

BEFORE THE
POSTAL RATE COMMISSION

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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

INTERNATIONAL MAIL REPORT

DOCKET NO. RM2000-1

COMMENTS OF UNITED PARCEL SERVICE IN
RESPONSE TO COMMISSION ORDER NO. 1270
(DECEMBER 27, 1999)

Pursuant to Commission Order No. 1270, United Parcel Service ("UPS") submits these comments concerning the Commission's report to Congress under Section 3663 of the Postal Reorganization Act ("the Act"), 39 U.S.C. § 3663.

PRELIMINARY STATEMENT

The Commission has imposed a daunting task on parties interested in this rulemaking proceeding. It has asked those parties to comment on such specific matters as, for example, the "adequacy of the information upon which the Commission's first international mail report was based." Order No. 1270 at 12. *See also id.* at 13 (requesting comments on "the analytical methods applied by the Commission to calculate the . . . costs . . . of international mail services"). Yet, the Commission has not provided the cost information on which the report is based, and the brief description of the "analytical methods applied . . . to calculate the . . . costs" which is provided is not always clear. Nevertheless, UPS provides its insights on the methods used as best we understand them.

THE FULL REPORT AND ALL SUPPORTING DOCUMENTS
SHOULD BE MADE AVAILABLE TO THE PUBLIC.

A. Disclosure Standards

The Commission has invited comments on "the procedures that should be employed to determine which portions of the report or supporting documents should not be publicly disclosed, what criteria or standards should govern that determination, what categories of commercial information meet those standards, and the basis for that belief." Order No. 1270 at 14.

UPS submits that the full report and, with rare exceptions, all supporting cost information should be disclosed to the public. An exception to full disclosure for the specific information in question should be made only where (1) disclosure would result in specific identifiable and serious injury to the Postal Service, and (2) the interest of the public in full disclosure of the basis for the rates it pays is outweighed by the Postal Service's interest in confidentiality. This approach is consistent with the principles of the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), as well as principles of civil litigation concerning the determination of whether specific commercial information is of a confidential nature.

FOIA requires broad disclosure of agency records. 5 U.S.C. § 552(a); *Maricopa Audubon Soc. v. U.S. Forest Service*, 108 F.3d 1082, 1085 (9th Cir. 1997), *citing Church of Scientology v. Department of the Army*, 611 F.2d 738, 741 (9th Cir. 1980). Nevertheless, the Postal Service has taken the position that even the most basic international mail data -- such as cost coverages for specific products -- are shielded from disclosure under Section 410(c)(2) of the Act, 39 U.S.C. § 410(c)(2). See Docket No. IM99-1, *United States Postal Service Response to Motion of United Parcel Service*

to Provide Public Access to International Data Requested in Order No. 1228 and for Opportunity to Provide Public Comment, filed April 5, 1999 ("Postal Service Response").

Exemption 3 of FOIA provides that:

(b) This section does not apply to matters that are . . .

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld

One court has held that Section 410(c)(2) of the Act falls within this FOIA exemption.

National Western Life Insurance Co. v. United States, 512 F. Supp. 454, 459 (N.D.

Texas 1980) ("*National Western Life*"). Section 410(c)(2) provides:

(c) Subsection (b)(1) of this section [making FOIA applicable to the Postal Service] shall not require the disclosure of . . .

(2) 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

The Postal Service argues that almost all international mail data fall within Section 410(c)(2) and should not be publicly disclosed.

The legitimacy of the Postal Service's claim that the public should not be told, for example, the extent to which the rates for a particular service do not cover its costs depends on whether such information is "commercial [information], including trade

secrets, . . . which under good business practice would not be publicly disclosed.”¹ The statute does not define the term “good business practice.” That term has been described as a standard that “may not be specifically quantifiable.” *National Western Life*, 512 F. Supp. at 459. The *National Western Life* court stated that “[g]ood business practice’ is readily ascertainable by looking to the commercial world, management techniques, and business law, as well as to the standards of practice adhered to by large corporations.” *Id.* However, the test set forth in Section 410(c)(2) is *not* whether a privately-owned company would disclose the information in question. On the contrary, the court in *National Western Life* ordered the Postal Service to produce information which the court recognized might not be disclosed by a private company. *Id.* at 462. The court did so because there are significant differences between the Postal Service and private corporations. *Id.* As the court recognized, after all is said and done, the Postal Service “is still a public agency.” *Id.* See also H.R. Rep. No. 1104, 91st Cong., 2d Sess. (1970), at 19 (“The Postal Service is -- first, last and always -- a public service”).

