Received from Pretika Corporation, June 15, 2018, at 2; Docket No. IM2018-1, Comment Received from Dexas International Ltd., June 12, 2018, at 2.

international flow of small packets by incentivizing the shipping of goods from countries that pay lower terminal dues.³²

In September 2019, UPU members met in Geneva, Switzerland and negotiated reforms to the UPU terminal dues system as it applies to UPU letter post small packets and bulky letters. See October Notice at 4. Pursuant to these reforms, the Postal Service will apply self-declared rates to certain Inbound Letter Post Small Packets and Bulky Letters items beginning July 1, 2020. *Id.* In Order No. 5412, after considering the long history of concern discussed above, the Commission found that unsealing the self-declared rates would further the public interest in maintaining financial transparency because it would help ensure that the recent reform efforts address the weaknesses of the terminal dues. Order No. 5412 at 17.

In its response, the Postal Service does not contest or otherwise address these points regarding the public interest in unsealing the self-declared rates. See Postal Service Response.

In Order No. 5412, the Commission also noted that unsealing the self-declared rates would further the public interest in maintaining financial transparency because these rates are only available to designated operators and there is potential for price discrimination. Order No. 5412 at 17-18. In its response, the Postal Service incorrectly characterizes Order No. 5412 as relying “on a general interest in preventing price discrimination as a basis for unsealing” the self-declared rates. Postal Service Response at 6 (internal marks omitted). This assertion ignores the Commission’s discussion of the long history of poor financial performance of the Inbound Letter Post product and how unsealing the self-declared rates would further the public interest in

³² 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 (Presidential Memorandum), at section 2(c)(i), available at: <http://www.whitehouse.gov/presidential-actions/presidential-memorandum-secretary-state-secretary-treasury-secretary-homeland-security-postmaster-general-chairman-postal-regulatory-commission/>.

maintaining financial transparency because it would help ensure that the recent UPU reform efforts address the weaknesses of the terminal dues system.

The Postal Service also argues that unsealing the self-declared rates as a means to prevent price discrimination is inconsistent with the Commission's determination to abstain from ordering the Postal Service to offer the self-declared rates to domestic mailers. *Id.* at 6-7 (citing Order No. 5152 at 23). The Postal Service notes that in Order No. 5152, the Commission held that the "proper mechanism for vetting claims of discrimination by the Postal Service is not through preventative measures, but instead through the complaint procedures expressly provided by statute in 39 U.S.C. §§ 403(c), 3662." *Id.* at 6.

However, unsealing the self-declared rates is consistent with the Commission's determination in Order No. 5152 because it is not a "pre-emptive[] attempt to ameliorate discriminatory effects" of offering these rates only to designated operators. *Id.* at 6-7 (citing Order No. 5152 at 23). In Order No. 5152, the Commission declined to direct the Postal Service to make the self-declared rates available to all domestic mailers or to make the Postal Service set the self-declared rates equal to domestic rates.³³ Notwithstanding the Postal Service's explanation in its original filing of why the rates for foreign operators were not set exactly equal to domestic rates or the comments in opposition from the Chamber and others, the Commission found, at the time, that there was insufficient information in the record to determine whether or not there was evidence of undue discrimination or preference in violation of section 403(c) and that

³³ Docket No. CP2019-155, Order Approving Range of Rates for Inbound Letter Post Small Packets and Bulky Letters and Associated International Registered Mail Service, July 12, 2019, at 23 (Order No. 5152). In Docket No. CP2019-155, the Chamber and UPS both opposed limiting the self-declared rates to designated operators and condemned the difference between rates for domestic mailers and designated operators. See Docket No. CP2019-155, Comments of United Parcel Service, Inc. on Notice and Order Concerning Rates not of General Applicability for Inbound E-Format Letter Post, June 21, 2019, at 5-6; Docket No. CP2019-155, Comments of the U.S. Chamber of Commerce, June 21, 2019, at 8.

the Postal Service's offer to negotiate indicated that further developments may be forthcoming. *Id.*

Unsealing the self-declared rates will enable interested parties to assess whether limiting self-declared rates to designated operators amounts to “undue or unreasonable discrimination[.]” *See* 39 U.S.C. § 403(c). In addition, it will enable interested parties to assess whether designated operators are receiving “undue or unreasonable preference[.]” *See id.* Accordingly, unsealing the self-declared rates will better allow interested parties to determine whether filing a section 3662 complaint is appropriate. If users of the mail decide to file a section 3662 complaint, unsealing the self-declared rates would enable them to file a complaint in which they can fully outline their allegations of undue or unreasonable discrimination or preference because they would be able to discuss the self-declared rates unburdened by protective conditions.

