

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

Before Commissioners:

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

Competitive Product Prices
Parcel Select Contracts
Parcel Select Contract 44

Docket No. MC2021-42

Competitive Product Prices
Parcel Select Contract 44 (MC2021-42)
Negotiated Service Agreements

Docket No. CP2021-43

ORDER DENYING THE STRATEGIC ORGANIZING CENTER'S
MOTION FOR ACCESS AND MOTION FOR LEAVE AND
AMAZON.COM SERVICES LLC'S MOTION FOR LEAVE

(Issued September 29, 2022)

I. INTRODUCTION

On August 17, 2022, the Strategic Organizing Center (SOC) filed a motion for access to non-public materials.¹ Subsequently, on September 2, 2022, SOC filed a motion for leave to reply to the opposition responses.² On September 9, 2022, Amazon.com Services LLC (Amazon) filed a motion for leave to file a response to the

¹ Motion by Strategic Organizing Center Requesting Access to Non-Public Materials Under Protective Conditions, August 17, 2022 (SOC Motion for Access).

² Motion by Strategic Organizing Center Requesting Leave to Reply to Responses Opposing SOC's Motion for Access to Non-Public Materials Under Protective Conditions, September 2, 2022 (SOC Motion for Leave).

SOC Motion for Leave and its proposed reply.³ For the reasons discussed below, the Commission denies the SOC Motion for Access, the SOC Motion for Leave, and the Amazon Motion for Leave.

II. PROCEDURAL HISTORY

SOC previously filed a similar motion for access to non-public materials in Docket Nos. MC2021-115 and CP2021-117. For a procedural history of parties' filings and the Commission's orders in those dockets, please see Order No. 6189⁴ and Order No. 6285.⁵ In summary, SOC sought access to a different set of non-public materials in those dockets that have no relevance to the allegations it anticipates it would make in a complaint proceeding, and its motion and supplemental submission were denied by the Commission. See Order No. 6189 at 12; Order No. 6285 at 5-6. Now SOC has filed a revised motion for access in the instant dockets.

On August 17, 2022, SOC filed a motion in the instant dockets 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. SOC Motion for Access at 1. Upon information and belief, SOC identified Parcel Select Contract 44 (Contract 44) filed in the instant dockets as the relevant NSA. *Id.* SOC requested access to Contract 44 as well as the supporting Governor's Decision "for its counsel so that SOC may investigate and initiate a complaint before the Commission" pursuant to 39 U.S.C. § 3662. *Id.* at 2.

³ Motion of Amazon.com Services LLC for Leave to File Response, September 9, 2022 (Amazon Motion for Leave).

⁴ Docket Nos. MC2021-115 and CP2021-117, Order Denying Motion for Access Without Prejudice and Holding Proceedings in Abeyance Pending Filing of Joint Statement, June 6, 2022 (Order No. 6189).

⁵ Docket Nos. MC2021-115 and CP2021-117, Order Denying the Strategic Organizing Center's Supplemental Submission and Granting the Postal Service's Motion for Clarification, September 29, 2022 (Order No. 6285).

On August 22, 2022, the Postal Service and Amazon filed responses in opposition to the SOC Motion for Access, which urge the Commission to deny the motion with prejudice.⁶ On the same day, the Package Shippers Association (PSA) also filed a response in opposition, requesting that the Commission deny the motion.⁷

On September 2, 2022, SOC filed a motion for leave to reply to the opposition responses. See SOC Motion for Leave. In conjunction with its motion for leave, SOC also filed a supplemental submission regarding its motion for access.⁸ Concurrently with its motion for leave, SOC filed its proposed reply to the opposition responses.⁹

On September 8, 2022, the Postal Service filed a response in opposition to the SOC Motion for Leave and the SOC Proposed Reply, and renewed its motion for clarification.¹⁰ On September 9, 2022, Amazon filed a motion for leave to file a response to the SOC Motion for Leave and the SOC Proposed Reply. See Amazon Motion for Leave. Concurrently with its motion for leave, Amazon filed its opposition response.¹¹

⁶ USPS Response in Opposition to Motion Requesting Access to Non-Public Materials, August 22, 2022, at 1 (Postal Service Response); Opposition of Amazon.com Services LLC to Motion by Strategic Organizing Center for Access to Non-Public Materials, August 22, 2022, at 1-3 (Amazon Response).

⁷ Response of the Package Shippers Association in Opposition to Motion for Access to Non-Public Materials, August 22, 2022, at 1 (PSA Response).

⁸ Supplemental Submission Regarding Motion Requesting Access to Non-Public Materials Under Protective Conditions, September 2, 2022 (SOC Supplemental Submission).

⁹ Proposed Reply of Strategic Organizing Center to Responses in Opposition to SOC Request for Access to Non-Public Materials Under Protective Conditions, September 2, 2022 (SOC Proposed Reply).