Thus, even though a private company may choose not to disclose certain information, that fact alone does not negate the disclosure of the same type of information by the Postal Service. In short, in such instances disclosure may not be contrary to good business practice for the Postal Service, in light of its overriding obligations to the public.

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1. The Commission’s report indicates that “at least” four outbound services do not cover their costs. Report at 35. The Commission does not disclose whether any of these below-cost services have cost coverages which approach 100%, or whether the coverage shortfall is more severe (e.g., a cost coverage of 85%).

The Postal Service's argument that information on international costs and cost coverages should not be disclosed is premised on its assertion that such disclosure would cause it competitive harm. See *Postal Service Response* at 7-8 (summarizing Postal Service argument against disclosure). But even assuming some competitive harm may result from the disclosure of costing data -- and, as we discuss later, that is unlikely -- that harm must be weighed against the public's interest in ensuring that the Postal Service meets its overriding obligation under the Act to provide its services at fair and reasonable rates. See *National Western Life*, 512 F. Supp. at 462.

Judicial precedent under the Federal Rules of Civil Procedure regarding the disclosure of allegedly confidential commercial information also weighs in favor of full disclosure here. Rule 26(c)(7) of the Federal Rules provides that "a trade secret or other confidential research, development, or commercial information [may] not be revealed" only "for good cause shown." Significantly, good cause is required to protect even trade secrets from disclosure.

To meet the good cause standard, disclosure must cause a clearly defined and specifically identified injury to the party seeking to withhold the information, **and** that harm must outweigh the benefits of disclosure. *Damiano v. Sony Music Entertainment, Inc.*, 168 F.R.D. 485, 490 (D.N.J. 1996). General or speculative harm is insufficient to prevent disclosure. The party seeking protection has the burden of identifying specific examples of significant potential harm, *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986), and the potential harm must be a "clearly defined and serious injury." *Publiker Industries, Inc. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984). As the United States Court of Appeals for the Third Circuit has stated with respect to the

“troublesome conflict between [a] governmental entity’s interest as a litigant and its public disclosure obligations,”

[W]e believe that a strong presumption against entering or maintaining confidentiality orders strikes the appropriate balance by recognizing the enduring beliefs underlying freedom of information laws: that an informed public is desirable, that access to information prevents governmental abuse . . . and that, ultimately, government must answer to its citizens.

Pansy v. Borough of Stroudsburg, 23 F.3d 772, 791-92 (3d Cir. 1994).²

The Postal Service cannot identify any significant or substantial harm that would result from the disclosure of cost coverages or supporting cost data for individual international services. It has speculated that competitors may use costing data and product specific cost coverages to undercut the Postal Service’s rates. *Postal Service Response*, at 3-6. However, cost coverages do not add any additional information of any significance that would be helpful to a competitor who wishes to do so that is not already available from the Postal Service’s *price* for the service, which of course is public information. A competitor either is able and willing to undercut the Postal Service’s *price*, or it is not. If it is willing and able to do so, it most likely would have already done so in the absence of knowing the Postal Service’s cost coverage; if it has not already undercut the Postal Service’s price, then it is unlikely to do so no matter what the cost coverage is.

2. While *Pansy* was decided in the context of a civil lawsuit, the question before the court involved whether the public -- not a party involved in the litigation -- should be given access to information for which a protective order was sought. Thus, the court applied principles relevant to whether the information should be disclosed to the public.

The only additional information of any real value that cost coverages provide is to inform the public of whether, and the extent to which, the Postal Service is treating its customers and its competitors unfairly. That is information which the public *should* have.

Similarly, the only additional information that the supporting cost data would reveal is whether the Postal Service is adequately taking into account all of the costs that should be charged to a service. This, too, does not give a competitor any significantly greater competitive benefit over and above knowing the prices actually charged by the Postal Service. But it does permit the public to determine, if it wishes, whether the Postal Service is accurately determining the prices it charges. That, too, is information the public should have.

