

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

Annual Compliance Report, 2008

Docket No. ACR2008

MOTION TO MAKE CORE COST, VOLUME, AND
REVENUE MATERIALS PUBLIC

(January 27, 2009)

Table of Contents

	<i>Page</i>
I. MOTION.....	1
II. SUMMARY OF JUSTIFICATION	2
III. DISCUSSION	6
A. The Postal Service’s Motion	6
1. The scope of withholding.	9
2. The effect of withholding.	11
3. More stringent protective conditions.....	14
B. Responses to the Postal Service’s Motion.....	16
1. Answers and comments.....	16
2. Order No. 155.	17
C. The Public “Core Costing Materials” are Unusable.....	19
D. Gutting the Postal Service’s Core Costing Materials is Unnecessary	21
1. The PAEA does not place the Postal Service in the shoes of others “in the business world,” particularly with respect to its public disclosure obligations.....	21
2. The Postal Service’s public disclosure obligations are defined more by the need of the Commission, with the help of the public, to effectively police the boundary between its monopoly and competitive earnings, than by the Postal Service’s tactical pricing freedom over competitive products.	24
3. Expanding the Postal Service’s authority to withhold information is incompatible with the PAEA’s basic strategy of substituting transparency and accountability for “hands on” regulation of competitive product rates.	26
E. The Postal Service’s Core Costing Materials Do Not Qualify as Privileged Under Applicable Standards.....	30
1. The common law trade secret/commercial information privilege is not an absolute privilege.....	30
2. Under applicable standards, competitive product data at the product level or above do not qualify for the trade secret/commercial information privilege.	33

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

Annual Compliance Report, 2008

Docket No. ACR2008

MOTION TO MAKE CORE COST, VOLUME, AND
REVENUE MATERIALS PUBLIC

(January 27, 2009)

I. MOTION

The Public Representative intends to file comments that analyze the relationship between attributable costs and revenues for individual products, as well as trends in those relationships over time. Its comments would involve all products—market dominant and competitive—that are subject to the PAEA’s positive contribution requirements. The information presented is derived from the nonpublic version of the Postal Service’s “core costing materials,” and would be presented at the same level of detail as the summary table on page 24 of the Commission’s FY 2007 Annual Compliance Determination (ACD). Because the comments primarily address broad policy concerns, their value would be greatly diminished if only a handful of “insiders” who have signed non-disclose/non-use agreements for the Postal Service’s core costing materials were allowed to see and respond to them.

The public versions of the Postal Service’s core costing materials are essentially useless to an analyst attempting to evaluate the Postal Service’s compliance with the Postal Accountability and Enhancement Act (PAEA), for reasons that are discussed below. Also, as discussed below, the Postal Service has not met its burden of showing that publicly disclosing the original, private versions of those materials would cause substantial commercial harm to any of its competitive products. Therefore, the Public

Representative moves that the Commission, after a reasonable period for response to this Motion, make the original, private versions of the Postal Service's core costing materials public. This motion extends to all other library references filed in this docket, as well as any other financial reports that are needed for compliance review, that display financial data for postal services at the individual product level or above.¹

The Public Representative's motion is for an interim solution for purposes of this docket. Whether competitive product information below the product level should be withheld from the public is a question that the motion does not address. Whether all of that information should be withheld from the public is an issue that needs to be resolved as part of a comprehensive analysis of the commercial sensitivity of the Postal Service's financial information. This should occur in a docket that is less compressed than the annual compliance review. The logical forum for this is in a supplemental round of comments in the Commission's Periodic Reporting Rules, which are still pending.

II. SUMMARY OF JUSTIFICATION

On December 12, 2008, the Postal Service filed a motion to place the "core costing materials" underlying its Annual Compliance Report (ACR) in a nonpublic annex. It also moved to modify the customary protective conditions employed by the Commission to greatly narrow the class of people that would be permitted to see its core costing materials after signing a non-disclosure, non-use agreement.² Its rationale was that cost information about individual competitive products cannot be segregated from cost information about market dominant products, making it necessary to withhold all attributable cost information from the public.

¹ One basic additional data report needed for compliance review that the Postal Service has yet to provide to the Commission is the annual Revenue Pieces and Weight (RPW) report. If the public is to participate effectively in the annual compliance review, it needs to have access to this report. The information in the RPW report can be made public without disclosing commercially sensitive data by aggregating competitive product information to the individual product level.

