

believes the Commission must determine the types of documentation in the nonpublic annex, and whether “core costing” documents like the historically-public Cost and Revenue Analysis (“CRA”) report and Cost Segments and Components Report (“CSCR”) (as well as the other items identified in the Postal Service’s motion) will be rendered inaccessible to all but a few mailers.¹ Valpak/NAPM fully supports the Postal Service in its use of new pricing authority for competitive products, but believes the need to impose broad limits on public access to “core costing” documents has not been established.

I. Need for a Scheduling Order, Public Representative, and Separate Proceeding

The instant motion ostensibly deals with **protective conditions** for nonpublic documents, but it also implicates the **scope** of those nonpublic documents under the Postal Accountability and Enhancement Act (“PAEA”) — a matter of great import. The Postal Service motion raises issues that call for serious thought and broad mailer involvement. Over the past year, when the Postal Service has proposed even a minor classification change or a proposed change to a costing methodology in preparation for the FY 2008 Annual Compliance Report (“ACR”), the Commission has opened a docket, appointed a Public Representative, and

¹ Although the Postal Service does not rely on Docket No. ACR2007 as an indication of what it believes is public, it apparently assumes that since no party objected to what it placed in its nonpublic annex, the same materials (i) will be placed in the nonpublic annex in this docket, and, (ii) the Postal Service claims, are beyond the scope of its present motion. *See* Postal Service Motion, p. 6., n.1. It is expected that when the Postal Service files its ACR for FY 2008, it will appropriately justify each item that it places in the nonpublic annex in accordance with 39 U.S.C. section 504(g) and the vision for the Commission’s proposed Part 3007 of its rules. If the Commission does not now address the issue of what may be filed in the nonpublic annex, mailers should be able to object to the Postal Service placing documents in the nonpublic annex when filed.

provided a period for public comment. The potential effect of the motion now under consideration is arguably just as important, or even more important, than at least some of those costing methodology changes, and must be considered in light of the PAEA requirement that there be “increased transparency” of the Postal Service. *See* 39 U.S.C. section 3622(b)(6).

The Postal Service’s motion was filed merely 17 days before the statutory deadline for the Postal Service to file its Annual Compliance Report for FY 2008 with the Commission. However, despite the late date, Valpak/NAPM respectfully suggests that the Commission consider this to be a reduction of public transparency, and a change worthy of a separate proceeding, or at least a separate scheduling order with the appointment of a Public Representative, so that it can receive appropriate input from both the public and the Public Representative designated to represent interests of the public.²

II. PAEA Requires the Commission to Define the Nonpublic Annex

The Postal Service points to protective language it included in its report in Docket No. ACR2007 to show that the decisions it made in that docket with respect to whether materials were public or nonpublic were not precedential. *See* Postal Service Motion, pp. 2-3. Indeed, most parties that were involved in Docket No. ACR2007 — as well as the Commission — recognized the transitional nature of that ACR. In a sense, the ACR for FY 2008 will be

² The statutory and practical problems associated with the elimination of a permanent Public Representative are discussed in Valpak Initial Comments, Docket No. RM2008-3, pp. 7-15; Valpak Reply Comments, Docket No. RM2008-3, pp. 11-12; and Valpak Initial Comments, Docket No. RM2008-4, pp. 23-24.

transitional as well, with respect to the form of the report, and the procedures to be followed, as rules governing the ACR are still pending in Docket No. RM2008-4.

Guidance is provided by PAEA on the nonpublic annex, however, which must be followed:

(e) CONTENT AND FORM OF REPORTS.—

(1) IN GENERAL.—The Postal Regulatory Commission shall, by regulation, prescribe the content and form of the public reports (and any nonpublic annex and supporting matter relating to the report) to be provided by the Postal Service under this section.... [39 U.S.C. section 3652(e).]

The Commission's proposed rules in Docket No. RM2008-4 regarding contents of the annual compliance reports do not specify — or even mention — contents of the nonpublic annex, but they do discuss the standard by which the Commission would determine whether to permit the Postal Service to designate information as confidential:

Rather than treat any category of information as commercially sensitive per se, the Commission would balance the potential harm to the Postal Service's commercial interests against the need of stakeholders and the public to know how the Postal Service is discharging its duties as a monopoly imbued with a public trust. [Order No. 104, p. 14.]

The Postal Service acknowledges the Commission's primary role in defining the scope of the nonpublic annex. In Docket No. ACR2007, the Postal Service observed: "The presence of clear rules laying out what is and what is not confidential will facilitate the Postal Service's preparation of future Reports." FY 2007 ACR, p. 33, n.23.

