

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

**Regulations to Establish Procedure For        }**  
**According Appropriate Confidentiality        }**        **Docket No. RM2008-1**

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**INITIAL COMMENTS OF PARCEL SHIPPERS ASSOCIATION, THE  
ASSOCIATION FOR POSTAL COMMERCE, DIRECT MARKETING  
ASSOCIATION, INC., MAIL ORDER ASSOCIATION OF AMERICA, TIME  
WARNER INC., NATIONAL POSTAL POLICY COUNCIL, MAGAZINE  
PUBLISHERS OF AMERICA, INC., AND ALLIANCE OF NONPROFIT  
MAILERS  
ON ORDER NO. 96  
(September 25, 2008)**

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**INTRODUCTION**

Commission Order No. 96 opened Docket No. RM2008-1 to implement the provisions of 39 U.S. C. § 504(g), which provides that, if the Postal Service supplies information to the Commission under subpoena or under other procedures, and it believes such information is exempt from disclosure, the Commission shall not publicly disclose that information unless it has established rules for determining the appropriate degree of protection for such information. Further, 39 U.S.C. § 410 (c) authorizes the Postal Service to claim exemption from public disclosure, including trade secrets, in negotiated service agreement (NSA) and other proceedings before the Commission.

The Parcel Shippers Association, the Association for Postal Commerce, the Direct Marketing Association, the Mail Order Association of America, the National Postal Policy Council, Time Warner Inc., the Magazine Publishers of

America, Inc., and the Alliance of Nonprofit Mailers (PSA, et al.) welcome this opportunity to submit comments on the Commission's proposal.

**I. The Proposed Rules Allow the PRC to Override USPS Claims of Confidentiality and Make USPS Information Public.**

These proposed rules (new part 3007 of the Commission's rules) establish the procedure for according appropriate confidentiality, triggered by 39 U.S.C. § 504(g)(1), which provides that the Postal Service can determine "... that any document or other matter it provides to the Postal Regulatory Commission is exempt from public disclosure." They deal exclusively with the Postal Service's right to claim confidentiality and would appear to leave undisturbed the existing rules applicable to information supplied to the Commission by third-parties, and their rights to seek protective rules.<sup>1</sup> This may explain why these new rules do not address the interests of other parties who may have their own sensitive information disclosed in a Postal Service filing with the Commission.

Perhaps because of the PAEA's concern with the Postal Service's competitive posture, the Commission's proposed rules place an entirely new emphasis on ensuring that the sequestering of Postal Service information will not be to the detriment of the public and the competitive environment.

There is thus a balancing required, according to the Commission, which finds that it is:

directed by the provisions of the PAEA and because the Commission considers it necessary and appropriate, the Commission proposes rules that could lead to public disclosure of information initially claimed by the Postal Service as non-public. In developing proposed rules, the Commission is mindful of, and takes very seriously its responsibility to achieve a fair balance between the

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<sup>1</sup> See PRC Rules of Practice, Section 25(c) and (g); Section 27(a), (b) and (e); Section 28(e); Section 31(a), (b) and (c); Section 42(a); and Section 43(c)(4).

commercial interests of the Postal Service and the public interest in disclosure of information concerning a public entity that operates in commercial markets.

Order No. 96 at 5.

**II. The Proposed Rules Give No Protection to Third-Parties' Confidential Information in the Possession of USPS**

Nowhere in the proposed rules is there any indication by the Commission that it also must concern itself with the impact on third-parties who, either through requisite compliance with Postal Service rules or in the course of entering into a partnership or negotiating an NSA, have provided commercially sensitive confidential information to the Postal Service, which subsequently is filed with the Commission either voluntarily or upon an order of the Commission.

While the Commission's proposed rules do contemplate the standard protective orders that have long been available for confidential information, the proposed rules are all directed to requests for such protective orders *by the Postal Service*. Order No. 96 at 7.

One could argue that the Postal Service would be zealous in protecting the commercially sensitive information that it had obtained from third-parties pursuant to its filing requirements or through a nondisclosure agreement with a prospective applicant for an NSA; but, there is no requirement that the Postal Service defend such information, nor any requirement that the Commission, in judging whether it will also make such information public, weigh the impact of such disclosure on parties other than the Postal Service.

**III. The Proposed Rules Should be Modified to Give Protection to the Confidential Information of Third-Parties.**

The rules should require that:

- A. An advance notice be given to any third-party whose confidential information is to be supplied to the Commission by the Postal Service;
- B. A third-party has an absolute right to intervene to defend the confidentiality of its own information; and
- C. The PRC will not publicly disclose confidential information of a third-party that has lodged an objection to such disclosure.

As it is required to do under the Freedom of Information Act, the Postal Service has adopted a rule (39 CFR § 265.8) which requires that the Postal Service give pre-notification to a third-party before disclosure of any information submitted by that party and which the party considers and has designated as confidential; and the Postal Service must afford that party the right to show why the information should not be disclosed to the public or any other person. The same basic considerations should apply to the disclosure of third-party sensitive information held by the Postal Service or a vendor to the Postal Service when sought by the Commission. Competitively sensitive data must always be treated with circumspection to avoid misuse of data collection efforts by public bodies like the Postal Service. Indeed, the failure of the Commission to adopt the proposal we have advanced would put the Postal Service in the untenable position of violating its own rule, a result that serves no legitimate interest and contravenes basic Congressional policy.

We are not arguing that the Commission should not be able to balance the interests of the Postal Service in confidentiality with, as the Commission says, “maintaining the financial transparency of a government establishment competing in commercial markets.” Order No. 96 at 2-3. It is manifest, however, that the same balancing requirements in the public interest are not implicated in the disclosure of the sensitive information of a third-party that has supplied such

information to the Postal Service under the assumption and guarantee of confidentiality.

If the Commission believes that the disclosure to it or its consultants or interested parties is necessary, but the individual third-party who has supplied such information to the Postal Service believes that it would be severely damaged, it should be able to require the Commission to retain such information supplied by the Postal Service in confidence.

If the Postal Service, in a proceeding before the Commission, asserts a position that depends upon information gleaned from third-parties in confidence, and does not disclose that information, or the individual party involved, upon due notice, asserts its privilege that such information be not made available, then there can be an adverse inference of evidence against the Postal Service, or, if it is a proceeding wherein the owner of the information is a party, and an advocate for a position, then the party will suffer that same adverse inference.<sup>2</sup>

The important point is that third-parties' confidential information should not, without their approval, be disgorged to the private sector and to competitors.

If the Commission does not honor this approach, and parties are to be constantly at risk of having their most sensitive information disclosed to their competitors or to the market at large in a manner which could be damaging to the welfare of their companies, it will become less and less likely that parties will be willing to supply information to the Postal Service, where they have an option, and even less likely that they will engage in the negotiation of beneficial agreements.

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<sup>2</sup>See PRC Rule 25(c).

## CONCLUSION

In promulgating these rules required by the PAEA for Postal Service disclosure of information, the PRC should be diligent about the implications of such rules to third-parties who deal with the Postal Service.

Respectfully submitted,

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