¹⁰ USPS Response in Opposition to Motion of Strategic Organizing Center for Leave to Reply and Renewed Motion for Clarification, September 8, 2022 (Postal Service Response in Opposition to SOC Motion for Leave).

¹¹ Opposition of Amazon.com Services LLC to Motion of Strategic Organizing Center for Leave to File Response, September 9, 2022 (Amazon Response in Opposition to SOC Motion for Leave).

III. POSITIONS OF THE PARTIES

A. SOC Motion for Access

SOC requests access to unredacted versions of Contract 44 and the supporting Governor's Decision for its counsel for the purpose of "aiding the initiation of a proceeding before the Commission" pursuant to 39 C.F.R. § 3011.300(c). SOC Motion for Access at 2 (quoting 39 C.F.R. § 3011.300(c)). Specifically, SOC seeks access to these documents so that its counsel may "investigate and initiate a complaint before the Commission" pursuant to 39 U.S.C. § 3662. SOC Motion for Access at 2. SOC anticipates that its complaint would allege that in its performance of Contract 44, the Postal Service is: (1) giving undue preference to Amazon in violation of 39 U.S.C. § 403(c); (2) causing delays to the delivery of equivalent service categories of "important letter mail" in violation of 39 U.S.C. § 101(e); and (3) undermining "effective and regular postal services to rural areas" in violation of 39 U.S.C. § 101(b). *Id.* SOC states that it has preliminary evidence obtained through an online survey of Postal Service employees and follow-up interviews with survey respondents that substantiate these claims. *See id.* at 7-8. SOC states it anticipates initiating a complaint proceeding within 60 days of receiving access to the non-public materials. *Id.* at 9.

SOC argues that the balancing of parties' interests that the Commission undertakes when determining whether to grant access to non-public materials favors granting its motion. *See id.* at 10-11. Specifically, SOC argues that: (1) Contract 44 is relevant to its potential complaint; (2) SOC needs the full contents of the contract to evaluate its claims; (3) the Postal Service is a public entity; (4) the non-public information relates to issues important to the public (the fairness and legality of the Postal Service's operations, and the public's usage of 39 C.F.R. § 3011.300(c) to obtain non-public information in aid of initiation of a proceeding); and (5) the harm to the Postal Service is minimal because SOC is only seeking access to, not disclosure of, the non-public materials, the access is governed by strict protective conditions, and private

mailers are already aware that their contracts with the Postal Service may be subject to disclosure. *See id.* at 11-15.

SOC also argues that the Commission should grant its motion for access because the Postal Service has allegedly “waived its right to object to the release of the non-public information” by refusing to release non-public information to SOC during the meet-and-confer process ordered by the Commission in Docket Nos. MC2021-115 and CP2021-117. *See id.* at 15-21; *see also* Order No. 6189 at 12-13. In connection with this argument, SOC also argues that because the Postal Service takes the position that the terms of Contract 44 bar it from compromising with SOC, only the Commission has the power to grant SOC access to the non-public information. *See* SOC Motion for Access at 21-22.

Finally, SOC states that it is “a non-profit research and advocacy organization supported by a coalition of labor unions.” *Id.* at 22. It further states that “[n]either SOC as an organization nor its individual counsel have any affiliation with the delivery services, communications, or mailing industries, and neither SOC nor its individual counsel are . . . involved in ‘competitive decision-making’ within those industries.” *Id.* The motion includes SOC’s individual counsel’s signed protective conditions statement and certifications to comply with protective conditions. *Id.* Exhibit 1.

B. Postal Service Response

The Postal Service argues that SOC failed to show the relevancy of the non-public portions of the contract as required by 39 C.F.R. § 3011.301(b)(2)(ii), and instead relied on conclusory allegations. Postal Service Response at 2. The Postal Service also claims that SOC is in essence second-guessing the Commission’s determination that the contract is legally compliant. *Id.* In addition, the Postal Service argues that SOC failed to meet the requirement of 39 C.F.R. § 3011.301(b)(3) by failing to disclose that one of the four labor unions it is associated with is the International Brotherhood of Teamsters (IBT), which represents a portion of United Parcel Service, Inc.’s (UPS)

workforce and is actively engaged in an organizing campaign and advocacy focused on Amazon delivery workers. *Id.* at 3-4. Furthermore, the Postal Service argues that granting SOC access would have a chilling effect on mailers' willingness to contract with the Postal Service and harm the Postal Service's commercial interest. *Id.* at 4-5. Finally, the Postal Service argues that it has not waived its right to object to the SOC Motion for Access as SOC claims, and non-disclosure agreements with the Postal Service's NSA customers legally prevent it from disclosing confidential information. *Id.* at 5-6. Therefore, the Postal Service urges the Commission to deny the SOC Motion for Access with prejudice. *Id.* at 6.