² See Motion of the United States Postal Service Requesting Establishment of Protective Conditions to Govern Access to Certain Core Costing Documentation, December 12, 2008 (Motion).

The Commission declined to modify the customary protective agreement. Instead, prompted by the suggestions of several parties responding to the Motion, it directed the Postal Service to reformat its core costing materials by collapsing all competitive product information into a single line item and filing them publicly. The focus of the Commission's order was the Postal Service's basic data reporting systems.³

The Postal Service complied with Order No. 155 by providing reformatted reports in which all information about competitive products was removed. It warned that these reports, for technical reasons, are ill-suited to such reformatting, may not actually run with the competitive detail removed, and may not yield totals that match the private versions of the respective reports.⁴

The Postal Service's warnings were prescient. The public versions of its core costing materials that process inputs to produce outputs (as most of them do) will not run with the reformatted datasets and do not yield totals that match the withheld versions. The results presented in the public versions cannot be replicated, and their accuracy cannot be verified. Much of the reformatting has broken the links that connected the original spreadsheets and necessitated the use of hard-coded numbers whose derivation cannot be traced. In short, the public versions of the Postal Service's core costing materials are impervious to analysis. They are useless in evaluating the compliance of the Postal Service with the requirements of the PAEA.

Because only the private documentation of the Postal Service's annual compliance report is susceptible to analysis, the review process up to the present has been driven underground. This threatens to hamstring the remainder of the review process administratively and drive public participation away. It will require the Commission's annual compliance determination to either be written in evasive generalities or placed in a sealed envelope, either of which will greatly reduce its value.

³ See Commission Order No. 155, December 23, 2008, at 4-5.

⁴ Response of the United States Postal Service to Commission Order No. 155, December 29, 2008, at 5-6.

This will reverse progress toward enhanced transparency and accountability, which is one of the overriding goals of the PAEA.

That is the bad news. The good news is that most of this damage to the PAEA's regulatory scheme is unnecessary. The Postal Service's core costing materials do not need to be gutted. They are set up to estimate **average** attributable costs at the product level for both market dominant and competitive products. Knowing product averages, whether they are costs, volumes, or revenues, has little value to competitors or even to negotiated service agreement (NSA) candidates. This is because the Postal Service does not charge an average rate based on average attributable costs for its competitive products. As the table at page 36 shows, the distinct rates actually charged for an individual competitive product (such as Priority Mail, or Parcel Select) can number in the thousands. They are computed from a complex matrix of weight, zone, cube, entry point, machinability, payment method, and annual volume. Given such intricate rate design, allegations of substantial harm simply are not plausible if costs for elements that actually determine rates are not revealed.⁵

Because the Postal Service's core cost materials are confined to average figures for each competitive product as a whole, they remain safely above this level of detail. The minimal value that product-average data might have to a competitor or an NSA candidate does not meet the legal standard that the Postal Service must satisfy to withhold information from the public. That standard is derived from the common law trade secret/commercial information privilege, made applicable to the Postal Service through section 504(g)(3)(A) and (B) of the PAEA. It requires the Postal Service to show that disclosing **a particular kind of information** is likely to cause **substantial competitive harm of a specifically identified kind**.

⁵ Although the rates for most competitive products are based in a complex matrix of variables, rates for a few competitive products are identifiably tied to an average product-level cost. One would be Premium Forwarding Service. Its rate has only two elements—a unit price, and a general fee. The cost basis for that unit price would be commercially sensitive if it were separately disclosed. To avoid disclosing it, its attributable cost could be combined with the attributable cost of Parcel Return Service, as it was in the FY 2007 ACR.

The Postal Service has not come close to making the required showing. Instead, its ACR relies on the assumption that it should not have to disclose product-specific data for competitive products, since others “in the business world” don’t. See FY 2008 ACR at 70. The PAEA, however, does not place the Postal Service in the shoes of private business, particularly when it comes to disclosure obligations. If this is what Congress had intended, it would have allowed a provision held over from the Postal Reorganization Act (PRA) [section 410(c)] to define the Postal Service’s public disclosure obligations. Under the PRA, section 410(c)(2) defined the Postal Service’s public disclosure obligations when a rate case was not pending. It was carried over into the PAEA, where it still allows the Postal Service to withhold commercial information that would not be disclosed “under good business practice.” Read in isolation, it provides the Postal Service with exactly what it wants. It places the Postal Service in the shoes of private business when it comes to public disclosure obligations.

