

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

Annual Compliance Report, 2008

Docket No. ACR2008

**PITNEY BOWES INC. RESPONSE TO THE MOTION OF THE
UNITED STATES POSTAL SERVICE REQUESTING ESTABLISHMENT OF
PROTECTIVE CONDITIONS TO GOVERN ACCESS
TO CERTAIN CORE COSTING DOCUMENTATION**

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I. INTRODUCTION

Pursuant to Rule 3001.21(b) of the Postal Regulatory Commission's (Commission) Rules of Practice and Procedure, Pitney Bowes Inc. (Pitney Bowes) submits this response to the United States Postal Service's December 12, 2008 Motion Requesting Establishment of Protective Conditions to Govern Access to Certain Core Costing Documentation.¹

Notwithstanding a separate Commission rulemaking to establish procedures for according appropriate confidentiality,² including the publication of illustrative protective conditions,³ and despite the fact it is required to file its 2008 Annual Compliance Report (ACR) in less than two weeks, the Postal Service for the first time proposes new, additional access restrictions to core costing information that the Postal Service proposes to file in a nonpublic annex to that ACR.

The Commission should reject the Postal Service's proposal to further limit access to core costing information provided in a nonpublic annex to the 2008 ACR as premature and overly-restrictive.

II. DISCUSSION

The Postal Service's motion is divided in two parts. In the first part, the Postal Service discusses the need to limit public access to certain "cost information regarding specific competitive products" and "background documentation, in which the cost splits between competitive and market dominant products are developed [.]"⁴ Of particular

¹ See Motion of the United States Postal Service Requesting Establishment of Protective Conditions to Govern Access to Certain Core Costing Documentation (USPS Motion), filed December 12, 2008.

² See PRC Order No. 96, Notice of Proposed Rulemaking to Establish a Procedure for According Appropriate Confidentiality (Dkt. No. RM2008-1), issued August 13, 2008.

³ See Notice of Filing Illustrative Protective Conditions (Dkt. No. RM2008-1) (Model Protective Order), filed September 18, 2008.

⁴ USPS Motion, at 2-3.

importance is the “background information” which includes virtually all of the core costing materials that were traditionally filed in connection with omnibus rate proceedings and many of which are now required to meaningfully assess the cost avoidance estimates which inform the Commission’s review of workshare discounts under section 3622(e).⁵ This core costing information includes: the Cost and Revenue Analysis (CRA) Report, the Cost Segments and Components Report (CSC), the CRA Models, the CRA “B” Workpapers, Cost Segment 3 Cost Pools, In-Office Cost System (IOCS) data, City Carrier Cost System (CCCS) data, Rural Carrier Cost System (RCCS) data, and Transportation Cost Systems (TRACS) data.⁶

Pitney Bowes recognizes the legitimate interest the Postal Service has in protecting commercially sensitive information about its competitive products and agrees that it would “make no sense for the Postal Service to undertake substantial effort to shield summary reports, if the critical contents of those summary reports could nonetheless be inferred from background documentation in the public portion of the ACR materials.”⁷ Accordingly, Pitney Bowes does not oppose the Postal Service’s proposal to file this “background documentation” in a nonpublic annex.⁸

In the second part of the motion, however, the Postal Service proposes to modify the Commission’s standard protective conditions to impose additional access restrictions

⁵ See 39 U.S.C. § 3622(e).

⁶ See *Id.*, at 4.

⁷ USPS Motion, at 3.

⁸ It is likely that the Postal Service could avoid much of the potential concern regarding “background documentation” through a more careful presentation of the core cost information. Consistent with the approach the Postal Service used in its FY 2008 Revenue, Pieces, and Weights (RPW) Report, the Postal Service could protect the confidentiality of its competitive product cost data by aggregating the information in its core costing materials for specific competitive products (e.g., Priority Mail, Express Mail, and Parcel Select) to a general result for competitive products. For example, with respect to the CRA and the CSC (LR-1 and LR-2), the Postal Service could roll up the costs for all the competitive products and report them on one line. The tallies for the competitive classes in LR-27 could similarly be coded together.

to nonpublic core costing information by narrowing the class of eligible individuals. These proposed modifications are premature and overly-restrictive.

The Commission's Model Protective Order is designed to protect participants from competitive disadvantage or other business injury⁹ resulting from the disclosure of commercially sensitive or proprietary information¹⁰ by restricting the personnel that may review commercially sensitive information¹¹ and prohibiting persons eligible for access to protected information from using that information in any other proceeding or for a commercial advantage.¹² The Postal Service has made no showing that the access restrictions and protective conditions afforded by the Model Protective Order are insufficient to protect the Postal Service's competitive interests. Nor has the Postal Service made any showing that the parties admitted to the protective order have failed to adhere to the conditions imposed or that the Commission has not appropriately enforced the existing standards.