Even if some marginal harm might result from disclosing cost coverages and supporting cost data, that harm is outweighed by the substantial and important interests served by disclosure. Two of the factors the courts weigh in favor of public disclosure are whether the matter "involves issues important to the public or of legitimate public concern," and whether the party opposing public disclosure is a public entity or official. *Damiano v. Sony Music Entertainment, Inc.*, 168 F.R.D. 485, 490 (D.N.J. 1996), *citing Pansy*, 23 F.3d at 787. *See also Damiano*, 168 F.R.D. at 491 ("If the parties or issues are of a public nature, and are matters of legitimate public concern, that should be a factor weighing in favor of disclosure"), *citing Pansy*, 23 F.3d at 788.

The public's compelling interest in disclosure here is a function of the Postal Service's obligation to the public to offer each of its services at rates that cover the costs attributable to the service and that make a reasonable contribution to institutional costs. Those interests are fundamental principles of the Postal Service's governing

statute. Section 403(a) of the Act requires that all postal rates, including international rates, be fair and equitable. Section 403(c) prohibits undue or unreasonable discrimination among all users of the mails. Section 101(d) provides that “[p]ostal rates shall be established to apportion the costs of all postal operations to all users of the mail on a fair and equitable basis.” At a minimum, these provisions require that the rates for each international service cover its attributable costs and a reasonable portion of *nonattributable costs*.

Congress’ adoption of Section 3663 is itself a further indication of the public’s substantial interest in the information needed to assure compliance with these statutory policies. It is inconceivable that, when it adopted Section 3663, Congress intended parts of the Commission’s report or the supporting information to be a well-kept secret shared only by the Commission, the Speaker of the House, and the Presiding Officer of the Senate. If that were the case, Congress surely would have said so.

The Postal Service has argued that international cost information need not be disclosed because Congress did not apply to international rates the same ratemaking procedures that apply to domestic rates. Postal Service Response at 5-6. While Congress did not require hearings in Section 3663, it did adopt a procedure for determining the propriety of international rates so that the Postal Service could be held accountable for the results of its international ratesetting practices. That the additional procedural protections which exist in the case of domestic rates do not also apply to international rates *supports* full disclosure, rather than vice versa. The absence of the protections available for domestic rates makes public disclosure of the Commission’s full report and the supporting information all the more important because for international rates, disclosure is the only mechanism available to hold the Postal

Service accountable; the only way that the important public policies embodied in Sections 101, 403, and 3663 of the Act can be enforced is to make sure that the public is fully informed about the Postal Service's compliance with these statutory mandates when it sets its international rates, so that the public may, if it wishes, take appropriate action. Otherwise, the statutory ratemaking requirements are essentially unenforceable and meaningless.

The Commission should apply the same burden for establishing the confidentiality of cost data on international rates as it uses for determining whether information should be produced in domestic rate cases. If the same type of information is not deemed confidential when dealing with domestic rates, then it is equally nonconfidential in the case of international services. Thus, cost coverages -- which are routinely made public for domestic rates (including for competitive services) -- should be disclosed. Similarly, most (if not all) supporting cost data should be disclosed. Information that perhaps need not be disclosed might include, for example, that relating to specific proprietary mail sorting technologies or logistical processes.

To reflect the appropriate presumption in favor of disclosure, UPS recommends that the second sentence of the rule as proposed be deleted ("Information contained in these reports that is considered to be commercially sensitive should be identified as such, and will not be publicly disclosed except as required by applicable law"), and that the following new sentence be added in its stead: "The entire report and all of the information used to prepare the report shall be made available to the public when the report is issued, unless (1) such disclosure will result in specific identifiable and serious injury to the Postal Service, and (2) the interest of the public in full disclosure is outweighed by such injury."

B. Procedures Relating to Disclosure

The Commission has also invited comments on “the procedures that should be employed to determine which portions of the report or supporting documents should not be publicly disclosed” Order No. 1270 at 14. UPS suggests the following: whenever the Postal Service submits data to the Commission pursuant to 39 U.S.C. § 3663(b), it should be required to indicate what information it believes should not be disclosed under the standard described above, and why it should not be disclosed under that standard. The Commission should then publish a notice in the Federal Register informing the public of the nature of the information so designated by the Postal Service and of the Postal Service's justification for its designation. Interested persons should be invited to comment on the Postal Service's claims of confidentiality within 30 days of publication. The Postal Service should have 30 days to respond to those comments.

