

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

**Regulations to Establish Procedure
for According Appropriate Confidentiality**

Docket No. RM2008-1

COMMENTS OF PITNEY BOWES INC.

James Pierce Myers
Attorney at Law
1617 Courtland Road
Alexandria, Virginia 22306
Telephone: (571) 257-7622
Facsimile: (571) 257-7623
E-Mail: jpm@piercemyers.com

Michael F. Scanlon
K&L GATES LLP
1601 K Street, NW
Washington, DC 20006
Telephone: (202) 778-9000
Facsimile: (202) 778-9100
E-Mail: michael.scanlon@klgates.com

Counsel to PITNEY BOWES INC.

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I. INTRODUCTION

Pitney Bowes Inc. (Pitney Bowes) submits these comments in response to Order No. 96, the Postal Regulatory Commission's (Commission) Notice of Proposed Rulemaking to Establish a Procedure for According Appropriate Confidentiality, issued August 13, 2008.

This is an important proceeding that addresses Congress' intent in enacting the Postal Accountability and Enhancement Act (PAEA)¹ to ensure appropriate confidentiality protections necessary to effectuate the pricing flexibility afforded to the Postal Service. The relevant sections of the PAEA recognize the need to balance the Postal Service's interest in keeping commercially sensitive information confidential with the Commission's obligation to ensure accountability and transparency. Appropriate confidentiality protections are also necessary to facilitate expanded public / private partnerships and to stimulate future technological innovation and investment in the mailstream.

Section 504(g)(1) provides that the Postal Service may determine "that any document or other matter it provides to the Postal Regulatory Commission" is exempt from public disclosure under section 410(c) or section 552(b) of title 5. 39 U.S.C. § 504(g)(1).

Under section 410(c), the Postal Service may claim as exempt from public disclosure the name and address information of postal customers; information of a commercial nature, including trade secrets, whether or not obtained from a person outside the Postal Service, which under good business practices would not be publicly disclosed;

¹ See Pub. L. No. 109-435, 120 Stat. 3198 (Dec. 20, 2006). The PAEA amends various sections of title 39 of the United States Code. Unless otherwise noted, section references in these comments are to sections of title 39.

certain information related to the negotiation of collective bargaining agreements; information prepared for proceedings before the Commission or the federal courts concerning postal rates, classes and services; reports and memoranda prepared by outside sources unless their disclosure would have been required if the Postal Service had prepared the reports or memoranda itself; and investigatory files compiled for law enforcement purposes, unless legally available to parties other than the Postal Service. *See* 39 U.S.C. § 410(c).

Under section 552(b) of title 5, the Postal Service may withhold from public disclosure information related to internal Postal Service personnel matters; information specifically exempted from public disclosure by statute; information related to trade secrets and privileged or confidential commercial or financial information; non-public interagency or intra-agency memoranda or letters; privacy protected personnel, medical and other files; and certain law enforcement records or information. *See* 5 U.S.C. § 552(b).

Section 504(g) provides that the Postal Service must give reasons, in writing, for any claimed exemption, *see* 39 U.S.C. §504(g)(1), and that unless the Commission has established rules for determining the appropriate degree of protection of information or materials claimed to be non-public by the Postal Service, the Commission may not (1) “use such information for purposes other than the purposes for which it is supplied,” or (2) “permit anyone who is not an officer or employee of the Commission to have access to any such information.” *See* 39 U.S.C. § 504(g)(2).

Through this proceeding the Commission will “establish a procedure for according appropriate confidentiality” for information which the Postal Service claims is

exempt from disclosure under section 410(c) or section 552(b) of title 5. *See* 39 U.S.C. § 410(c); 5 U.S.C. § 552(b). Section 504(g) requires the Commission to “balance the nature and extent of the likely commercial injury to the Postal Service against the public interest in maintaining the financial transparency of a government establishment competing in commercial markets” in determining what degree of protection is appropriate. 39 U.S.C. § 504(g)(3)(A).