One benefit of the pending motion is that it informs the Commission of the necessity to specify the contents of the nonpublic annex in its pending rules for the ACR.³ The pending motion also illustrates the difficulties that can arise on the eve of filing an Annual Compliance Report when contents of the nonpublic annex are not specified by Commission rules. Allowing the matter to be resolved ad hoc in each ACR docket, or having the matter decided on the eve of a filing, cannot work.

III. Increased Administrative Burden

Expanding the size and scope of the nonpublic annex would place a substantial administrative burden on both the Commission and parties commenting on the ACR. The Commission would be required to protect the nonpublic documents, comments utilizing the nonpublic comments, and its determination citing the nonpublic comments or documents in the nonpublic annex. Commenters seeking to address public and nonpublic matters would be required to file two sets of comments, one public version and one subject to protective conditions. Parties also desiring to respond to initial comments which are subject to protective conditions would be required to submit two sets of reply comments. This also would create an administrative nightmare for the Commission's docket section. On the other hand, to avoid this burden, commenters unilaterally may either (i) reduce the scope of their comments to

³ Additionally, the real-world exercise of the proposed protective conditions is helpful with respect to proposed Part 3007 of the Commission's rules establishing procedure for according appropriate confidentiality in Docket No. RM2008-1, and hopefully the Commission will be in the position to make appropriate changes to those rules based on lessons learned here.

publicly-available materials, which would deprive the Commission of valuable input, or (ii) file everything under seal to protect themselves, which would negate the effectiveness of the Commission's website in sharing information broadly among all stakeholders and bring down a curtain barring public access to mailer input.

Further, lawyers, economists and others who obtain nonpublic records frequently reformat CRA and other data into spreadsheets and other analytical devices that they use to help them analyze and better understand the information. Under the proposed protective conditions, they would be required to destroy their work immediately after each docket, and recreate it each year. This would increase the cost and difficulty of effective participation in the Commission's review process.

Lastly, the request for protective conditions in the pending motion is confined to information relating to competitive products even though every cost segment and cost component containing costs of some competitive products would be split somehow, on some basis. Reviewing this division for the costs segments and components will be difficult for any party.

IV. The Postal Service's Justification

Part of the Postal Service's rationale for confidentiality is the assertion that access to the cost information gives mailers (not just competitors) an advantage in negotiating agreements for competitive products. Postal Service Motion, pp. 8-10. However, with respect to market dominant products, the Postal Service accepts transparency, noting that negotiating market dominant deals, when mailers have "intimate knowledge of the cost structure of market

dominant products,” creates difficulties for the Postal Service, but that it reluctantly “accepts [the] difficulties as part of the inherent distinction between market dominant and competitive products.” *Id.*, p. 8, n.2.

The Postal Service has not yet demonstrated harm in the competitive area. The information which the Postal Service intends to shift to the nonpublic annex has been public for decades. Nor has the Postal Service suggested that making the information publicly available in Docket No. ACR2007 put it at a disadvantage in the numerous negotiated agreements for competitive products that have been filed in the past year. It is not inherently obvious that having, for example, a completely public Cost and Revenue Analysis report or Cost Segments and Components Report would give anyone, whether competitor or a mailer, an advantage over the Postal Service. Mailers seeking to negotiate prices for competitive products can be expected to compare a proposal from the Postal Service against other carriers’ offerings. Although a mailer with information on the Postal Service’s costing information might be able to buttress its argument, the Postal Service can never be compelled to offer a rate not of general applicability because of low cost characteristics. With respect to the types of data on competitive products that have been in the CRA and the CSCR, the Postal Service certainly has never provided mailer-specific data. It can be expected that information in the upcoming ACR will only provide aggregate data, separated only by product.

Competitive products for FY 2008 consisted of approximately 1.6 billion pieces of the Postal Service’s total volume of 202.7 billion pieces. The Commission should avoid allowing the competitive products tail to wag the market dominant products dog. A complete and public

CRA and CSCR is necessary for the Commission to conduct a proper annual compliance review and determination, as well as for mailers to assist in advising the Commission.⁴

V. Conclusion

For the foregoing reasons, the Commission should issue a scheduling order or institute a separate proceeding to fully consider the Postal Service's position, to receive comments from all other parties potentially affected by the Postal Service's motion, and then to determine what documents the Postal Service may put into the nonpublic annex in Docket No. ACR2008, and under what conditions access may be had.

Respectfully submitted,

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⁴ In the recent proceeding on the general competitive products price change, the Public Representative noted that it was "unable to verify that the new rates for Competitive Products will comply with 39 U.S.C. §3633(a)" due to the fact that it did not have sufficient information. Docket No. CP2009-8, Public Representative Comments, p. 1. Adding more information to the nonpublic annex would inherently make analysis even more difficult.