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BEFORE THE

POSTAL REGULATORY COMMISSION

WASHINGTON, D.C. 20268–0001

COMPETITIVE PRODUCT PRICES PRIORITY MAIL & FIRST-CLASS PACKAGE SERVICE PRIORITY MAIL & FIRST-CLASS PACKAGE SERVICE CONTRACT 200	Docket No. MC2021–115
COMPETITIVE PRODUCT PRICES PRIORITY MAIL & FIRST-CLASS PACKAGE SERVICE CONTRACT 200 (MC2021–115) NEGOTIATED SERVICE AGREEMENT	Docket No. CP2021–117

SUPPLEMENTAL SUBMISSION REGARDING
MOTION REQUESTING ACCESS TO NON-PUBLIC MATERIALS
UNDER PROTECTIVE CONDITIONS
(August 5, 2022)

The Strategic Organizing Center ("SOC") files this supplemental submission to request that the Postal Regulatory Commission ("PRC") immediately grant its Motion Requesting Access to Non-Public Materials under Protective Conditions, filed May 12, 2022 ("Motion")[1] and grant it full access to the relevant contract because the United States Postal Service ("USPS" or "Postal Service") has effectively waived its right to object to the release of the non-public information SOC seeks by taking the position that not only will it *not* release any information

[1] Strategic Organizing Center's Motion Requesting Access to Non-Public Materials under Protective Conditions, May 12, 2022, at 1 (Motion).

regarding any USPS contract, but that it lacks the power to do so because, it claims, it must obtain Amazon's consent to any such release. In contending it is powerless to release information without Amazon's consent – and in asserting several purported alternative ways of responding to SOC's inquiry and objectives – USPS is attempting a blatant end-run around the rules for access to information the PRC has established pursuant to its statutory authority and on which its Order 6189,[2] directing USPS and SOC to meet and confer regarding the release of the information SOC seeks, is based. Those rules properly balance USPS's business interests against the public's interest in accountability and transparency. Accordingly, the Postal Service's refusal to recognize or participate in the process established under the rules constitute grounds for immediately granting SOC's Motion and granting SOC access to the full unredacted version of the relevant contract, along with the supporting Governor's Decision, between USPS and Amazon.

1. Procedural Background

On May 12, 2022, SOC filed a motion with the PRC requesting access to the unredacted versions of the negotiated service agreement ("NSA") currently in effect between the Postal Service and Amazon, and of the supporting Governor's Decision. The Motion stated that SOC has preliminary evidence suggesting that USPS is unduly preferencing Amazon in violation of 39 USC § 403(c), 39 USC § 101(e), and 39 USC § 101(b), and that SOC seeks the unredacted materials to further investigate the basis for these potential violations in contemplation of initiating a complaint before the Commission pursuant to 39 USC § 3662. SOC's Motion

[2] Postal Regulatory Commission, Order 6189. Order Denying Motion for Access Without Prejudice and Holding Proceedings in Abeyance Pending Filing of Joint Statement, June 6, 2022 ("Order").

included its counsels' certification of their agreement to comply with the PRC's extensive protective conditions for granting access to non-public materials.

On May 18, 2022, the Postal Service filed a response in opposition to the Motion urging the Commission to deny the Motion with prejudice on the grounds that the procedures established by PRC Rules §§ 3011.300(c) and 3011.301(b)(2)(ii) should not be available to parties preparing to initiate a proceeding before the Commission given the availability of alternative means of information discovery, the prospect that disclosure of the information would damage USPS's business relationships, and that the information sought was not relevant to SOC's potential legal claims.[3]

