

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

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

Docket No. RM2008-1

**INITIAL COMMENTS OF
AMERICAN POSTAL WORKERS UNION, AFL-CIO
(September 25, 2008)**

On August 13, 2008, the Postal Regulatory Commission issued Order No. 96 Notice of Proposed Rulemaking to Establish a Procedure for According Appropriate Confidentiality. The American Postal Workers Union, AFL-CIO (APWU) commends the Commission for proposing a comprehensive framework for addressing issues of confidentiality. APWU submits these comments on the proposed regulations.

Section 504(g) of Title 39 provides that the Postal Service may determine “that any document or other matter it provides to the Postal Regulatory Commission” is non-public under Section 410(c) or Section 552(b) of Title 5. 39 U.S.C. § 504(g)(1). This information must still be produced to the Commission. Id. The Commission then must determine the “appropriate degree of confidentiality to be accorded” to the claimed non-public information. Id. at § 504(g)(3)(A). Section 504(g) further provides that in “determining the appropriate degree of confidentialitythe Commission shall 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.” Id. The Commission’s proposed

Rule 3007.25(a) purports to “memorialize” this balancing test. However, this Rule as currently written is far broader than the law contemplates.

Specifically, Rule 3007.25(a) requires the Commission to “balance the nature and extent of the likely commercial *or other injury* identified by the Postal Service ... against the public interest in maintaining the financial transparency of a government entity operating in commercial markets...” The balancing test elucidated in Section 504(g) refers only to the “likely commercial injury.” The Commission’s proposed rule is too broad and inappropriately permits the Postal Service to assert injury that is not commercial but could nonetheless be considered by the Commission to outweigh the public’s interest in disclosure.

In addition, the proposed rule states “government entity *operating* in commercial markets” while Section 504(g)(3)(A) states “government establishment *competing* in commercial markets.” This significant change should not be enacted. The balancing test was designed to protect the Postal Service’s commercial interests vis a vis its competitors. Yet the rule as proposed would permit the Postal Service to claim as non-public information relevant to its market dominant products, without requiring the Postal Service to specify why information withheld relates to its competitive position. Therefore, the Commission should revise Rule 3007.25(a) to reflect the actual requirements of Section 504(g)(3)(A).

The APWU submits that Rule 3007.25(b) also be revised. The proposed rule would permit the Postal Service to claim that materials are non-public based on the *likelihood* that production would invade specific evidentiary privileges recognized in Federal Court. While 39 U.S.C. § 504(g) does not recognize an exemption from

disclosure based on evidentiary privileges, the APWU agrees that in theory this is a reasonable rule to implement, however, the present form of the rule is not permissible. If the Commission is going to permit the Postal Service to refrain from disclosing material based on claims of privilege or undue burden the rules must require the Postal Service to assert and prove that the privilege actually applies, not merely claim that it is likely to apply. In the event that the Postal Service satisfies its burden and establishes that an evidentiary privilege or undue burden applies, then the Commission should undertake to balance the Postal Service's claim of privilege or undue burden with the public's interest in disclosure.

The APWU supports the Commission's proposed rules 3007.20 and 3007.23. These rules establish a thorough set of requirements that Postal Service must fulfill when claiming that information should be protected from public disclosure. These requirements should go far towards preventing unreasonable claims of confidentiality. However, the Commission should make one revision to Rule 3007.23(b). As proposed, this rule permits the Commission to issue a "preliminary determination concerning the appropriate degree of protection, if any, to be accorded to the materials claimed to be non-public by the Postal Service." APWU submits that this preliminary determination should not only be permitted it should be required. Under the proposed rule, interested parties can only file responsive pleadings regarding the initial determination of the Postal Service that some material is exempt from public disclosure after the Commission chooses to issue a preliminary finding. Rule 3007.23(b)(1). If the Commission does not issue such a finding, the only way to challenge the Postal Service determination is to seek access and receive permission

to view the non-public material under Rules 3007.24 – 3007.31. Only then can the interested party seek to have the non-public information publically disclosed under Rule 3007.32. This comes too late in the process and places much of the burden on the public, including interested parties, to refute the determination that the material should be non-public. This is contrary to the transparency and openness envisioned by the Postal Accountability and Enhancement Act. Therefore, the Commission should revise proposed Rule 23(b) to state: “The Commission or its authorized representative **shall** issue a notice of preliminary determination concerning the appropriate degree of protection, if any, to be accorded to the materials claimed to be non-public by the Postal Service.”

For the foregoing reasons, the APWU respectfully requests that the Commission revise its proposed confidentiality rules as described above.

Respectfully submitted,

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