4. Conclusion

The Commission determines that unsealing the self-declared rates would further the public interest of maintaining financial transparency of the Postal Service, a government establishment competing in commercial markets. As discussed above, there are longstanding and often-repeated concerns expressed about the UPU terminal dues system that have resulted in domestic mailers subsidizing the acceptance, processing, and delivery of UPU letter post small packets and bulky letters for over 20 years. Unsealing the self-declared rates would provide greater transparency as to whether the recent changes to the UPU terminal dues system address these concerns. In addition, the public interest in enabling users of the mail to determine whether they are experiencing price discrimination and to file a complaint to address such discrimination outweighs the nature and extent of likely commercial harm to the Postal Service. Given that the Postal Service has not carried its burden of persuasion to demonstrate likely commercial injury would result from disclosure of the self-declared

rates, the public interest in unsealing these rates is more than sufficient to justify unsealing.

B. Other Issues

In their responses to Order No. 5412, the Postal Service, the Public Representative, and IMAG all raise issues unrelated to section 504(g)(3)(A)'s balancing test. In the following section, the Commission considers these issues and responds to the participants' arguments.

1. Unsealing the Self-Declared Rates is Consistent with Commission Precedent

The Postal Service argues that unsealing the self-declared rates for Inbound Letter Post Small Packets and Bulky Letters is arbitrary and capricious because it would diverge from "years of consistent Commission practice." Postal Service Response at 2-3. The Postal Service asserts that the Commission should apply the balancing test found in section 504(g)(3)(A) "no differently for the [self-declared rates] than the Commission has applied it for years for the rates of similar competitive UPU products." *Id.* at 2. Specifically, the Postal Service states that UPU publishes Postal Service rates for the Inbound EMS and Inbound Parcel Post products in IB circulars and claims that the Commission "has consistently afforded [Inbound EMS and Inbound Parcel Post rates] non-public treatment." *Id.* at 5-6.

Contrary to the Postal Service's assertions, the Commission has never applied the balancing test to Inbound EMS or Inbound Parcel Post rates to determine the appropriate level of non-public protection that should be accorded to these rates. As the Commission notes in Order No. 5412:

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*.

Order No. 5412 at 12 (citing Order No. 4679 (emphasis in the original)). This has been the Commission's position since it issued rules related to non-public treatment.³⁴ Accordingly, because the Commission has not made a determination regarding the non-public status of Inbound EMS or Inbound Parcel Post rates, the Commission has never *accepted* any rationale for non-public treatment given in the applications for non-public treatment related to those rates. Therefore, a determination that the self-declared rates should be unsealed is consistent with the Commission's regulations and is not a departure from "years of consistent Commission practice" as the Postal Service claims. See Postal Service Response at 2-3.

Moreover, as the Commission has previously noted, "the application of the [section 504(g)(3)] balancing test is necessarily fact-specific."³⁵ Thus, the question of whether to unseal the self-declared rates for Inbound Letter Post Small Packets and Bulky Letters is necessarily a different question than the treatment of Inbound EMS or Inbound Parcel Post rates and requires the Commission to consider the facts unique to the Inbound Letter Post Small Packets and Bulky Letters product.