Congress, however, added sections 504(g) and 3652(e)(1) to the PAEA. Section 410(c) is now subordinated to new section 504(g), which gives to the Commission the responsibility of determining what information the Postal Service is obligated to disclose to the public. In section 504(g), Congress explicitly recognizes the difference between the Postal Service and a private business when it comes to public disclosure obligations. Section 504(g) instructs the Commission, when it determines what the Postal Service’s public disclosure obligations are, to bear in mind that there is a “**public interest**” in maintaining the “**financial transparency**” of the Postal Service as a “**government establishment competing in commercial markets.**” (Emphasis added.)

Section 3652(e)(1) gives to the Commission the duty to prescribe what information and documentation the Postal Service will submit in its annual compliance report, including what portion of that documentation will be submitted in its nonpublic annex. Presumably, when the Commission carries out this duty, Congress intended it to be guided by section 504(g) and its recognition that the public has a stake in the financial transparency of the Postal Service that has no counterpart in private business.

III. DISCUSSION

A. The Postal Service's Motion

The issues of what the Postal Service's disclosure obligations are, and the potential effect of those obligations on the effectiveness and integrity of the annual compliance review process, has been injected into this proceeding, but has not yet been adequately dealt with.⁶ This is due, in part, to the fact that the Postal Service waited until just before it filed its FY 2008 ACR to attempt to dramatically redefine its disclosure obligations. This is also due, in part, to the fact that the Commission has not yet adopted final rules that govern the handling of Postal Service claims that most of its commercial information must be shielded from public view. If this proposed redefinition of its public disclosure obligations were embraced by the Commission, it would permanently undermine the effectiveness of the compliance review process. It is not feasible to bring the issue of the scope of the Postal Service's disclosure obligations to its ultimate resolution in this proceeding because of the limited time that remains, but a workable interim resolution governing this docket needs to be reached without further delay. Not doing so risks tying this review process in procedural knots, chilling public participation, forcing much of the dialogue underground, and requiring the

⁶ Most of the answers to the Postal Service's Motion observed that whether the core documentation supporting the annual compliance review process should be accessible to the public is a fundamental question that cannot be adequately addressed in the short response time allowed for routine motion practice, or immediately before the review of that annual compliance report is to begin. See Response of Parcel Shippers Association and Direct Marketing Association, Inc. to Motion of the United States Postal Service Requesting the Establishment of Protective Conditions, December 19, 2008 (PSA/DMA Response) at 4; 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, December 19, 2008 (Pitney Bowes Response) at 5; Response of United Parcel Service to Motion of the United States Postal Service Requesting Establishment of Protective Conditions to Govern Access to Certain Core Costing Documentation, December 19, 2008 (UPS Response) at 4. Answer of Valpak Direct Marketing Systems, Inc., Valpak Dealer's Association, Inc., and National Association of Presort Mailers to Motion of the United States Postal Service Requesting Establishment of Protective Conditions to Govern Access to Certain Core Costing Documentation, December 19, 2008 (Valpak Answer) at 3. The Postal Service agrees. See FY 2007 ACR at 33.

Commission's compliance determination to conceal much of the information upon which it is based.

In the Postal Service's FY 2007 ACR, it characterized its decision to place certain portions of its filing in its nonpublic annex as both under-inclusive and over-inclusive, due to the transitional nature of its filing. It declared that "in the future it will be necessary to protect sensitive commercial information about competitive products that was formerly made public under the PRA."⁷ FY 2007 ACR, December 28, 2007, at 33.

It called for a

comprehensive assessment by the Postal Service, the Commission, and interested stakeholders of what data should, and should not, be accorded protection, in light of the new pricing standards of the PAEA. The logical place for that assessment is the future Commission rulemaking concerning the Annual Compliance Report, wherein this issue can be addressed, and more specific guidelines concerning the protection of commercial information can be developed, without the tight timeframes that faced the Postal Service in preparing this Report.

Id. Footnote 23, which follows, states

For example, while the Postal Service recognizes that certain portions of the ICRA may be suitable for public disclosure, the Postal Service lacked the time to identify and segregate the non-confidential portions of the ICRA from the confidential portions when preparing this Report. The presence of clear rules laying out what is and is not confidential will facilitate the Postal Service's preparation of future Reports.