C. PSA Response

PSA stresses the commercial harm to the Postal Service if SOC were granted access. PSA Response at 1-3. PSA claims that SOC failed to provide a "detailed statement justifying the request for access" required by 39 C.F.R. § 3011.301(b)(2) and instead relied on conclusory allegations. *Id.* at 3 (quoting 39 C.F.R. § 3011.301(b)(2)). In addition, PSA argues that the alleged violations of 39 U.S.C. § 101(b) and (e) fail for lack of jurisdiction and the alleged violation of 39 U.S.C. § 403(c) amounts to second-guessing the Commission's determination that the contract is legally compliant. PSA Response at 3. Finally, PSA claims that the access rules in 39 C.F.R. § 3011.301 were never intended as "an alternative to bypass the statutory and regulatory limitations on discovery in connection with complaint proceedings under [39 U.S.C. § 3662]." *Id.* at 4. Therefore, PSA requests that the Commission deny the SOC Motion for Access. *Id.*

D. Amazon Response

Amazon discusses the commercial harm to the Postal Service and chilling effect on its ability to compete against other shippers if SOC were granted access. Amazon Response at 2. Amazon claims SOC's use of the access rules for pre-litigation discovery is procedurally improper because the regulatory history of 39 C.F.R. § 3011.301 allegedly shows it was never intended to allow parties to engage in pre-litigation discovery. *Id.* at 6-9. Amazon also claims construing the access rules broadly in this way would create unnecessary conflict with the statutory complaint provisions of 39 U.S.C. § 3662 and would also be inconsistent with the Federal Rules of Civil Procedure. *Id.* at 9-11.

In addition, Amazon argues that even if access rules were appropriately used for pre-litigation discovery, SOC failed to satisfy the substantive standards of 39 C.F.R. § 3011.301 because: (1) allegedly the Commission's complaint jurisdiction under 39 U.S.C. § 3662(a) does not encompass claims arising under 39 U.S.C. § 101(b) or (e); (2) the Postal Service is authorized to offer rates and classes not of general applicability to individual mailers under 39 U.S.C. § 3632(b)(3); (3) 39 U.S.C. § 403(c) does not prohibit price or service discrimination generally, but only prohibits undue or unreasonable discrimination; (4) the Commission already determined that the contract is legally compliant and SOC is attempting to second-guess the Commission's determination; and (5) the Commission and courts usually defer to the Postal Service's business judgments. *See id.* at 11-15.

Finally, Amazon argues that balancing the parties' interests also necessitates denial of SOC's motion because not only would the Postal Service and its commercial partners be harmed by granting the SOC Motion for Access, but remote and rural customers would also be harmed if the Postal Service's long-term financial viability and its universal service obligation were threatened as a result of the chilling effect on the

Postal Service's ability to compete. *Id.* at 15-17. Amazon thus requests that the Commission deny the SOC Motion for Access with prejudice. *Id.* at 3, 17.

E. SOC Motion for Leave, SOC Supplemental Submission, and SOC Proposed Reply

SOC requests that the Commission grant it leave to file a reply to the opposition responses filed by the Postal Service, PSA, and Amazon because the SOC Motion for Access raises issues of significant public interest, the responses are allegedly "the functional equivalent to public comments seeking changes to the PRC's extant rules," and the responses raise new arguments to which SOC has not had the opportunity to respond. SOC Motion for Leave at 3-4.

In connection with its motion for leave, SOC also filed a supplemental submission regarding its motion that it filed in Docket Nos. MC2021-115 and CP2021-117. See SOC Supplemental Submission. In it, SOC again recounts the procedural history of those dockets. See *id.* at 2-5. It then reargues that the Commission should grant its motion for access because the Postal Service has allegedly "effectively waived its right to object to the release of the non-public information" by refusing to release non-public information to SOC during the meet-and-confer process. See *id.* at 1-2; see also *id.* at 6-10.

In its proposed reply, SOC once again recounts the procedural history of Docket Nos. MC2021-115 and CP2021-117. SOC Proposed Reply at 1-2. SOC then proceeds to address various points raised in the responses filed by the Postal Service, PSA, and Amazon. See *id.* at 2-15.

F. Postal Service Response in Opposition to SOC Motion for Leave

The Postal Service states that despite multiple unauthorized and duplicative filings spread across several dockets, SOC has not made a sufficient showing that it should be granted access to non-public materials. Postal Service Response in Opposition to SOC Motion for Leave at 1. The Postal Service argues that SOC's bases for requesting leave to file a reply lack merit: its "public interest" argument fails because SOC provides little to support the assertion, and its "lack of opportunity to respond to opposition arguments" fails because accepting it would negate the purpose of 39 C.F.R. § 3011.301(d). *Id.* at 2-3. In addition, the Postal Service argues that even if the Commission were to consider SOC's proposed reply, it does nothing to advance or clarify SOC's justifications for seeking access. *See id.* at 3-4. Therefore, the Postal Service requests that the Commission deny the SOC Motion for Leave. *Id.* at 5.