2. Unsealing the Self-Declared Rates Does Not Conflict with UPU Treatment

The Postal Service asserts that unsealing the self-declared rates for the Inbound Letter Post Small Packets and Bulky Letters product would be inconsistent with the UPU's longstanding practices. Postal Service Response at 5. The Postal Service notes that although the UPU IB will publish these rates no later than April 1, 2020, the "IB's publication of the rates will not likely be a *public* disclosure." *Id.* at 3 (emphasis in the original). Instead, the Postal Service asserts that it is likely that the UPU IB will publish

³⁴ See Order No. 4679 at 11; Docket No. RM2009-6, Order Establishing Procedures for the Freedom of Information Act, October 23, 2009, at 9 (Order No. 322).

³⁵ Docket No. ACR2018, Order Issuing the Determination to Unseal Library Reference PRC-LR-ACR2018-NP3, July 12, 2019, at 58 (Order No. 5151).

the self-declared rates via IB circular, which are “formal written notices that the IB issues.” *Id.* at 4. The Postal Service states that the IB typically posts these circulars “on the password-protected portion of [the UPU] website.” *Id.*

However, the Postal Service does not provide any evidence that the UPU views such rates to be non-public. It does not provide any regulations or guidance relating to the type of information that is posted in the UPU’s documentation centre versus the public portion. It does not provide any terms of use or user agreements that apply to those that are provided passwords and access to the documentation centre. It does not cite any regulations that detail the treatment individuals or entities with passwords should accord to the IB circulars or other documents available in the documentation centre.

In the past, the Commission has posted UPU Congress proposals, which were posted in the documentation centre, in dockets that reviewed the proposals’ consistency with section 3622.³⁶ The Postal Service did not object to posting such proposals.³⁷ In addition, not all IB circulars contain commercially sensitive information and many contain information that is publicly available. For example, the Postal Service frequently references IB circulars that notify designated operators that the Postal Service must provide certain information to the Commission and that these designated operators may address any confidentiality concerns directly with the Commission.³⁸ Thus, the fact that the self-declared rates are provided via IB circular in the documentation centre does not indicate that the UPU believes that these rates should be non-public.

³⁶ See e.g., Docket No. IM2019-1, Notice of Posting of Proposals, June 27, 2019; Docket No. IM2019-1, Notice of Posting of Proposals, July, 31, 2019; Docket No. IM2019-1, Notice of Posting of Proposal, July 31, 2019.

³⁷ Docket No. RM2015-14, United States Postal Service Reply Comments on Procedures Related to Commission Views, September 11, 2015, at 2-3, n.2 (Postal Service did not object to the Commission posting “specific proposals that it deems significant[.]”).

³⁸ See e.g., Docket No. ACR2019, United States Postal Service FY 2019 Annual Compliance Report, December 27, 2019, Attachment Two at 4; Docket No. CP2020-61, Notice of the United States Postal Service of Filing Changes in Rates Not of General Applicability for Inbound Parcel Post (at UPU Rates), and Application for Non-Public Treatment, December 10, 2019, Attachment 1 at 3.

Furthermore, in the case of self-declared rates, the Postal Service provided this information to the Commission and section 504(g)(3)(A) grants the Commission authority to determine the appropriate degree of confidentiality to be accorded information the Postal Service files under seal with the Commission. The Postal Service argues that the Commission should replace its determination regarding the appropriate degree of confidentiality to be accorded to the self-declared rates with what the Postal Service perceives to be the UPU's determination of commercial sensitivity. See Postal Service Response at 3-4. However, the Postal Service does not cite any statutory or regulatory language that supports its position. Section 504 does not require the Commission to supplant its balancing of 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, with a third-party's determination to publish information on a password-protected portion of its website.

In addition, contrary to the Postal Service's claims otherwise, customers and competitors have access to the UPU's documentation centre. See Postal Service Response at 4. Members of the UPU Consultative Committee include "non-governmental organizations representing customers, delivery-service providers, workers unions, suppliers of goods and services to the postal sector[,] and individual and company organizations that have an interest in supporting the UPU's mission and objectives."³⁹ Currently, there are fourteen international organizations on the UPU Consultative Committee, many of whom represent customers and competitors.⁴⁰ For example, the Global Express Association "represents the leading international express

³⁹ Universal Postal Union, About Consultative Committee, available at: <http://www.upu.int/en/the-upu/consultative-committee/about-cc.html>.