Footnote 24 continues

The Postal Service may, consistent with the discussion above, take the position in the future that information currently disclosed in this Report should be afforded protected status. As noted above, however, the Postal

⁷ *Id.* What the Postal Service did not make clear at the time was that by "sensitive commercial information about competitive products" it meant that in the future it would try to withhold **all** commercial information about competitive products.

Service expects that this determination will follow a full discussion, in a suitable proceeding, of the issues implicated.

The Commission's Periodic Reporting Rulemaking [Docket No. RM2008-4, which is still pending] prescribes the contents of the ACR and other periodic reports that the Postal Service is required to file. It deferred a specific discussion of the issue of public disclosure of reported information because the Commission had yet to complete a rulemaking on the procedures mandated by the PAEA for handling confidentiality claims. However, in Docket No. RM2008-4, the Commission discusses the basic standard that the PAEA requires the Commission to apply to such claims:

[T]he issue of public disclosure would be addressed by a process analogous to the process prescribed in rule 26(c) of the Federal Rules of Civil Procedure. 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.

See Docket No. RM2008-4, Notice of Proposed Rulemaking Prescribing Form and Content of Periodic Reports, at 15 (Order No. 104).

The Commission has yet to solicit the anticipated "full discussion, in a suitable proceeding" of the commercial sensitivity of postal data, and, consequently, it has yet to identify the "clear rules laying out what is and is not confidential." Nor did the Postal Service press the issue in either the Periodic Reporting Rulemaking, Docket No. RM2008-4, or the rulemaking to establish procedures for addressing confidentiality issues (Docket No. RM2008-1).⁸

After filing its FY 2007 ACR, the Postal Service allowed almost a year to go by before it gave more specific notice of its views as to how adoption of the PAEA altered

⁸ Both rulemakings are still pending, but in both, the period for comments and reply comments has expired.

its duty to disclose information. Sixteen days before it was to file its FY 2008 ACR, it filed a motion with the Commission asking it to establish stricter protective conditions than has been customary before allowing anyone access to the materials that it intended to place in the nonpublic annex to its FY 2008 ACR. Motion at 7-11. It was at that time that the Postal Service announced to the world that it intended to place beyond public view nearly all of the detailed financial information from which its compliance with the PAEA could be determined—information that was voluntarily made available to the public for more than 30 years.

1. The scope of withholding.

The Postal Service has yet to identify the full range of ACR documentation information that it wishes to withhold from the public [Motion at 6], but it identifies one portion as “core costing materials.” Aptly named, this material makes up the heart of its method of estimating the costs, volumes, and revenues for all of its products, both market dominant and competitive. This includes the basic input data that feed into its CRA cost model⁹ and the methods by which those data are transformed into estimates of product attributable cost.¹⁰ For financial information that relates exclusively to

⁹ In the Postal Service’s own view, the input data that are fundamental to its cost, volume, revenue, and cost coverage calculations for products, and which it insists should be kept from public view, are those reported by the In-Office Cost System (IOCS), the City Carrier Cost System (CCCS), the Rural Carrier Cost System (RCCS), and the Transportation Cost Systems (TRACS). See Motion at 4. Additional data that are fundamental to these calculations that the Postal Service is obligated to provide separately of its ACR filing is its annual RPW report.

¹⁰ By the Postal Service’s own assessment, the essential methods it applies in calculating product costs, revenues, and cost coverages are those contained in its Cost and Revenue Analysis Report (CRA), the Cost Segments and Components Report (CSC), the CRA Model, the “B” Workpapers, the Cost Segment 3 Cost Pool and related information, and the Non-Operation Specific Piggyback Factors. *Id.*

competitive products, the Postal Service contemplates barring public access under any conditions.¹¹

In its Motion, the Postal Service explained that concealing the core costing material by which its compliance with the PAEA could be verified is a necessary evil. Its position proceeds from the unexamined premise that any information about competitive products is, by definition, “commercially sensitive” and therefore may never again appear in a summary report. It asserted that it is not safe for the public to know how attributable costs are split between competitive and market dominant products because the splitting is done through a single, integrated analysis. Knowing the process by which costs are attributed to specific market dominant products, it said, would reveal the process by which costs are attributed to specific competitive products. It noted that its basic input datasets provide uniform criteria (or “keys”) by which attributable costs can be distributed to both market dominant and competitive products. Having that data, it said, and knowing how to distribute it to classes, would allow the public to reconstruct the attributable costs for competitive products that were formerly provided in public summary public reports. Motion at 5.

