

BEFORE THE
POSTAL RATE COMMISSION

PERIODIC REPORTING PROCEDURES : DOCKET NO. RM2005-1
: :
:

COMMENTS OF UNITED PARCEL SERVICE IN
RESPONSE TO ADVANCE NOTICE OF PROPOSED
RULEMAKING ON PERIODIC REPORTING PROCEDURES
(December 6, 2004)

Pursuant to Commission Order No. 1423 (November 8, 2004), United Parcel Service (“UPS”) submits these comments on the Commission’s Advance Notice of Proposed Rulemaking.

Commission Rule 102 (39 C.F.R. § 3001.102) requires the Postal Service to file certain information with the Commission on a yearly basis, even when there is no pending proceeding. As the Commission discussed in its Order adopting the current version of Rule 102 (Order No. 1386, November 3, 2003), the periodic reporting of this information is critical to the Commission’s ability “to process future rate, classification, and complaint cases within the tight deadlines imposed by the Postal Reorganization Act [the ‘Act’]. . .” and to “help the affected public to participate more meaningfully in such cases.” Order No. 1386 at 5-6. The Act therefore gives the Commission the authority to require the Postal Service to file these reports. *Id.* at 59, citing 39 U.S.C. § 3603.

In order for the Commission to carry out its duties under the Act effectively and efficiently, including assuring due process for the interested public, the rule requires the Postal Service to file periodically basic information underlying the Postal Service's published Cost and Revenue Analysis ("CRA") report, including the basic datasets used to attribute costs and changes made to the CRA's method of attributing those costs. Given the complexity of postal ratemaking, without this information the Commission cannot adequately ensure within the 10-month window allowed by the statute for resolution of rate cases (1) that each subclass of mail is recovering its attributable costs, and (2) that each subclass is contributing its fair share to the Postal Service's institutional costs. Nor can the Commission properly exercise its discretion to initiate classification proceedings under Section 3623 of the Act. The interested public is also entitled to this information, not only to enable it to participate meaningfully in rate cases within the tight time constraints imposed on those cases but also to have a meaningful opportunity to exercise other rights under the Act.

The Act unquestionably authorizes the Commission to require the Postal Service to file this information on a periodic basis. See 39 U.S.C. § 3603. Nothing in the Act prohibits the Commission from collecting information from the Postal Service outside of the course of proceedings. Because the Commission has deemed it "necessary and proper" for the Postal Service to file the periodic reports required by the rule in order to carry out the Commission's ratemaking and classification functions, see 39 U.S.C. § 3603, the adoption of current Rule 102 was a proper exercise of the Commission's authority.

The Commission's authority to require periodic reporting of Postal Service data is not abrogated by a Postal Service claim that the information to be reported is commercially sensitive. As the Commission noted when it adopted the current version of the periodic reporting rule, nothing in the Act limits the Commission's access to non-sensitive information. Order No. 1386 at 70-71. Section 410(c)(2) of the Act, which exempts the Postal Service from publicly disclosing trade secrets and other commercially sensitive information in response to Freedom of Information Act ("FOIA") requests, does not govern the Postal Service's duty to provide information to the Commission. Section 410(c)(2) deals with the Postal Service's obligations under FOIA. The Commission's authority to require the Postal Service to file information with the Commission is independent of the Postal Service's FOIA obligations.

Section 410(c)(4) of the Act is similarly inapplicable here. Again, that section applies to FOIA requests. Moreover, information routinely collected and relied on by the Postal Service on a daily basis in managing its operations does not become "information prepared for use in connection with" rate or classification cases simply because the Postal Service also inevitably relies on that information in a rate case. Section 410(c)(4) is similar to the work product doctrine in civil litigation. Rule 102 does not require the Postal Service to identify in advance its litigation strategies or information gathered specifically for rate cases. Under the Postal Service's overbroad reading of Section 410(c)(4), every single piece of information it uses in putting together its rate proposals, including information the Postal Service now routinely makes publicly available, could be shielded from the public -- a result that is clearly not contemplated by Section 410(c)(4).

In any event, the specific information the Postal Service has refused to file is not commercially sensitive. It is the same information that the Postal Service routinely discloses to the Commission *and the public* during a ratemaking proceeding, with no restrictions on access. Never before in those proceedings has the Postal Service sought protection for this data. Order No. 1386 at 69. In addition, this information was publicly disclosed each year from FY1995 to FY2000 without any apparent harm to the Postal Service. Id. at 79. The Postal Service's claim of commercial sensitivity rings hollow in light of this past history.

The Postal Service's commercial sensitivity claim was specifically addressed by the Commission and resolved against the Postal Service in Docket No. RM2003-3, when the periodic reporting rule was last amended. Order No. 1386 at 68-80. The Postal Service cannot now be permitted to refuse unilaterally to follow the Commission's rule by simply repeating arguments that were rejected in Docket No. RM2003-3.

The Commission has asked for comments on the policies and principles that should govern Postal Service claims that certain periodically reported information should be kept confidential and on the Postal Service's request that the Commission "refine procedures for controlling dissemination of information provided as periodic reports." Order No. 1423 at 6. The proper time to raise and resolve confidentiality concerns is when the Commission is considering adoption of a periodic reporting rule, as happened in Docket No. RM2003-3, not after the rule has been adopted. UPS sees no need for additional procedures to raise claims of confidentiality regarding periodic data reports. The existing rulemaking process is sufficient to permit all interested parties to address the issue of confidentiality when a specific rule is proposed.

However, the Commission may wish to adopt a rule addressing the situation where the Postal Service raises a legitimate claim of confidentiality when an amendment to the periodic reporting rule is proposed. In that instance, should the Commission agree with the Postal Service's claim after all interested parties have had an opportunity to address the issue, the sensitive information which the Commission proposes to be filed should still be filed with the Commission, but under seal. The Postal Service would not waive confidentiality because, under FOIA, the Commission is permitted to withhold public disclosure of confidential information under 5 U.S.C. § 552(b)(4). Indeed, the Commission already has an established procedure for addressing a Postal Service concern that information filed with the Commission which is truly "confidential" will be disclosed pursuant to a FOIA request to the Commission. Commission Rule 42a; see also Heeney v. FDA, 2001 U.S. App. LEXIS 7732 (9th Cir. April 12, 2001) (agency proper in withholding information filed with it that was confidential under FOIA). Thus, the Commission would still benefit by using the data, and the Postal Service cannot complain that it would suffer any harm.

The Commission should also consider adopting a rule to deal with Postal Service refusals to file required information. The new rule would give notice that the Commission might take certain steps if the Postal Service fails to comply with its periodic reporting requirements. UPS proposes that the Commission adopt a rule similar to Commission Rule 25(c) (39 C.F.R. § 3001.25(c)), which allows the Commission to take specified actions when a party fails to respond to discovery during a proceeding, and also reaffirm its authority to take action under 39 U.S.C. § 3624(c)(2). By making it clear that failing to follow the Commission's rule may have adverse

consequences, the Commission would create a strong incentive for compliance with the periodic reporting rules. The Commission may also assure that the Commission and the public will not be harmed by a lack of compliance.

Respectfully submitted,

John E. McKeever
Laura A. Biancke
Attorneys for United Parcel Service

Piper Rudnick LLP
One Liberty Place
1650 Market Street
Suite 4900
Philadelphia, PA 19103
(215) 656-3300
(215) 656-3301 (FAX)