⁴⁰ Universal Postal Union, Consultative Committee International Organizations, available at: <http://www.upu.int/en/the-upu/consultative-committee/members/international-organizations.html>.

delivery carriers,” including DHL Express, FedEx, and UPS.⁴¹ Granting non-public treatment to self-declared rates would not shield these rates from competitors and customers, because members of the UPU Consultative Committee have access to IB circulars in the documentation centre.⁴²

3. The Concern Expressed by the Public Representative Does Not Warrant According Non-Public Treatment to the Self-Declared Rates

Although the Public Representative did not comment on the application of 39 U.S.C. § 504(g)(3)(A)'s balancing test to the self-declared rates, she expresses concern that unsealing the self-declared rates would disclose information that other designated operators view as commercially sensitive. PR Response at 2. She states that the Commission should consider whether it is possible to work with the Department of State to propose regulations at the UPU to unseal these rates. *Id.* She states “[i]f the United States proposed to make these rates public through the UPU, all member countries would have the opportunity to weigh in on the decision that will affect all of them.” *Id.*

Taking such extraordinary steps is unnecessary for several reasons. First, unsealing the self-declared rates would not reveal operator-specific data. Rather, unsealing the self-declared rates reveal default rates that the Postal Service charges designated operators for the acceptance, processing, and delivery of Inbound Letter Post Small Packets and Bulky Letters items absent a negotiated service agreement. Thus, self-declared rates are akin to commercial rates that apply to large volume mailers absent a negotiated service agreement, which the Postal Service publishes for domestic competitive products such as Priority Mail, Priority Mail Express, and First-Class Package Service.

⁴¹ Global Express Association, About Us, available at: <https://global-express.org/index.php?id=2>.

⁴² See General Regulations of the Universal Postal Union, Article 121.1.1, Berne, available at: http://www.upu.int/uploads/tx_sbdownloader/actsActsOfThe26ThCongressIstanbul2016En.pdf.

Second, as noted above, the Postal Service's self-declared rates for Inbound Letter Post Small Packets and Bulky Letters are Postal Service data, not third-party data. The Public Representative's suggestion that the Commission work with the Department of State to adopt UPU provisions regulating such rates ignores the Commission's authority, granted by Congress, in 39 U.S.C. § 504(g)(3)(A). The Public Representative's suggested approach would require the Commission to relinquish its statutory authority to weigh alleged commercial harms against the public interest in maintaining financial transparency of a government establishment competing in commercial markets to a third party who is not applying the same standard to determine whether information should be made public.

Third, despite receiving advance notice, no designated operators have approached the Commission with any confidentiality concerns. The Postal Service states that it provided notice to all designated operators through an UPU IB circular that it regularly submits certain business information to the Commission. October Application at 3; November Application at 3. At the same time, the Postal Service also instructed designated operators to address any confidentiality concerns directly before the Commission and provided information on how they may raise such concerns. *Id.* In this proceeding, no designated operators raised any confidentiality concerns related to unsealing the self-declared rates.

4. It is Not Necessary to Wait Until the UPU Publishes the Self-Declared Rates to Determine the Appropriate Degree of Non-Public Treatment

If the Commission does not reverse its preliminary determination, then the Postal Service asserts that there are two reasons why the Commission should refrain from issuing a final determination to unseal the self-declared rates until after the UPU IB publishes the self-declared rates. Postal Service Response at 7. First, the Postal Service claims issuing a determination to unseal self-declared rates before the UPU IB publishes the rates could lead to confusion. *Id.* at 7. The Postal Service argues that

there is a possibility, although “admittedly unlikely,” for confusion because the UPU IB could evaluate whether the self-declared rates comply with applicable UPU business rules. *Id.* If the self-declared rates do not comply with the applicable UPU regulations, then the published self-declared rates could be different from the self-declared rates submitted with the October Notice and Motion. *See id.*

Second, the Postal Service argues that when the UPU IB publishes the self-declared rates, it could only notify the countries and designated operators that are subject to self-declared rates. *Id.* at 8. The Postal Service argues that disclosing the self-declared rates to designated operators that are not subject to those rates “could undermine any efforts by the Postal Service to negotiate bilateral rates with operators that are not subject to the self-declared rates.” *Id.*