On June 6, the Commission issued Order 6189, which denied SOC's Motion without prejudice and held proceedings in abeyance pending the parties' filing a joint statement after their counsel had met and conferred "in a good faith effort to narrow or resolve disputed issues and clarify the parties' positions on any issues they cannot resolve." Order at 12. The Commission expressly rejected the Postal Service's contentions that access to non-public materials in aid of initiating a proceeding before the Commission should never be granted on both grounds asserted by USPS: that such materials should not be released solely to aid a potential proceeding before the PRC, Order at 10, and that there are other procedural mechanisms by which a party can obtain access to non-public information such as civil discovery, Order at 11. In doing so the PRC noted that the USPS's objections repeated the objections it asserted in opposition to the issuance of Rule 3011.301(b)(2)(ii) in 2018, which

[3] Response of the United States Postal Service in Opposition to Motion for Access to Non-Public Materials, May 18, 2022, at 1, 4 ("Postal Service Response").

created a process for parties to receive access to non-public materials in aid of initiation of new proceedings, and further noted that it had expressly considered and rejected those same arguments at the time the rules were issued. Order at 9-11. In the Order the PRC similarly rejected the Postal Service's objection, also raised and rejected at the time the rules were considered, that protective conditions to which persons who obtain non-public information are subject are inadequate to protect the interests at stake. Order at 10-11.

The Commission also noted that SOC's Motion represented the first instance in which a party has sought to use the procedure established by §3011.301(b)(2)(ii), and concluded that "it is in the public interest to allow the public (here, SOC) meaningful opportunities under §§ 3011.300(c) and 3011.301(b)(2)(ii) to gain access to non-public information to aid initiation of a proceeding before the Commission . . . in furtherance of the Commission's overall goal of providing accountability, transparency, and oversight of the Postal Service."

In denying the SOC's Motion without prejudice, the Commission further suggested the SOC had likely not requested the correct NSA; thus the first issue on which SOC and USPS were directed to confer was the identification of the applicable NSA between USPS and Amazon. To that end, the Order directed the parties to meet and confer and to file a Joint Statement specifically addressing:

a. Potential identification of the docket or contract number(s) applicable to NSAs between the Postal Service and Amazon;
b. Potential provision of the unredacted text of the applicable contract(s) between the Postal Service and Amazon and the supporting Governor's Decision(s);
c. Potential narrowing of the scope of non-public materials sought by SOC;

d. Potential terms for a non-disclosure agreement governing SOC's counsel's use, care, and dissemination of any non-public information and materials; and

e. Any other potential matter that would aid in an efficient resolution of the request for access to the non-public materials.[4]

2. SOC is entitled to the non-public information it seeks because USPS has waived its right to object to release of the information by obstructing and attempting to circumvent the PRC's process contemplating such release.

a. SOC is entitled to access to the correct contract.

On the threshold issue of identifying which NSA between USPS and Amazon is potentially relevant to SOC's request, the Postal Service refused to confirm the existence of any such contract and thus would not assist in identifying the potentially relevant contract at issue.[5] In spite of USPS's unresponsiveness, SOC has determined that the NSA relevant to its potential

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[4] Order at 13.

[5] USPS stonewalled in spite of the fact that the importance of its relationship with the company is well known from documents already released to the public and touted by Postal Service itself. For example, a USPS operations policy memorandum for January 10, 2022 directs regional managers to "Verify the Amazon route book for scheduled drop times over the holiday weekend [and] Utilize the Amazon projections sent on Friday (1/14/22) for proper planning and scheduling." https://about.usps.com/who/legal/foia/documents/delivery-operations/del-ops-mlk-jr-day-2022.rtf. The memorandum provides instructions for no other named USPS customer. "Newly revealed USPS documents show an agency struggling to manage Trump, Amazon and the pandemic," Washington Post, Sept. 18, 2020 ("Amazon is a lucrative client for the Postal Service. Amazon drove about $3.9 billion in revenue and $1.6 billion in profit for the USPS in fiscal 2019, according to multiple emails and financial statements obtained via open records laws") https://www.washingtonpost.com/us-policy/2020/09/17/usps-trump-coronavirus-amazon-foia/. Statement of James P. Cochrane before the Subcommittee on Federal Workforce, U.S. Postal Service and the Census, U.S. House of Representatives, May 22, 2014, ("Last year, we launched a strategic partnership with Amazon to test Sunday package delivery in select markets. This value-added service, which utilizes dynamic routing technology, was implemented in time for the 2013 holiday mailing and shipping season. Since launched, millions of packages have been delivered on Sundays to Amazon Customers. With an expansion announced earlier this month, the Postal Service now delivers packages on Sundays for Amazon in 15 cities—with plans to continue to roll out to a large portion of the U.S. population this year.") https://about.usps.com/news/testimony/2014/pr14_day0522.pdf.