G. Amazon Motion for Leave and Amazon Response in Opposition to SOC Motion for Leave

Amazon states that if the Commission finds good cause to grant SOC's motion for leave, it should also grant Amazon's motion for leave and consider its response in opposition to SOC's motion for leave and proposed reply. Amazon Motion for Leave at 1.

Amazon claims that SOC's three arguments in support of its motion for leave are all meritless: its "public interest" argument is circular and unavailing; SOC distorts the opposition parties' arguments as no party is challenging the Commission's rules; and granting leave to SOC because it has not had the opportunity to respond to the opposition responses would read the limitation of 39 C.F.R. § 3011.301(d) out of the rules. Amazon Response in Opposition to SOC Motion for Leave at 1-2. Amazon then proceeds to address the merits of SOC's proposed reply. *See id.* at 2-6. Therefore, Amazon requests that the Commission deny the SOC Motion for Leave. *Id.* at 7.

IV. COMMISSION ANALYSIS

A. Legal Standard

The Postal Service may seek non-public treatment for materials that are submitted to the Commission if such information would be exempt from disclosure pursuant to 39 U.S.C. §§ 410(c), 504(g), 3652(f), or 3654(f).¹² Under 39 U.S.C. § 504(g)(3), the Commission has specific authority to determine whether production of the non-public material is required in the course of “any discovery procedure established in connection with a proceeding [before the Commission].” 39 U.S.C. § 504(g)(3)(B). Section 504(g)(3)(B) provides that, in the context of discovery, the Commission may disclose information obtained from the Postal Service if the disclosure is found to be appropriate and consistent with the kind of balancing of interest that is performed by Federal civil courts when asked to establish protective conditions under rule 26(c) of the Federal Rules of Civil Procedure. *Id.* Specifically, the statute requires the Commission to establish procedures by regulation based on rule 26(c) of the Federal Rules of Civil Procedure to ensure “appropriate confidentiality for information furnished to any party.” *Id.*

¹² Non-Public Information, 83 Fed. Reg. 31,258, 31,282 (July 3, 2018) (to be codified at 39 C.F.R. § 3007.101(a)). These regulations went into effect on August 2, 2018. *Id.* at 31,258. The Commission’s regulations were later reorganized, and the rules pertaining to non-public material are now found at 39 C.F.R. part 3011. See Docket No. RM2019-13, Order Reorganizing Commission Regulations and Amending Rules of Practice, January 16, 2020 (Order No. 5407) (effective April 20, 2020).

The Commission's regulations governing access to non-public information codify this statutory requirement by setting forth rules providing for access to non-public materials along with strict protective conditions based on rule 26(c) of the Federal Rules of Civil Procedure. In the rulemaking proceeding amending the rules relating to non-public information, the Commission provided an overview of how the rules function:

Recognizing that public disclosure of certain information may be commercially harmful to the Postal Service, other persons, or both, [the] existing [non-public materials rules] permit[] the filing of commercially sensitive information to be non-public (also known as 'sealed' or 'under seal'). At the same time, acknowledging the need for transparency, [the] existing [non-public materials rules] provide[] for procedures to allow for a person to request that non-public materials be disclosed to the public (also known as 'unsealed'). Moreover, [the] existing [non-public materials rules] provide[] for procedures to allow for persons to request access to non-public materials, subject to protective conditions, in order to meaningfully participate in Commission proceedings.¹³

The SOC Motion for Access concerns procedures relating to requests for access to non-public materials subject to protective conditions under subpart C of 39 C.F.R. part 3011. The parties do not dispute that the materials requested contain commercially sensitive information and that the material is designated by the Postal Service as non-public. Subpart C of 39 C.F.R. part 3011 sets forth rules that "allow non-public materials to remain under seal and allow specific persons to access the materials subject to protective conditions."¹⁴

¹³ Docket No. RM2018-3, Notice of Proposed Rulemaking Relating to Non-Public Information, February 13, 2018, at 2 (Order No. 4403).

¹⁴ Docket No. RM2018-3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, at 65 (Order No. 4679).

As directed by 39 U.S.C. § 504(g)(3)(B), the rules in subpart C of 39 C.F.R. part 3011 state that “[i]n determining whether to grant access to non-public materials, the Commission shall balance the interests of the parties consistent with the analysis undertaken by a Federal court when applying the protective conditions appearing in Federal Rule of Civil Procedure 26(c).” 39 C.F.R. § 3011.301(e). Fed. R. Civ. P. 26(c) provides that a “court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense,” upon a motion from “[a] party or any person from whom discovery is sought . . . [coupled with] a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action.” Fed. R. Civ. P. 26(c)(1).

