

BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

Periodic Reporting Procedures

Docket No. RM2005-1

INITIAL COMMENTS OF THE UNITED STATES POSTAL SERVICE

(December 6, 2004)

On November 8, 2004, the Postal Rate Commission issued Order No. 1423, styled as an "Advanced Notice of Proposed Rulemaking." In this document, the Commission summarizes, from its perspective, a recent dispute between the Commission and the Postal Service regarding the appropriateness and legality of recent modifications made by the Commission to its periodic reporting rules. In Order No. 1386, over the strenuous objections of the Postal Service, the Commission greatly increased the amount and type of information to be regularly produced by the Postal Service under these rules. During the course of the rulemaking docket under which the new requirements were considered (Docket No. RM2003-3), moreover, the Commission made clear its intention to make public all information produced, an objective reiterated in the recent Notice. See, e.g., Order No. 1423 at 2-4.

As noted by the Commission in Order No. 1423, the Postal Service has declined to produce some of the additional new information required by the modified periodic

reporting rules, for reasons most recently explained in correspondence dated September 8, 2004. The Postal Service reiterated that the Commission's new information requirements conflict with the governing statutory scheme insofar as they would read out of the statute protections against disclosure of commercially-sensitive business information, and premature disclosure of materials developed for use in Commission rate proceedings. They would also disrupt the careful balance drawn in the statute between the Postal Service's commercial and other interests and the Commission's need for data to conduct statutorily mandated rate proceedings, by transforming that scheme into one in which the Postal Service annually produces detailed, rate-case-type information and the Commission engages in ongoing investigation and oversight, and routinely publishes Postal Service information on the Internet. Letter from Mary Anne Gibbons, Senior Vice President, General Counsel, United States Postal Service, to the Honorable Steven W. Williams, Secretary, Postal Rate Commission (September 8, 2004).

It should come as no surprise that the two statutory ratemaking partners have different perspectives on the appropriate role of the Commission outside of formal ratemaking proceedings. In this instance, the Commission has categorically rejected the objections raised by the Postal Service regarding the significant, and statutorily-questionable expansion of the Commission's role implicit in the new rules.

Nevertheless, the Postal Service must reiterate its position that the Commission's role outside of authorized ratemaking proceedings is significantly circumscribed by the statutory scheme, and that the Commission may not, even under its rulemaking

authority, require production of information in the manner now asserted without significant statutory revision.

This view of the current statutory scheme is consistent with views expressed relatively recently by the Chairman of the Rate Commission. As the Chairman stated in testimony before the President's Commission on the Postal Service:

The PRC primarily is charged with reacting to requests from the Postal Service. It has no continuing responsibility to investigate, evaluate, or advise on matters that inevitably affect domestic mail rates.

Testimony of Postal Rate Commission Chairman George Omas Before the President's Commission on the Postal Service (February 20, 2003) at 18. Chairman Omas went on to request legislative changes which would enable the Commission to undertake ongoing investigation and regulation of the Postal Service. The proposed rules can, therefore, be interpreted as an attempt to achieve the same result without the legislative change previously acknowledged as necessary.

The new rules would do more than enable the Commission to exercise an ongoing oversight function, however. By insisting that detailed financial and other information underlying the CRA Report routinely, and without delay, be made available by the Commission to the public, the new rules threaten to nullify the statutory protections of sensitive information established by Congress in section 410 of Title 39.

The Commission views its new rules as a legitimate exercise of its broad rulemaking authority, relying on the wording of section 3601 of Title 39. See Docket No. RM2003-3, Order No. 1386 at 58-64. Under this view, the Commission can promulgate any rules that it wishes to, provided only that it make a determination that

the changes are “necessary” to carry out its functions.

There are fundamental flaws with this view. The Commission’s rulemaking authority is not without limits. As the Commission notes, it has authority to promulgate rules necessary to the exercise of its statutory functions. However, more than thirty years of postal ratemaking have demonstrated that the Commission is able to carry out its statutory functions without periodic provision and disclosure of the detailed, comprehensive materials needed to manipulate data summarized in the Postal Service’s public financial reports, information now sought outside of formal rate proceedings.

The Postal Service has, over the years, provided increasing amounts of information to participants at the outset of omnibus rate proceedings. Much of the new information provided with recent rate filings responds to revised Commission filing rules calling for fuller documentation of Postal Service studies and data systems, rules designed to make the information provided more accessible to rate-case participants. The Commission’s recent efforts to make such documentation readable on widely-available personal computers, which the Postal Service has not opposed, will further empower rate-case participants to quickly understand the Postal Service’s evidentiary presentations. This history does not support the Commission’s conclusion that extensive, detailed, fundamental financial and other information and materials needed to execute computer models, provided annually or more frequently, in advance of formal proceedings, suddenly is a necessity for postal ratemaking.

Nevertheless, the Commission maintains, because the *Commission* has

announced that it finds the new requirements necessary, it is free to implement them without any possibility of challenge to the legitimacy of that determination, and regardless of any inconsistency with the remaining statutory framework. Apparently the Commission believes that its rulemaking authority under current law is so unfettered that its rules may, for example, supercede the Postal Service's interests in protecting confidential information. Such a position simply does not conform to the statutory ratemaking scheme. Section 410 of Title 39 clearly indicates the intent of the Congress to protect such information from public disclosure, and places the power to protect such information in the hands of the Postal Service.