complaint regarding USPS's business relationship with Amazon is Parcel Select Contract 44, filed in Docket Nos. MC2021-42 and CP2021-43. Accordingly, in requesting immediate access to the relevant NSA between USPS and Amazon, SOC means to request Parcel Select Contract 44 and the accompanying Governor's Decision.

b. USPS has waived its right to object to the release of the non-public information by persistently seeking to avoid the regulatory process established by the PRC.

USPS stated it would not release any information from any NSA voluntarily, including the identity of any NSA between USPS and Amazon, based on the same arguments considered and rejected in the PRC's Order. Instead, the Postal Service suggested several alternative procedures that amount to a further rejection and attempted end-run around the process established by the PRC – as reiterated in the Order – for the public to obtain protected access to non-public information to enable the public to participate meaningfully in the PRC's procedures and provide public accountability and oversight regarding matters of important public interest.

First, USPS reiterated that it should not need to release information to SOC because SOC could use FOIA or civil discovery to obtain non-public portions of the contract. The PRC considered and rejected this objection in the Order, Order at 11, yet USPS persists in raising this as a reason it will not provide information in response to SOC's Motion.

USPS also stated SOC should have disclosed further, detailed information about its current sources for the purpose of allowing USPS to conduct its own investigation into possible preferencing of Amazon, which would negate the need for SOC to further investigate or file a

complaint. USPS thus proposes substituting its own investigation and judgment for the public inquiry specifically authorized under PRC Rule § 3011.300 (c).

Similarly, USPS proposed providing, in lieu of a contract or portions thereof, a statement that would consist of the USPS's own determination whether or not the contract at issue contains any information responsive to SOC's interest in the contract. Again, USPS is seeking to substitute its own review and conclusions for the transparency and public scrutiny provided for under Rule § 3011.300 (c).

Finally, in considering possible terms of an agreement to protect non-public information, USPS also rejected the certifications SOC's counsel made in the Motion under Rule § 3011.301 (b)(5) and (6) agreeing to comply with the extensive protective conditions required by the Commission including that they will use the materials only for the purpose authorized by the Commission, that they will protect all materials from dissemination or disclosure to unauthorized persons, and that they will execute and file Certifications of Compliance with Protective Conditions and Termination of Access upon termination of their access to the materials. Rather, USPS stated these protections are inadequate and would seek to execute a separate order, enforceable in a federal district court, to protect any non-public information SOC obtains. This is yet another way in which USPS – while suggesting SOC will not respect PRC's authority or its rules – is itself attempting to disregard the PRC's established process for public accountability and divert this matter into an entirely separate process of its own making.

In summary, the USPS is proposing to circumvent the regulatory process established for public participation and obtaining non-public information by a) refusing to provide any information including assisting in identifying or confirming the correct contract; b) maintaining

that SOC should use civil discovery or public records laws[6] rather than the PRC process; c) asserting SOC should reveal detailed information about its current sources to enable the USPS to substitute its own investigation of SOC's potential allegations for SOC's inquiry; d) proposing that USPS make its own substantive determination whether any contract terms bear on potential preferencing of Amazon and issue a statement reflecting that determination to SOC in lieu of providing any non-public information to SOC as, once again, the regulatory process provides; and e) rejecting the PRC process for protecting non-public information as inadequate and proposing a separate, non-PRC mechanism instead.