The Postal Service explained that there are other core costing materials that allow some segregation of information about market dominant products from competitive products. It promised to segregate “as much commercially non-sensitive information as possible” from each report and put that information in the public version. In its Motion, the Postal Service expressed its intent to provide a public version of the CRA, the Cost Segments and Components, the Cost Segment 3 material, and Non-operations Specific Piggyback Factors. *Id.* at 6.

¹¹ See Response of the United States Postal Service to Commission Order No. 155, December 29, 2008, at 7. Several commenters join in pointing out that this is an assertion of absolute privilege over all financial information that relates exclusively to competitive products. The joint comments note that claims of absolute privilege for commercially sensitive information violate the legal standards established by the PAEA. They also observe that the Postal Service has yet to demonstrate that such information falls within the qualified trade secret/commercial information privilege. Reply of Valpak Direct Marketing Systems, Inc., Valpak Dealers Association, Inc., National Association of Presort Mailers, Inc., and Association of Priority Mail Users, Inc. to Response of the United States Postal Service to Commission Order No. 155, January 21, 2009, at 3-9.

2. The effect of withholding.

The Postal Service sought to convey the impression that the effect on the compliance review process of this wholesale concealment of essential financial information would be benign. It envisioned that at the beginning of the compliance review process, interested persons would access the censored but readily available public versions of the summary reports that are part of its “core costing materials.” If inclined to attempt some actual analysis, the Postal Service suggested, it would be a simple matter for them to gain access to the non-public core costing materials by signing a blanket protective conditions agreement covering all of them. It gave its assurance that “[t]hrough these procedures, the ability of eligible individuals to analyze the contents of all of these core materials should be comparable for FY08 data to what it was for FY07 data.” *Id.*

In order to paint a benign picture of the new disclosure landscape under its intended approach, the Postal Service leaves out crucial details. The potential range of data and methods that lie at the center of its cost and contribution estimates that must be kept under wraps at each stage of the proceeding dwarfs what has been concealed in the past. It is quite possible that the majority of issues that emerge in this compliance review will have to be debated, resolved, and explained in what amounts to a star chamber proceeding which only the initiated (those willing to sign sweeping non-disclosure and non-retention agreements) can witness. This raises very serious due process concerns.¹²

¹² For the same reasons, accepting the Postal Service’s drastically narrowed view of its public disclosure obligations would also turn the informal rulemakings on methodological changes envisioned by the Commission’s proposed Periodic Reporting Rules [see Order No. 104 at 30-35, 42] into star chamber proceedings. As Time Warner notes

Many of these [core costing] materials include methodology as well as data in a way that is hard to separate, e.g., in large spreadsheets that allocate piggyback costs to different mail categories, SAS programs that distribute costs among categories, etc. Any rulemaking the Commission might undertake to deal with costing issues would be meaningless without references being made to these “core” costing materials.

Time Warner Answer at 3.

In addition, the approach that the Postal Service advocates invites procedural chaos in this docket. It will become necessary to divide information requests into portions that could be disseminated on the Commission's website and portions that will have to be secretly issued, answered, and couriered back and forth, only in hard copy form. The alternative will be to ask for information in terms that are intentionally vague and indirect in order to remain public. (This would at least alert the public to the fact that a particular issue was being discussed behind closed doors.)¹³ To conduct future technical conferences, it might become necessary to toggle back and forth between public and private mode depending on the direction that the discussion takes, re-screening participants as the discussion enters and leaves forbidden territory.

Written comments will also have to be segregated into public and private portions. In the absence of clear guidelines as to which categories of information are to be treated as commercially sensitive and which are not, this segregation would be a risky and burdensome task.¹⁴ To avoid the risk and the burden, mailers could 1) confine their comments to publicly filed information, 2) address taboo issues only in vague terms relying on references to secret appendices, 3) file all of their comments under seal, or 4) walk away. Arguments could easily arise over whether material was properly segregated. As Valpak notes, this fractured process could create an administrative nightmare for the Commission's docket section. The value of the Commission's website would dwindle as less and less information is eligible for posting. *Id.* at 5. Most objectionably, major determinations by the Commission are likely to rest on secret reasoning and suppressed data that the Commission would archive or surrender at the Postal Service's option.

With each compliance review cycle, it will become more and more difficult for the public to evaluate the basis for the Commission findings and conclusions, as the

¹³ Dialogue at the technical conference held at the Commission on January 26, 2009 simply hit a dead end when questions were asked that could only be answered by referring to private core costing materials.