Section 504(g)(3)(B) further requires the Commission to establish a procedure for affording appropriate confidentiality for information which the Postal Service has claimed is exempt from disclosure in the narrower context of any “discovery procedure” that is part of a Commission “proceeding.” *See* 39 U.S.C. § 504(g)(3)(B). Section 504(g)(3)(B) directs the Commission to fashion its discovery procedures based on rule 26(c) of the Federal Rules of Civil Procedure. *See id.*

Pitney Bowes agrees with the Commission’s interpretation that the PAEA intends for the Commission to engage in essentially the same balancing test under sections 504(g)(3)(A) and 504(g)(3)(B), such that a single rule governing disclosure under both sections is preferred. *See* Order at 5.

These comments primarily discuss the need to expand the proposed rules to address the legitimate expectations of private parties by keeping confidential the commercially sensitive information which they may have shared with the Postal Service. Because the policy interests in support of disclosure of Postal Service information – the expectation for accountability and transparency of a governmental entity operating in commercial markets – are inapplicable to private parties, Pitney Bowes respectfully submits that the Commission must adopt different, more stringent standards for the

disclosure of commercially sensitive information that private parties may have shared with the Postal Service.

II. DISCUSSION

Subject to the specific points raised below, Pitney Bowes supports the Commission's proposed procedures for according confidentiality. The proposed burden-shifting framework in which the Postal Service is provided an initial opportunity to assert a privilege or basis for nondisclosure, followed by the Commission's preliminary determination and a further opportunity for respond, is an appropriate and fair model framework. The proposed cooling-off period to allow the Postal Service or other parties to object to access to materials subject to protective order is a best practice as an important procedural safeguard which should minimize inadvertent disclosure.

A. The Commission Should Adopt Rules to Protect Commercially Sensitive Information Provided to the Postal Service by Private Parties

The proposed rules focus extensively on the parameters of disclosure, and conversely the protection of confidentiality, of Postal Service information and seek to "achieve a fair balance between the commercial interest of the Postal Service and the public interest in disclosure of information concerning a public entity that operates in commercial markets." Order at 5. The proposed rules, however, do not distinguish between the different types of information held by the Postal Service. Specifically, the proposed rules do not adequately speak to the protection of confidential commercial information that private parties have shared with the Postal Service.

For several reasons the proposed rules should expressly protect confidential commercial information provided to the Postal Service by private parties. First, this is

not Postal Service information, it is the information of the private party. The policy rationale underlying the balancing test articulated by the Commission is therefore inapplicable because there is no “public interest in disclosure of information *concerning a public entity.*” Order at 5 (emphasis added). Thus, the balancing of interests tips decidedly in favor of nondisclosure because there is no countervailing public accountability or transparency interest to weigh against the competitive harm to the private party that would result from the disclosure of the confidential commercial information.

Second, the interests of a private party that has provided confidential commercial information to the Postal Service may not be perfectly aligned with the Postal Service’s interests and reasons for claiming an exemption. Under those circumstances the Postal Service’s request for an exemption may not adequately address the concerns of the private party.

Third, failure to provide adequate protections for confidential commercial information provided to the Postal Service by private parties would create a disincentive for informal informational exchanges between private parties and the Postal Service which are necessary to promote public / private partnerships and to stimulate innovation and investment in the mailstream.

Fourth, the PAEA does not authorize the Commission to compel the disclosure of confidential commercial information from private parties. The Commission’s authority to compel disclosure under section 504 is limited by its terms to the Postal Service and other “covered persons” defined under section 504(f)(4). *See* 39 U.S.C. § 504(f)(4). Accordingly, private parties who are not acting as an “agent” or “contractor” of the Postal

Service should not forfeit the right to have confidential commercial information protected by virtue of having shared the information with the Postal Service.

The concern regarding the protection of confidential commercial information of private parties is particularly acute where they are not a party to the proceeding in which information is sought from the Postal Service. The Commission's Rules of Practice and Procedure appropriately address disclosure requirements and the associated evidentiary inferences for parties who have intervened in a Commission proceeding. *See* 39 C.F.R. §§ 3001.20a, 3001.26, 3001.27, 3001.28, and 3001.91. But neither the existing rules nor the proposed rules in this docket adequately address the protection of confidential commercial information of parties who have not intervened. Moreover, in each of the three basic contexts identified in Order 96 in which the Commission will seek to obtain information from the Postal Service, confidential commercial information provided to the Postal Service by a private party may need to be protected from disclosure. *See* Order 96 at 5-7.