The rules establish a process that provides limited transparency (subject to protective conditions) under which the public may play a meaningful role in "accountability, transparency, and oversight of the Postal Service." Order at 6 (citation omitted). It would entirely subvert PRC's rules and authority to allow the very body which the rules seek to hold accountable to determine and characterize the relevance of any potential information, or conduct its own inquiry into SOC's allegations with no public participation or scrutiny whatsoever. The same rules similarly establish substantial mechanisms, backed by sanctions under Rule § 3011.303, to protect non-public information obtained by public parties through this process. Accordingly, USPS's attempts to avoid the PRC and its authority should be rejected, and the PRC should find USPS has waived its right to object to SOC's request for information.

c. USPS has waived its right to object to the release of non-public information because it claims it lacks the power to release any such information.

[6] As USPS undoubtedly knows, NSAs are largely unobtainable through public records laws.

In the course of conferring, USPS stated multiple times that it might be unable to release any information whatsoever without the consent of Amazon.

Thus on the issue of identifying which NSA between USPS and Amazon is potentially relevant to our request, the Postal Service not only refused to confirm that any contract between itself and Amazon exists or otherwise assist in identifying any potentially relevant contract, it also stated that it might be barred from confirming any contract even exists without the consent of any party to any such contract.

Similarly, although USPS inquired what narrower categories of information SOC would be willing to accept, it reiterated that it is likely bound by the terms of the contracts themselves to obtain consent from any party to those contracts to release any information. Likewise, although USPS asked SOC if it would accept a statement containing USPS's own determination whether the relevant contract contains information that bears on SOC's inquiry, it stated that it likely would not be able to release such a statement without obtaining permission of the private party to the contract. Even in refusing to rely on the PRC's rules to protect non-public information and proposing a separate order for this purpose, it stated it may also be bound by its contractual obligations to obtain permission from the party to the contract to enter into a confidentiality agreement with SOC.

USPS is therefore asserting a blanket lack of authority to release, in any form, the information SOC seeks. In effect, USPS claimed it does not have meaningful authority to make any compromise with SOC on the matters identified by the Commission. Rather it signaled this authority resides in the counterparty to the contract at issue, Amazon. It follows that USPS counsel engaged in only the illusion of bargaining, inviting SOC to narrow its position, without

expressing any capacity or willingness to do the same. This additional barrier to obtaining information renders USPS's participation in the meet and confer process meaningless and illusory.

More to the point, the assertion that USPS lacks the power to release non-public information is absurd on its face, because USPS is therefore claiming it does not have the power to comply with the PRC's regulatory process. If USPS or other actors could insulate themselves from public oversight – or other regulatory compliance – by simply contracting with a third party to prevent such compliance, legal and public accountability and authority would be entirely meaningless. In short, USPS should not be permitted to immunize itself from complying with Commission Rules §§ 3011.300 to 305 on procedures for seeking access to non-public materials by claiming that only a private party to the NSA may authorize the release of information. To hold otherwise would elevate private agreements over public law created specifically to hold those parties accountable, and in effect relinquish the power to make these decisions to a private corporation – in this case Amazon. SOC has very little doubt of the outcome if Amazon is permitted to decide whether the public may obtain information in order to hold Amazon accountable to public rules and laws.

Because USPS takes a position that is nonsensical and seems intent on rejecting and circumventing PRC's authority to regulate the release of non-public information in order to, as the Commission put it in Order 6189, "provid[e] accountability, transparency, and oversight of the Postal Service," Order at 11, the PRC should hold that USPS has waived any right to object to release of the information that SOC seeks.

3. Conclusion

For the reasons stated above, SOC respectfully requests that the PRC hold SOC is entitled to immediate access to the full, unredacted version of the relevant NSA between USPS and Amazon and the accompanying Governor's Decision.

Respectfully submitted,

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