The party opposing access to non-public information, analogous to requesting a protective order under rule 26(c) of the Federal Rules of Civil Procedure, “bears the burden of making the showing of good cause contemplated by the rule and therefore must make a specific demonstration of facts in support of the request[.]”¹⁵ Courts reviewing a request for a protective order “must weigh the movant’s proffer of harm against the adversary’s significant interest in preparing for trial.” *Smith*, 322 F.R.D. at 99 (internal citations and marks omitted). When determining whether to limit or deny discovery under this rule, the United States Court of Appeals for the District of Columbia Circuit balances several factors including “the requester’s need for the information from this particular source, its relevance to the litigation at hand, the burden of producing the sought-after material[,], and the harm which disclosure would cause to the party seeking to protect the information.”¹⁶ Other Federal courts consider additional factors such as

¹⁵ *Smith v. Yeager*, 322 F.R.D. 96, 99 (D.D.C. 2017) (internal citations and marks omitted).

¹⁶ *Burka v. U.S. Dep’t of Health & Human Servs.*, 87 F.3d 508, 517 (D.C. Cir. 1996) (internal citations omitted). Here, because the Postal Service has already provided the requested material at issue, the burden of producing the requested material is not a factor in the Commission’s analysis.

whether the party benefiting from a protective order is a public entity or official, and whether the information relates to issues important to the public.¹⁷

Accordingly, the Commission's rules permitting access to non-public materials set forth strict conditions that must be met prior to the disclosure of any information. Section 3011.301 requires that a motion requesting access to non-public materials shall "[i]dentify the particular non-public materials to which the movant seeks access" and "[i]nclude a detailed statement justifying the request for access[.]" 39 C.F.R. § 3011.301(b)(1) and (2). Additionally, "[i]f access is sought to aid initiation of a proceeding before the Commission, the motion shall describe the subject of the proposed proceeding, how the materials sought are relevant to that proposed proceeding, and when the movant anticipates initiating the proposed proceeding[.]" *Id.* § 3011.301(b)(2)(ii). The motion must "[a]ttach a description of protective conditions completed and signed by the movant's attorney or non-attorney representative," and it must "[a]ttach a certification to comply with protective conditions executed by each person (and any individual working on behalf of that person) seeking access[.]" *Id.* § 3011.301(b)(5) and (6). Furthermore, for individuals to be eligible for access, they must not be involved in "competitive decision-making for any individual or entity that might gain competitive advantage from using non-public materials[.]"¹⁸

¹⁷ See *Castellani v. Atl. City*, 102 F. Supp. 3d 657, 666 (D.N.J. 2015).

¹⁸ *Id.* § 3011.300(b). An individual is involved in "competitive decision-making" if he or she "consult[s] on marketing or advertising strategies, pricing, product research and development, product design, or the competitive structuring and composition of bids, offers or proposals. It does not include rendering legal advice or performing other services that are not directly in furtherance of activities in competition with an individual or entity having a proprietary interest in the protected material." *Id.*

B. Analysis

1. The SOC Motion for Access and the Balancing Test

Based on an analysis of the five-factor balancing test, the Commission determines that the SOC Motion for Access should be denied because SOC's need for Contract 44 and the relevance of Contract 44, at the present juncture, is relatively low in comparison with the harm that granting the SOC Motion for Access would cause to the Postal Service.

As discussed above, in determining whether to grant a motion for access, the Commission balances the interests of the parties consistent with the analysis performed by Federal courts when establishing protective conditions under Federal Rules of Civil Procedure 26(c). Federal courts have considered the following five factors:

- (1) The requester's need for the information from this particular source
- (2) The information's relevance to the litigation at hand
- (3) The burden of producing the sought-after material
- (4) The harm which disclosure would cause to the party seeking to protect the information
- (5) Whether the party benefiting from a protective order is a public entity or official, and whether the information relates to issues important to the public¹⁹

With regard to factor 3, because the Postal Service has already provided the requested material at issue, the burden of producing the requested material is not a factor in the Commission's analysis. With regard to factor 5, the Postal Service is a public entity and SOC's allegations, if true, relate to issues important to the public. However, the analysis of this factor will almost always result in the same answer because the Postal Service serves a vital public role in providing postal services to the

¹⁹ See *Burka*, 87 F.3d at 517; *Castellani*, 102 F. Supp. 3d at 666.

entire United States. Therefore, this factor alone will not tip the balancing scale one way or another. As a result, to resolve the SOC Motion for Access, the Commission's determination results upon balancing SOC's need for Contract 44 (factor 1) and Contract 44's relevance to SOC's potential complaint (factor 2) on the one hand, against the harm that granting SOC access to Contract 44 would cause to the Postal Service (factor 4) on the other hand. The Commission finds that the former is outweighed by the latter based on the particular facts of this case.