The Postal Service characterizes its proposed modifications to the Commission's Model Protective Order as "significant"¹³ and "material"¹⁴ in some places and, alternatively, as "cosmetic"¹⁵ in others. To be sure, the Postal Service's proposed modifications to the Commission's Model Protective Order are significant, far-reaching, and overly-restrictive.

The Postal Service's proposed modifications to paragraph 1(b) of the Commission's Model Protective Order are shown as follows in the underlined text:

⁹ See Model Protective Order, at paras 1(b), 5 and 6.

¹⁰ See *id.*, at paras 2, 5, 6 and 11.

¹¹ See *id.*, at para 1(b).

¹² See *id.*, at para 1(b) and Certification.

¹³ USPS Motion, at 7.

¹⁴ *Id.*

¹⁵ *Id.*, at 10.

A person, as defined in rule 5(f), 39 C.F.R. § 3001.5(f), or an individual employed by such person, or acting as agent, consultant, contractor, affiliated person, or other representative of such person for purposes related to the matter identified as _____. However, no person involved in competitive or strategic decision-making for any entity that might gain competitive or strategic advantage from use of this information shall be granted access to these materials. “Involved in competitive or strategic decision-making” includes consulting on marketing or advertising strategies, pricing, product research and development, product design, or the competitive structuring and composition of bids, offers or proposals. It does not include rendering legal advice or performing other services that are not directly in furtherance of activities in competition with, or otherwise adverse to the interests of, a person or entity having a proprietary interest in the protected material. Additionally, it does not include rendering legal advice or performing other services in the course of negotiations concerning prices of market dominant products.¹⁶

The Postal Service contends that the provisions of the Model Protective Order may be sufficient to protect its interests relative to competitors, but that the additional limitations are necessary to shield competitive product cost information from customers with whom the Postal Service may negotiate a deal for competitive products in the future.¹⁷ Pitney Bowes recognizes that Postal Service may have different reasons for shielding commercially sensitive costing information from competitors and customers, but these concerns fail to justify the introduction of the amorphous notions of “strategic decision making” and “strategic advantage” in the protective order.¹⁸ These terms, which the Postal Service does not even attempt to define, are content-free terms upon which the Postal Service can project anything it wishes. Nor does the Postal Service cite to any precedent or any authority in support of the use of these terms in protective orders in any other regulatory or commercial context. The introduction of these terms and the addition

¹⁶ USPS Motion, at 9.

¹⁷ *See id.*, at 8.

¹⁸ *Id.*, at 9.

of the open-ended phrase “or otherwise adverse to the interests of” will do little more than generate uncertainty and confusion and, therefore, should be rejected.

The unjustifiable over-breadth of the proposed changes is revealed in the Postal Service’s concession that the proposed modifications “would intentionally preclude analysts who obtain access to the core costing documentation from subsequently acting as participants or consultants to the negotiation of a competitive contract price.”¹⁹ The proposed access restrictions would have a far-reaching and deleterious effect on the ability of the mailing community to access core costing information consistent with the transparency goals of the PAEA.

Without any opportunity to investigate pricing and costing information in advance of proposed pricing changes, interested parties must analyze the costing information in the ACR to assess the degree to which postal prices and service levels comply with the requirements, objectives, and factors of the PAEA. Most, if not all, interested parties do so with the help of external counsel or consultants. Restricting counsel and consultants from participating in future competitive products negotiations would limit the number of attorneys and consultants who are willing and able to participate in the ACR proceeding, thus preventing interested parties from obtaining the counsel or consultant of their choice. These concerns are particularly acute where, as here, the postal bar is quite small and the number of consultants who are expert in the highly-specialized field of postal costing is even smaller. Moreover, as stated above, all eligible individuals who access the nonpublic annexes of the ACR would be limited under the Commission’s Model Protective Order from disclosing information to other parties or using information obtained in through the ACR in any other proceeding or for commercial advantage.

¹⁹ *Id.*

The Commission should consider initiating a separate proceeding or an information request in the pending Commission rulemaking to establish procedures for according appropriate confidentiality to allow a fuller exploration of the issues raised by the Postal Service. The complex interrelationship of transparency, accountability, and competitive interests as they pertain to the core costing information presented in the ACR are not suitable for resolution on motions practice with a seven day return date. While the initiation of a follow-on proceeding or information request would not permit any change in connection with the 2008 ACR filing, the Postal Service cannot be heard to complain where, as here, it failed to timely raise these issues in a prior related rulemaking. Moreover, as discussed above, the Postal Service has not come forward with any specific allegations of competitive harm and, in fact, the competitive products costing information was disclosed in the 2007 ACR without apparent harm.

III. CONCLUSION

For the reasons stated above, Pitney Bowes respectfully requests that the Commission deny the Postal Service's request for additional access restrictions to nonpublic core costing information submitted with the 2008 ACR.

Pitney Bowes further requests that the Commission consider initiating a separate proceeding or issuing an information request in a pending rulemaking to address the underlying issues regarding the interplay and presentation of market dominant and competitive cost information in connection with the ACR.

Respectfully submitted:

/s/

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