¹⁴ See Valpak Answer at 5-6.

obsolescence of the last set of public “core costing materials” grows with each passing year. Likewise, it will be difficult to lodge a complaint based on a Commission compliance determination that rests on confidential information, and even more difficult to process such a complaint. Finally, it would be difficult, if not impossible, for the Commission to develop decisional precedents in an accountable way, if its decisions come to be based largely on suppressed analysis and data.

Whenever needed information is placed under protective conditions, continuity of analysis suffers. Both the protective conditions proposed by the Postal Service¹⁵ and the Commission’s model protective agreement¹⁶ would require the analyst to surrender all protected data at the end of the proceeding. Applied to core costing materials, this would require the analyst looking for historical trends, patterns, or anomalies in the Postal Service’s cost, volume, or revenue data to surrender the data at the end of each compliance proceeding and start his research from scratch in the next compliance proceeding. This would raise the costs and lower the quality of postal research by third parties, and discourage them from even attempting to study postal issues.¹⁷

With the new obstacles that it would erect to meaningful public participation, it is clear that applying the Postal Service’s drastically narrowed view of its disclosure responsibilities would cause public participation in the compliance review process to

¹⁵ See paragraph 3 of the Attachment to the Postal Service’s Motion.

¹⁶ See Docket No. RM2008-1, Notice of Filing Illustrative Protective Conditions, September 18, 2008, Attachment at 2 of 5.

¹⁷ See Valpak Answer at 6. Time Warner complained that research into postal cost behavior would be inhibited if those who sign the more restrictive protective conditions advocated by the Postal Service were required to surrender core costing materials at the end of the compliance proceeding. It proposed that the protective conditions that the Postal Service seeks be eased to allow those who sign to retain custody of core costing materials from the beginning of one compliance docket through the conclusion of the next (which under the current regulatory calendar would be about a year and a quarter). Time Warner Response at 3. The Postal Service endorsed this modification. See also Reply of the United States Postal Service to the Time Warner Response to the Postal Service Motion on Protective Conditions, December 19, 2008. While this would mitigate the problem somewhat, it would still deny the analyst the chance to study postal cost behavior using time series or panel data, approaches that have been essential in building attributable cost behavior models in the past.

with away.¹⁸ The authors of the PAEA clearly thought that they were establishing a regulatory framework that would enhance the transparency and accountability of the Postal Service. If meaningful public participation in the compliance review process is prevented by the Postal Service's disclosure policies, it would be a giant step backward for transparency and accountability, since, under the PAEA, compliance review is the primary vehicle for achieving both.

3. More stringent protective conditions.

This conclusion would apply with all the more force if the Commission were to adopt, at some point in the future, the toughened protective conditions that the Postal Service seeks. Those conditions would greatly narrow the range of persons that would be eligible for restricted access to the vastly expanded set of information that it wants to protect. The model protective agreement currently endorsed by the Commission denies access only to persons who perform services that are "directly in furtherance of activities in competition with [the Postal Service]."¹⁹ The Postal Service proposes to also deny access to persons who perform services that further the "strategic advantage" of an entity vis-à-vis the Postal Service. The phrase "strategic advantage" is apparently meant to refer to price negotiations with the Postal Service concerning competitive products. Motion at 9. However, it is not explicitly limited to price negotiations or to competitive products. The phrase is broad enough to cover any information or advice that would benefit a mailer in its dealings with the Postal Service.

¹⁸ There is already evidence in this proceeding of the negative effect of protective conditions on the incentive of analysts to study postal costs. During the technical conference held at the Commission on January 26, 2009, several well-known postal consultants pursued technical issues that they had prepared themselves for as best they could based on the public version of the core costing materials. When they posed methodological questions, however, they abandoned their inquiry when it was explained that the answer to the methodological questions posed could only be found in the private version of the Postal Service's core costing materials. To date, none of these veteran consultants, or anyone else for that matter, has been willing to take the risk of signing a non-disclosure agreement to access these materials. This is most likely due to the cloud that such an agreement would place over their ability to continue to advise their clients.

¹⁹ See Docket No. RM2008-1, Notice of Filing Illustrative Protective Conditions, *supra*, Attachment at 1 of 5.