The Commission should publish its determination on the Postal Service's claims and the information that is subject to disclosure when its Section 3663 report is issued, or (if the comment cycle has not ended because the information in question was submitted more than 60 days or so before July 1) as promptly thereafter as possible.

**THE COMMISSION SHOULD REQUIRE THE POSTAL
SERVICE TO SUBMIT THE AUDITED VERSION
OF THE CRA AND THE ICRA BY MARCH 15.**

To ensure the accuracy of its July 1 report, the Commission must have the most accurate information available as early as possible. In the Proposed Rule, the Commission invites unaudited versions of the Cost and Revenue Analysis Report—PRC Version and the Cost Segments and Components Report—PRC Version to be

provided by March 15, with audited versions supplied by May 15. Proposed Rule 3001.103(b), (c), Order No. 1270, Attachment A at 1.³

These deadlines are too generous. They would not provide the Commission or interested parties with as much time as should be available to review the audited data sufficiently. The Commission should require the Postal Service to provide audited versions of these reports by March 15 of each year. That is not an unreasonable requirement. In fact, it is the deadline specified by Congress in Section 3663 for the information needed by the Commission to prepare its report.

By comparison to the reporting deadlines imposed on private companies, a March 15 deadline is eminently reasonable. For example, the Securities and Exchange Commission ("SEC") requires annual 10-K reports to be filed within 90 days after the end of the fiscal year covered by the report. 17 C.F.R. § 240.13a-1; Form 10-K, General Instructions, Item A. The 10-K must be accompanied by audited financial statements. 17 C.F.R. § 210.3-01(a). These deadlines are much more stringent than the proposed March 15 deadline, under which the Postal Service would have approximately 166 days from the end of the fiscal year to submit audited reports.

There is no reason why the Postal Service should not be held to reporting standards like those imposed on large companies in the private sector. In fact, the Postal Service has openly expressed its willingness to conduct its operations following SEC guidelines. See *1998 Annual Report of United States Postal Service* at 32. By requiring audited reports by March 15, the Commission will be able to conduct a far

3. Under the text of the rule as proposed, it is unclear whether these same deadlines apply to the International CRA.

more thorough review of more up-to-date information earlier in the deliberative process. There will also be sufficient time to solicit at least some degree of public input before the July 1 report deadline.

**THE COMMISSION'S REPORT SHOULD USE
ACCRUED COSTS RATHER THAN A CASH BASIS.**

The Commission has also invited comment on the Postal Service's suggested revisions for calculating the "settlement difference" and attributable air transportation costs in its FY 1998 ICRA Report—USPS Version, filed June 7, 1999. Order No. 1270 at 13-14. The Commission expressed its tentative view that the Postal Service's revisions may be appropriate because "the accrued expenses do not reflect the actual monies paid out in the year under study." Order No. 1270 at 14.

The descriptions of the alternative methods for handling these costs are not completely clear. Thus, UPS is not in a position to comment definitively on this issue. However, we point out that while accrued expenses do not necessarily reflect actual payments in a given time period, that does not make accrued expenses an improper basis for costing purposes. Quite the contrary: it is generally accepted that an accrual basis more accurately matches revenues from the sales of goods and services with the costs of providing those goods and services. See, e.g., Federal Accounting Standards Advisory Board, Statements of Federal Financial Accounting Concepts and Standards (Feb. 28, 1997) at 49, SFFAC No. 1, ¶ 197 (stating that "[t]he accrual basis of accounting generally provides a better matching of costs to the production of goods and services . . ."); Financial Accounting Standards Board, Statement of Financial Accounting Concepts No. 1 (November 1978), ¶ FAC 01.44 (stating that "[I]nformation about enterprise earnings and its components measured by accrual accounting

generally provides a better indication of enterprise performance than information about current cash receipts and payments”).

Moreover, the Postal Service reports on the basis of accrued expenses in its own financial statements. See *United States Postal Service, 1998 Annual Report* at 62, Notes to Financial Statements, Note 2 (1999). Indeed, Congress apparently anticipated that the Commission would base its report on accrued expenses: Section 3663(a) specifically requires the Commission to report “costs, revenues, and volumes *accrued* by the Postal Service” 39 U.S.C. § 3663(a) (emphasis added). The question then becomes whether the particular basis on which the accruals are made is appropriate.

