

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

Periodic Reporting Procedures

Docket No. RM2005-1

REPLY COMMENTS OF THE UNITED STATES POSTAL SERVICE

(January 21, 2005)

Pursuant to Commission Orders No. 1423 and 1427, the United States Postal Service hereby files its reply comments in this Docket.

Four parties other than the Postal Service filed initial comments in this proceeding: the Major Mailers Association (“MMA”), the Office of the Consumer Advocate (“OCA”), the United Parcel Service (“UPS”), and Valpak Direct Marketing Systems, Inc. and Valpak Dealers’ Association, Inc. (“Valpak”). One commenter, MMA, recognizes the validity of the Postal Service’s concerns about indiscriminate dissemination of commercially sensitive information, and suggests that particular measures be explored to protect the Postal Service’s interests. See, e.g., MMA Comments at 3-5. Valpak suggests that it would be acceptable for the Postal Service to produce disputed materials under seal, with access limited to Commission staff and designated party representatives. Valpak Comments at 2-3. Valpak goes on to suggest that yet another rulemaking be established to explore the limitation of issues in future rate proceedings. Id. at 3-6. The OCA did not directly respond to the

Commission's request for comments. Instead, the OCA recapitulates Commission and Postal Service statements regarding the current dispute, and, sensing a possible easing of the Postal Service's objections to production of disputed items, states that it will "take up the Postal Service's offer to provide additional materials", an offer thought to have been made in correspondence with the Commission. The OCA indicates that it will comment on the issues raised by the Commission in Order No. 1423 only after this request for additional materials has been responded to by the Postal Service.

The remaining commenter, UPS, indicates strong support for the Commission's new periodic reporting requirements, characterizing the disputed information withheld by the Postal Service as "critical" to the Commission's ability to perform its statutory ratemaking functions within the existing statutory deadlines, and arguing that the new rules are well within the Commission's statutory authority. UPS Comments at 1-4. UPS denies the validity of the Postal Service's concerns regarding disclosure of commercially sensitive information, states that all such issues were resolved against the Postal Service in Docket No. RM2003-3, and suggests that the Commission consider new rules specifying adverse consequences for the Postal Service should it fail to provide information required by the periodic reporting rules. *Id.* at 4-6. At the same time, however, UPS suggests that it may be appropriate for the Postal Service to provide the disputed materials under seal, as a legitimate means to protect information otherwise protected under the Freedom of Information Act. *Id.* at 5.

There is little in the initial comments which requires response by the Postal Service. It is not surprising the most commentators, as potential users of Postal

Service financial information, would see value in regular production of such information. This support of broadened periodic reporting requirements is especially unsurprising with respect to UPS, a major Postal Service competitor. Interestingly, however, with the exception of the OCA, which deferred comment, all of the parties, even UPS, suggest that it might be appropriate for the Commission in an upcoming rulemaking to attempt to develop rules that would protect from indiscriminate disclosure commercially sensitive information required to be produced under the revised periodic reporting requirements, whether it be through filing under seal, or some other mechanism. It is gratifying that, to the extent that protective measures have been suggested, the concerns of the Postal Service concerning production of commercially sensitive information are being taken seriously, and that attempts are being made to resolve this aspect of the current dispute in a manner that would offer some protection to the Postal Service's commercial interests.

As the Postal Service noted in its initial comments, substantial questions surround the prospects for the development of adequate and effective protective measures applicable to information produced outside of rate proceedings. See Postal Service Initial Comments at 7-9. Despite these reservations, should the Commission decide to explore such potential protective measures in this Docket, the Postal Service would give such measures careful consideration.

The Postal Service's willingness to consider carefully crafted protective measures, however, should not be interpreted by anyone as a "softening" of its position on the underlying dispute regarding the Commission's lack of authority to demand

premature production of detailed, rate-case type financial information between rate cases, which would remain unresolved. As the Postal Service has indicated on prior occasions in Docket No. RM2003-3 and in its Initial Comments, the Commission's authority to require production of such information is limited under the statutory scheme. In section 410 of Title 39, the Congress specifically established the policy that information produced for use in rate litigation, as well as sensitive commercial information, would be exempted from disclosure under FOIA. Specification of these exceptions would have been completely nonsensical and meaningless if, at the same time, the Congress intended to authorize the Commission to require the periodic production and disclosure of such information. It is much more reasonable to conclude that that it was the view of the Congress that FOIA requests would be the most prominent threat to disclosure of the Postal Service's commercial information and litigation documentation, and that the Congress intended to protect such information from premature disclosure under FOIA or otherwise.

As mentioned in the Postal Service's Initial Comments, the recently-expanded periodic reporting requirements not only disrupt the carefully balanced statutory scheme, but also conflict with recent deliberations of the Congress concerning the current and (possibly reformed) future roles of the Postal Service and the Commission. See Postal Service Initial Comments at 5-7. Given that postal reform legislation, including provisions affecting the provision of commercial information by the Postal Service, has been and currently is before the Congress, the Postal Service continues to believe that the Commission should refrain from taking any action that would preempt

Congressional deliberations on the balance of powers between the partner ratemaking agencies.

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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