The Commission should adopt the well-established standard for protecting confidential commercial information provided by a private party to a government entity in the context of the Freedom of Information Act (FOIA). *See* 5 U.S.C. § 552. Following well-established decisional law construing disclosure obligations under FOIA, the Commission should exempt from disclosure any confidential commercial information that a private party voluntarily disclosed to the Postal Service, if it is the kind of information that the party would not customarily release to the public. *See e.g., McDonnell Douglas Corp. v. National Aeronautics and Space Admin.*, 180 F.3d 303, 304

(D.C. Cir. 1999); *Public Citizen Health Research Group v. National Inst. of Health*, 209 F. Supp. 2d 37, 45 (D.D.C. 2002).

The proposed rules should also be modified to provide private parties notice and an opportunity to be heard, as is provided in connection with a FOIA request. *See* 39 C.F.R. 3001.42a (Commission FOIA regulations); 39 C.F.R. § 265.8 (Postal Service FOIA regulations). To the extent the information sought from the Postal Service includes information provided by private parties, the Commission should provide those parties with notice of the Commission’s preliminary determination, the opportunity to file responsive pleadings, and the opportunity to object to any request for access to nonpublic material during the cooling off period prescribed in proposed part 3007.24.

An affirmative obligation to provide notice to affected parties is critical. Proposed part 3007.23 provides that “any interested person, including the Postal Service” may file in response to the Commission’s preliminary determination for access to non-public materials. The term “interested person” is not defined.² Further, while this provision may be sufficient in those circumstances in which a private party has intervened in a proceeding, it does not go far enough to protect the interests of private parties who have not done so. Without an affirmative obligation to provide notice to affected parties, private parties will be required to monitor virtually every proceeding before the Commission or risk missing an opportunity to raise an objection within a short response period. This is inefficient and unfairly imposes an undue administrative burden

² At a minimum, the protections afforded to “interested person[s]” ought to extend to “covered persons” as defined under section 504(f)(4). *See* 39 U.S.C. § 504(f)(4). Similarly, to the extent the information for which non-public treatment is sought pertains to an agent or contractor of the Postal Service, the Commission’s preliminary determination must also assess the potential commercial injury or competitive harm to the non-Postal Service “covered person.”

on private parties who have a legitimate expectation that confidential commercial information shared with the Postal Service will not be disclosed.

B. The Proposed Rules Should Be Modified To Limit Access To Protected Confidential Information To Parties With A Direct Interest In The Proceeding.

Part 3007.24 provides that “[a]ny person may file a motion requesting access to the materials claimed to be non-public by the Postal Service.” Order at 20. To limit disclosure and the potential for competitive harm, access should be limited to parties with a direct interest in the subject proceeding. Limiting access to parties with a direct interest in the proceeding would minimize the potential for abusive discovery and would enable the Commission to give effect to the enforcement provisions of part 3007.50.

Because the proposed rules provide that “any person” may seek access to protected information, the enforcement provisions are deficient to the extent the remedies are limited to sanctions in the context of a Commission proceeding. *See* Order at 24. Under the proposed rules, a party without a direct interest in the proceeding could obtain access to protected confidential commercial information for an improper purpose without fear of reprisal under the Commission’s rules.

At the same time, the reference to “[s]uch other sanctions as the Commission or its authorized representative deems appropriate” in part 3007.50(a)(3) is vague and undefined. The Commission should be explicit regarding the scope of its enforcement authority and the legal basis for imposing sanctions on persons who are not parties to a Commission proceeding.

III. CONCLUSION

Pitney Bowes appreciates the Commission's consideration of these comments.

Respectfully submitted:

/s/

James Pierce Myers
Attorney at Law
1617 Courtland Road
Alexandria, Virginia 22306
Telephone: (571) 257-7622
Facsimile: (571) 257-7623
E-Mail: jpm@piercemyers.com

Michael F. Scanlon
K&L GATES LLP
1601 K Street, NW
Washington, DC 20006
Telephone: (202) 778-9000
Facsimile: (202) 778-9100
E-Mail: michael.scanlon@klgates.com

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