In the absence of more information, UPS is not in a position to evaluate the accrual basis proposed by the Postal Service as compared to other possible accrual bases. Without more information, all that can be said is that the Postal Service should submit, and the Commission should use, accrued costs generated using the accrual method that most accurately matches costs with revenues.

**THE COMMISSION'S COSTING METHODS MAY NOT
ADEQUATELY REFLECT THE FULL ATTRIBUTABLE
COSTS OF INTERNATIONAL EXPRESS MAIL SERVICE.**

The Commission's report indicates that the rates for “at least” two outbound competitive services -- Global Priority Mail and Global Package Link -- do not cover the costs of those services. Report at 35. It is not clear whether Express Mail International Service (“EMS”) covers its costs. See Report at 38 (stating that “Achieving a positive outcome for EMS, should not pose a problem as the Postal Service is free to enter into bilateral agreements . . . in which rates can be cost based”).

The bilateral agreements under which EMS is provided are based on “imbalance charges.” Report at 6. It is UPS's understanding that, under this approach, payment for

the delivery of EMS items is only made by the postal administration which sends the greater volume of EMS items, and then only for the "excess" volume. Thus, inbound and outbound EMS are inextricably intertwined, and the cost incurred for the delivery of inbound items is essentially part of the cost for obtaining the delivery of outbound items. That is so because the bilateral agreements require the inbound service to be provided as a condition of obtaining the delivery of outbound EMS items. In other words, part of the cost of obtaining the delivery of outbound EMS is the Postal Service's delivery of inbound EMS.

Under these circumstances, outbound EMS and inbound EMS should be treated for costing purposes as if they are one and the same service. That is, the costs incurred by the Postal Service for both should be combined, and the rates that generate the revenues from the Postal Service's only revenue source for EMS -- *i.e.*, the rates paid for outbound EMS service -- should be designed to cover all of those costs (less any imbalance charges paid by the foreign postal administration to the Postal Service where inbound volume exceeds outbound volume).

TECHNICAL SUGGESTIONS

UPS also has some technical suggestions for modifications to the language of the proposed rule:

1. The proposed rule requires the Postal Service to provide to the Commission the International Cost and Revenue Analysis, but does not mention the International Cost Segments and Components report (as it does in the case of the corresponding domestic reports). The rule should explicitly require the production of both international reports by March 15.

2. The proposed rule states that if an unaudited version of the Cost and Revenue Analysis Report and of the Cost Segments and Components Report is provided on March 15, then the audited version should be provided by May 15, but no similar requirement is imposed in the case of the corresponding international reports. Should the Commission not adopt UPS's proposal that audited reports should be filed by March 15, then it should include in its rule the same deadlines for the international reports as is imposed for the comparable domestic reports.

CONCLUSION

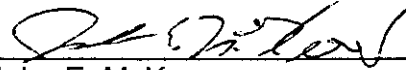
The average cost coverage for international mail as a whole -- 113% (Report at 9) -- is far lower than the average cost coverage for domestic services as a whole (159%). There is no reason why international mail should be so favored. At the very least, the cost coverages for individual international services should be made public so that ratepayers (and competitors) know the extent to which each international service contributes to this disparity.

The lack of transparency of international ratemaking to the public remains much the same as it was before Section 3663 was adopted. That hardly seems consistent with the enactment of the section. Unless and until costing data comparable to that made public for domestic services is also made public for international services, questions concerning the fairness of the Postal Service's international rates will continue, even though Section 3663 was meant to put those questions to rest.

In short, international ratemaking should no longer be shrouded with a cloak of mystery. The Commission should instead maximize public participation in the Section 3663 process by making public all of the data supporting its findings and soliciting public

comment on the proper use of that data, except where the data would not be disclosed in the case of domestic rates.

Respectfully submitted,



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Dated: December 27, 1999

CERTIFICATE OF SERVICE

I hereby certify that on this date I have caused the foregoing document to be served on the United States Postal Service by first class mail, postage prepaid, in accordance with Section 12 of the Rules of Practice.



William J. Pinamont

Dated: December 27, 1999
Philadelphia, PA

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