As the Postal Service, PSA, and Amazon argued in their responses, granting SOC access would cause significant commercial harm to the Postal Service. If any party could gain access to confidential NSAs by filing a motion for access to aid initiation of a proceeding before the Commission, that would signal to the Postal Service's customers that their sensitive commercial information could be disclosed to a large number of unknown parties. This would have a chilling effect on their willingness to contract with the Postal Service and would encourage them to contract with private shippers instead. This, in turn, would harm the Postal Service's competitive position, and threaten its financial prospects with reduced volume and revenue. It is not difficult to foresee that if the Postal Service's financial conditions worsened sufficiently, its ability to fulfill the universal service obligation would be impaired and the public would suffer significantly diminished postal service as a consequence. Although access to non-public materials is subject to stringent protective conditions under the Commission's rules and risk of disclosure is somewhat mitigated, the mere opportunity for *any* party to gain access under the guise of aiding the initiation of a potential proceeding would have the chilling effect and the resulting harm discussed above, even if non-public materials are not inadvertently disclosed.²⁰

²⁰ The Commission acknowledges that it has granted motions for access pursuant to 39 C.F.R. § 3011.301(b)(2)(i), which pertains to a scenario "[i]f access is sought to aid participation in any pending Commission proceeding," and upon balancing the interests of the parties, the Commission found the protective conditions to sufficiently mitigate harm where the movant's need for and relevance of the non-

On the other hand, SOC's need for Contract 44 and Contract 44's relevance to SOC's potential complaint, at the present juncture, is relatively low. SOC already has some preliminary information through its survey and interviews of the Postal Service employees that support its allegations in the potential complaint. SOC does not absolutely need Contract 44 to file a complaint with the Commission and could obtain the contract through the discovery process after filing the complaint. Therefore, Contract 44 is not essential to SOC filing a complaint with the Commission, and SOC's need for Contract 44, at the present juncture, is low.

In addition, at this stage Contract 44 only has some collateral or background relevance that may buttress SOC's allegations in a potential complaint. SOC's claims appear to be focused on the alleged undue preference for Amazon by the Postal Service in its application of Contract 44, not that Contract 44 shows any undue preference for Amazon on its face.²¹ For example, SOC distinguishes the "essential difference between determining that the Contract is lawful purely on its face – as the Commission has done – against whether, in light of *additional factual information* regarding USPS's *actual administration* of the Contract, its terms may enable or incentivize USPS to unduly preference Amazon deliveries to the detriment of other

public materials being sought was uncontested. See Docket No. ACR2021, Order Granting Motion for Access, February 1, 2022, at 10-14 (Order No. 6098) (granting access to outside counsel for a party to prepare comments in a pending proceeding where the Postal Service did not oppose the access request, but merely asked the Commission to take into account the written concerns of certain third-party foreign postal operators); Docket No. ACR2018, Order Granting Motions for Access, February 8, 2019, at 16 n.38 (Order No. 4998) (granting access to outside counsel for two parties to prepare comments in a pending proceeding where the Postal Service opposed granting access but did not contest the parties' need for the non-public materials and the relevance of the non-public materials to the pending proceeding). The balancing of the interest in the instant case is distinguishable from these prior orders because SOC's need for the non-public materials and the relevance of the non-public materials are contested and differ considerably because the non-public materials are evaluated via the framework of aiding initiation of a proceeding rather than aiding participation in a pending proceeding.

²¹ SOC Motion for Access at 2 ("The SOC anticipates the complaint will allege that in its performance of Contract 44 . . .").

mail.” SOC Proposed Reply at 10 (emphasis added).²² ²³ Therefore, Contract 44 does not, on its face, appear to be relevant to SOC’s allegations. Rather, Contract 44 *may* provide some background or collateral information that buttresses SOC’s allegations that in its application of Contract 44, the Postal Service has shown undue preference for Amazon. This type of collaterally relevant information is precisely what SOC can try to obtain through the discovery process after it files a complaint. Therefore, Contract 44’s relevance to the initiation of SOC’s potential complaint, at the present juncture, is also low.

Balancing SOC’s low need for Contract 44 and Contract 44’s low relevance to SOC’s potential complaint at the present juncture, against the significant harm that granting SOC access to Contract 44 would cause to the Postal Service (even with the mitigating effects of protective conditions), the scale tips towards protecting the non-public information and denying the SOC Motion for Access. This is especially true considering that this case is a matter of first impression, in which the movant is seeking access to aid the initiation of a proceeding before the Commission, as opposed to seeking access to aid the participation in a pending Commission proceeding. The Commission is mindful of the policy implications of granting the SOC Motion for Access

²² Although the Commission denies the SOC Motion for Leave as discussed below and does not consider the merits of its proposed reply, to the extent that SOC appears to be clarifying its position that it is alleging Contract 44, as applied, leads to undue preference, and not alleging that Contract 44 is unlawful on its face or alleging that the Commission’s determination of Contract 44’s compliance in its Annual Compliance Review docket is incorrect, the Commission finds the relevant language in its proposed reply to be illuminating.