Furthermore, the most recent postal reform bills considered by the House and the Senate reinforce the conclusion that the Postal Service has been granted significant power to define and protect its commercially-sensitive business information, and that the Commission may not, under its rulemaking authority or otherwise, presume to usurp this power. The postal reform bill currently before the House of Representatives, H.R. 4341, directly addresses the protections to be given to the Postal Service's confidential business information under a reformed ratemaking process. Revised Section 3652 of the bill governs annual reports to the new Postal Regulatory Commission. Subsection (f) of this section, entitled *Confidential Information*, provides that if the Postal Service determines that any document or portion of a document provided to the Commission under this section contains business information of the sort protected under section 410, and properly informs the Commission of this status, then the Commission may not, among other prohibitions, disclose this information to the public. This limitation would

apply regardless of whether the Commission agrees with the determination made by the Postal Service. See also Section 502 of H.R. 4341.¹

Perhaps more significantly, this vesting of the power to determine and secure the confidential status of business information in the Postal Service, not the Commission, is considered by the House Report to be reflective of the *current state of the law*. The House Report's commentary on new section 3652(f) states: "Subsection 3652(f) provides that the Postal Service may obtain confidential treatment for information that is protected from disclosure *under current law*, in accordance with provisions outlined in new section 504. See section 502 of the bill." House Report at 10 (emphasis added).

The Senate version of postal reform legislation, S. 2468, takes a somewhat different approach with respect to confidential information. Whereas the House bill restricts public dissemination (under appropriate procedures and conditions) to instances in which such information is produced pursuant to discovery in a formal Commission proceeding, the Senate bill would also allow the Commission to publicly disclose such information "in furtherance of its duties under this title," provided that procedures are established to accord appropriate confidentiality to information determined by the Postal Service to be sensitive. This would, however, be a change in the current statutory scheme, which would be effected if the Senate bill were to become law.

¹ The House bill does provide that the prohibitions on disclosure would not "prevent information from being furnished under any process of discovery" *in a ratemaking proceeding* under a reformed Title 39, but would require the establishment of "procedures for ensuring appropriate confidentiality" for any

By peremptorily issuing rules that not only conflict with the current statutory scheme, but with reform legislation under consideration by the House of Representatives, the Commission not only has impinged on the authority of the Postal Service, but has preempted the work of the Congress.

At the present time, the Commission has requested that interested parties comment on the dispute between itself and the Postal Service, specifically seeking “suggestions for adjustments to Commission rules designed to reconcile the conflicting interests outlined in this Notice.” Order No. 1423 at 2. Due to the fundamental underlying issues of agency authority and preemption of Congressional deliberation, the Postal Service believes that consideration of additional changes to the Commission’s rules is inappropriate and will not lead to rules that are consistent with the statutory scheme.

Fundamentally, moreover, pursuit of compatible rules raises several key issues. First, what process, if any, could be established by the Commission to protect the Postal Service’s legitimate commercial and other interests threatened by the premature disclosure of protected information, outside the context of statutory rate proceedings?² Second, what forms of protection might be available, practical and appropriate when cases are not pending? Third, what mechanisms for detection and enforcement can be established to make protections effective?

The Postal Service contends that, if any procedures are to be established to

information so furnished. *Id.*

² It is clear that the protective mechanisms currently in place are designed for use only in ongoing Commission proceedings, and are not readily applicable to information produced outside of such

shield sensitive information produced outside of formal rate proceedings, they must proceed from a presumption of confidentiality. Because of the unusual circumstances involved, in which the information to be produced does not underlie a pending request for rates and classifications, and the need of the Commission and the public for the information is in dispute, the Commission should abandon its intention to routinely make such information public. In a manner similar to that under consideration in H.R. 4341, the Postal Service should be permitted to identify, via a descriptive index or otherwise, materials which it considers to be sensitive, and that determination, under the Commission's rules, should create an automatic and binding presumption against unfettered public disclosure that can be overcome only under exceptional, specified and limited circumstances. For example, if a participant were to demonstrate that identical information was voluntarily and routinely made public by a competitor of the Postal Service, the Commission might disagree with the information's protected status. In this event, some procedural mechanism enabling that view to be challenged should be provided.

There might also be protective measures that conceivably could be considered. For example, perhaps public disclosure of certain sensitive information might be permitted only after an appropriate delay or lag consistent with the interests protected under the statutory scheme. Theoretically, protective conditions might be devised which could restrict use of the information in ways that would lessen the potential for harm. Any such protective conditions, however, would need realistic measures and

circumstances making possible detection of violations, and effective sanctions against violators.

By making these observations, the Postal Service does not intend to imply that it is confident that adequate procedures could be established, or that establishment of procedures and conditions would be sufficient to ensure consistency with the statutory scheme. These views are submitted solely in response to the Commission's request for comments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing document in accordance with Section 12 of the Rules of Practice.

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