However, these reasons do not require the Commission to refrain from making a determination regarding the appropriate degree of non-public treatment that should be accorded to the self-declared rates. First, as the Postal Service acknowledges, it is “admittedly unlikely” that the self-declared rates will change. *Id.* at 7. Furthermore, even if the self-declared rates change before they are published by UPU IB, it is unclear how issuing the determination to unseal now will result in confusion. This is because the self-declared rates will not be unsealed until after the UPU IB publishes the final self-declared rates, so only one set of self-declared rates would be unsealed.

Second, it is also unlikely the UPU IB will limit publication of the self-declared rates and inform only the designated operators that will be subject to self-declared rates. The Postal Service concedes that “in all likelihood the UPU IB shall publish the July 1, 2020 rates. . . by means of an International Bureau circular.” *Id.* at 3-4 (internal marks omitted). The Commission agrees with the Postal Service’s assessment. Therefore, by the Postal Service’s own admission, it is unlikely that the UPU will limit publication to just designated operators subject to self-declared rates. Additionally, even if the UPU only disseminates the self-declared rates to the designated operators that are subject to those rates, it is unlikely that unsealing the self-declared rates would

result in the commercial harm alleged by the Postal Service. Specifically, it is unlikely that designated operators not subject to self-declared rates will benefit from knowing the self-declared rates because the starting point for bilateral negotiations would be the default terminal dues that those designated operators pay, not the self-declared rates, which do not apply to them.

5. It is Not Necessary to Invite Comments After the Self-Declared Rates are Unsealed

In its response, IMAG requests that Commission “allow for a public comment period as it would allow for any other published rate[.]” once the self-declared rates are unsealed. IMAG Response at 2. Because the self-declared rates were filed under seal and because neither IMAG nor any other party requested access to the rates, IMAG argues that “[it] and other interested parties have been commenting on something that [they] have not even seen yet[.]” and that parties should have an opportunity to comment on the actual rates. *Id.*

The Commission declines to grant IMAG’s request for an additional public comment period. The Commission’s rules permit interested parties to request access to material the Postal Service files under seal. See 39 C.F.R. part 3007 subpart C. The rules specifically permit interested parties to request access to such material to “aid participation in any pending Commission proceeding[.]” 39 C.F.R. § 3007.301(b)(2)(i). In Order No. 5372, after reviewing the October Notice, the Motion, supporting workpapers filed under seal, and the comments, the Commission approved the self-declared rates to go into effect on July 1, 2020. Order No. 5372 at 11, 15. Thus, it is not appropriate to invite further public comment on the self-declared rates, which the Commission already approved.

VI. CONCLUSION

For the above reasons, the Commission determines that it is not appropriate to accord non-public treatment to the specific per-item and per-kilogram self-declared rates for the Inbound Letter Post Small Packets and Bulky Letters product. The Commission finds that the Postal Service did not meet its burden of persuasion to demonstrate that the self-declared rates 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 self-declared rates.

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 recent UPU reforms, the Commission finds that unsealing the self-declared rates will substantially further the public interest. Additionally, after considering the commercial harms identified in the applications for non-public treatment and the additional rationale provided in the Postal Service Response, the Commission finds that it is unlikely that disclosing the self-declared rates 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 retaining this information under seal.

The Postal Service shall publicly file the specific per-item and per-kilogram self-declared rates for the Inbound Letter Post Small Packets and Bulky Letters product seven days after the UPU publishes these rates.

VII. ORDERING PARAGRAPHS

It is ordered:

1. The Commission determines that the specific per-item and per-kilogram self-declared rates for the Inbound Letter Post Small Packets and Bulky Letters product should be unsealed.
2. The Postal Service shall publicly file the specific per-item and per-kilogram self-declared rates for the Inbound Letter Post Small Packets and Bulky Letters product seven days after the Universal Postal Union publishes these rates.

By the Commission.

Erica A. Barker
Secretary