²³ As discussed above, the Commission understands that SOC’s claims are focused on the application of Contract 44 that leads to alleged undue preference for Amazon, not that Contract 44 contains any undue preference for Amazon on its face. In a hypothetical where a movant’s claim is that a contract is illegal on its face, the Commission would remind the hypothetical movant that 39 U.S.C. § 3653(e) creates a rebuttable presumption of the contract’s compliance by the Postal Service for purposes of any complaint proceeding under 39 U.S.C. § 3662, if the Commission finds the contract to be compliant with title 39 of the U.S. Code in its Annual Compliance Determination. In that hypothetical, unless the movant could make some showing that it could rebut the presumption of compliance, its need for and the relevance of the contract would likely be quite low on balance. Such a hypothetical is not at issue in this case, as SOC has acknowledged. See SOC Proposed Reply at 10-11.

under the particular facts of this case: the need for and the relevance of the non-public materials here are low, whereas the potential harm to the Postal Service is significant in and beyond this case.

The Commission's determination here is a narrow one based on the particular facts and balancing of parties' interests presented in this case. The determination reached in this particular case does not mean that the Commission would never grant a motion for access to non-public materials to aid initiation of a proceeding under any circumstances. Rather, the Commission intends to adopt a case-by-case approach and analyze the specific factual circumstances and balance parties' interests based on those facts in each case.

2. Other Issues Related to the SOC Motion for Access

Postal Service Response, PSA Response, and Amazon Response raise a number of issues with regard to the SOC Motion for Access. These issues are not dispositive in terms of the balancing test discussed above. However, in the interest of addressing parties' arguments fully, the Commission discusses them below.

With regard to the Postal Service's claim that SOC failed to disclose its affiliation with UPS through one of the unions that is a member of SOC, IBT, the Commission notes that SOC disclosed that it is "a coalition of labor unions." See SOC Motion for Access at 22. Information publicly available on SOC's website lists IBT as one of the four labor unions that forms SOC.²⁴ Further internet research indicates that IBT represents some portion of UPS's workforce and is actively engaged in organizing campaign and advocacy focused on Amazon workers, as stated by the Postal Service. Postal Service Response at 3. The Commission declines to determine whether this rises to the level of "affiliation" with UPS under 39 C.F.R. § 3011.301(b)(3) (requiring the

²⁴ Strategic Organizing Center, About, available at <https://thesoc.org/about/> (last visited September 21, 2022).

movant to “[l]ist all relevant affiliations, including employment or other relationship (including agent, consultant or contractor) with the movant, and whether the movant is affiliated with the delivery services, communications or mailing industries”) because this is a not dispositive factor in the balancing of interests analysis. See 39 C.F.R. § 3011.301(b)(3). Nevertheless, the Commission notes that SOC disclosed some facts about its affiliation, but not all facts. The Commission cautions future movants to fully disclose all pertinent facts about their affiliations.

With regard to PSA’s claim that SOC failed to describe with specificity its justifications for requesting access and instead relied on conclusory allegations, the Commission finds that the SOC Motion for Access contains enough specificity because SOC has conducted a survey and interviews of Postal Service employees and obtained some preliminary information supporting its allegations. In the order adopting final rules relating to motions for access in 2018, the Commission stated that the requirements contained in 39 C.F.R. § 3011.301(b)(2)(ii) “ensure that the request for access is made in good faith, but are not so strict as to require that the planned proceeding is fully ready.”²⁵ Therefore, the Commission does not find that SOC’s motion fails because it lacks every detail. Rather, denial is premised on the balancing of the parties’ interests based on the particular facts of this case.

With regard to Amazon’s claim that that SOC’s use of access rules for complaints is inconsistent with the regulatory history of 39 C.F.R. § 3011.301, the statutory complaint provisions of 39 U.S.C. § 3662, and the Federal Rules of Civil Procedure, the Commission again declines to opine on this issue because it is not a dispositive factor in the analysis. To re-emphasize, the Commission’s denial determination is premised on the balancing of parties’ interests based on the particular facts of this case (*i.e.*, SOC has a low need for Contract 44 and Contract 44 has low relevancy to SOC’s potential

²⁵ Docket No. RM2018-3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, at 28 (Order No. 4679).

complaint at the present juncture, whereas the harm to the Postal Service would be potentially significant and wide-ranging). Again, 39 C.F.R. § 3011.301(b)(2)(ii) pertains to the scenario “[i]f access is sought to aid *initiation* of a proceeding before the Commission,” which as applied to SOC’s motion would refer to the filing of the potential complaint. 39 C.F.R. § 3011.301(b)(2)(ii) (emphasis added). This provision does not pertain to discovery to prosecute a potential complaint.²⁶ The Commission’s determination is further guided by the policy implications of granting the motion here in a case of first impression, as discussed above.

With respect to Amazon’s and PSA’s claims that a complaint based on alleged violations of 39 U.S.C. § 101(b) and (e) would fail for lack of jurisdiction (see PSA Response at 3; Amazon Response at 12), the Commission confirms that 39 U.S.C. § 3662 permits a complaint to be filed based on the belief that “the Postal Service is not operating in conformance with the requirements of the provisions of sections 101(d), 401(2), 403(c), 404a, or 601, or [chapter 36 of title 39 of the United States Code] (or regulations promulgated under any of those provisions).” 39 U.S.C. § 3662. The Commission further confirms that 39 U.S.C. § 101(b) and (e) appear in chapter 1 of the United States Code and are not otherwise enumerated in 39 U.S.C. § 3662.

3. SOC Motion for Leave and Amazon Motion for Leave

39 C.F.R. § 3011.301(d) provides that no party shall file a reply to a response to a motion for access, unless the Commission otherwise provides. See 39 C.F.R. § 3011.301(d). The Commission has not otherwise provided parties with an opportunity to file replies in this docket. SOC argues that good cause supports granting its leave to file a reply because its motion raises issues of public interest, the responses are

²⁶ Such an access mechanism appears in 39 C.F.R. § 3011.301(b)(2)(i), which pertains to a scenario “[i]f access is sought to aid participation in any pending Commission proceeding.” See 39 C.F.R. § 3011.301(b)(2)(i). SOC could also seek to obtain Contract 44 directly from the Postal Service via discovery in a pending complaint proceeding. See 39 C.F.R. §§ 3010.142(a), 3010.300(a), 3010.312.

allegedly effectively seeking changes to the Commission's rules, and the responses raise new arguments to which SOC has not had the opportunity to respond. See SOC Motion for Leave at 3-4.

The Commission is not persuaded by SOC's arguments. "Public interest" is not a panacea that parties can use to circumvent the Commission's rules. Other than some general statements about public interest, SOC has not pinpointed any specific public interest that would be served by allowing an exception to the rules. In addition, the Commission does not agree that the responses are seeking changes to the rules and thus somehow converting this into a rulemaking proceeding. See SOC Motion for Leave at 3. The responses merely advance their interpretation of the Commission's rules as they pertain to the SOC Motion for Access; they do not challenge the legality of the rules. Finally, SOC's claim that it should be allowed a second opportunity because the responses raise some arguments unforeseen by SOC is also not persuasive. See SOC Motion for Leave at 3-4. If this claim were true, 39 C.F.R. § 3011.301(d) would be essentially rendered ineffective because parties can always claim that they need to respond to opposing parties' new arguments and attempt to have the last word on the issues, resulting in endless, successive filings. Indeed, the SOC Motion for Leave and its proposed reply here triggered successive responses from the Postal Service and Amazon.

In summary, SOC's proposed reply does not aid the Commission's decision-making process, and the SOC Motion for Leave is hereby denied. The Commission has denied motions for leave to file reply comments under similar circumstances in the past and continues to do so here.²⁷ To grant the SOC Motion for Leave here would create a

²⁷ See, e.g., Docket No. MC2021-78, Order Denying Request to Transfer Bound Printed Matter Parcels to the Competitive Product List, February 10, 2022, at 9-10 (Order No. 6105) (denying parties' motions to file reply and sur-reply comments and finding that the significant volume of reply comments and sur-reply comments filed, which were not allowed on the original procedural schedule, did not further develop the factual record, and parties' continued legal arguments and disputes in successive filings did not aid the Commission's decision-making process).

slippery slope of allowing parties to submit successive comments, render the Commission's procedures and rules meaningless, and frustrate the Commission's administrative process.

Because the Commission denies the SOC Motion for Leave, the Commission also denies the Amazon Motion for Leave for similar reasons.

V. CONCLUSION

For the above reasons, the Commission denies the SOC Motion for Access, the SOC Motion for Leave, and the Amazon Motion for Leave.

VI. ORDERING PARAGRAPHS

It is ordered:

1. The Motion by Strategic Organizing Center Requesting Access to Non-Public Materials Under Protective Conditions, filed August 17, 2022, is denied.
2. The Motion by Strategic Organizing Center Requesting Leave to Reply to Responses Opposing SOC's Motion for Access to Non-Public Materials Under Protective Conditions, filed September 2, 2022, is denied.
3. The Motion of Amazon.com Services LLC for Leave to File Response, filed September 9, 2022, is denied.

By the Commission.

Erica A. Barker
Secretary