A restriction this broadly stated effectively gives a mailer's in-house analysts, independent consultants, or counsel, the Hobson's choice of advising the mailer in nearly complete ignorance of the cost and volume characteristics of postal products or finding other work. For purposes of the Postal Service's Motion, the Commission rejected this modification of its standard protective agreement. No doubt it is aware that if this were to become the standard protective agreement in compliance proceedings, the mailers who employ postal consultants or counsel would instruct them not to get involved. Without the assistance of in-house analysts, consultants, or counsel, mailers will be without the specialized expertise that is necessary to contribute to the analysis of postal costing or other economic issues. This would be a giant step backward for transparency and accountability, since, under the PAEA, compliance review is the primary mechanism for achieving both.²⁰

When the Postal Service seeks to deny "strategic advantage" to its customers by withholding product information from them, the effect is to reserve "strategic advantage" to itself. It should be noted here that the Postal Service has not identified a legal basis for invoking the trade secret/commercial information privilege against its own customers. This common law privilege extends only to threats of commercial harm posed to competitors. The Postal Service's attempt to protect itself from its own customers is a misapplication of the trade secret/commercial information privilege. No support can be found in the PAEA for expanding the privilege in this manner, except as something that the Postal Service prefers to infer from its tactical freedom to set competitive prices.²¹

It is far from clear that Congress contemplated an NSA contracting process that favors the Postal Service over its own customers. The fundamental rationale for

²⁰ See Pitney Bowes Response at 6; Valpak Answer at 6; and Time Warner Response at 3.

²¹ For reasons that will be explained in more detail below, it is more logical to infer that the PAEA requires transparency over competitive pricing in exchange for less direct regulation of competitive prices. See, for example, S. Rep. No. 108-318 at 1, which states that the core legislation that was to become the PAEA "guarantees a higher degree of transparency to ensure fair treatment of customers of the Postal Service and those companies competing with the Postal Service's competitive products."

granting the Postal Service monopoly rights over some services is that it makes all of its services more widely available to serve society. The basic policy provisions of sections 101 (that postal costs be fairly apportioned among all users), 403(b)(2) (that the Postal Service provide postal service that meet the needs of different categories of mail users), and 403(b)(3) (barring undue preferences in rates) apply to all Postal Service products, market dominant and competitive.

The Postal Service argues as though the PAEA has authorized it to take full advantage of the ignorance of its own customers of competitive products about the cost and revenue characteristics of those products. One can search the PAEA in vain, however, for a statement, direct or indirect, that the Postal Service's institutional self-interest is paramount to the interests of its own customers. That is the unsupported premise underlying the Postal Service's proposed tightening of protective conditions to exclude anyone who might use information "to the strategic advantage" of a customer (or any business) in its dealings with the Postal Service.

B. Responses to the Postal Service's Motion

1. Answers and comments.

Answers to the Postal Service's December 12 Motion were nearly unanimous in the view that the Postal Service had a duty to justify its sweeping commercial sensitivity assertions that it had not met,²² and that the protective conditions that it proposed were unnecessarily broad.²³ The majority of the commenters also agreed that redefining the Postal Service's disclosure obligations needs to be done in a more thorough and deliberate fashion than is possible through last minute motion practice, or the compressed schedule of the compliance review. They argue that a separate

²² See PSA/DMA Response at 3-4; Pitney Bowes Response at 3-4; UPS Response at 2-3; and Valpak Answer at 1, 7.

²³ PSA/DMA Response at 3; Pitney Bowes Response at 4-5; UPS Response at 3; Valpak Answer at 2; Answer of Time Warner Inc. to Motion of the United States Postal Service Requesting Establishment of Protective Conditions, December 19, 2008, at 3.

proceeding should be devoted to the issue, or at least that the schedule of this proceeding should be altered to allow a more deliberate analysis of it in this docket.²⁴

2. Order No. 155.

In evaluating the Motion, the Commission agreed that the Postal Service had not adequately justified its proposal to apply newly-restrictive protective conditions to its core costing materials. Focusing on the set of basic data system reports that the Postal Service sought to protect, the Commission concluded that the Postal Service had not provided a sufficient explanation as to how its proposed protective conditions would allow effective access to those materials. Commission Order No. 155, December 23, 2008, at 4.

Rather than apply newly-restrictive protective conditions to core costing material relating to both market dominant and competitive products, the Commission concluded that it would be most expedient to have the Postal Service attempt to collapse the data related to competitive products into a single row on the relevant spreadsheets, as several commenters suggested.²⁵ The Commission seemed to view this as the quickest way to allow the public to access cost, volume, and revenue data about market dominant products without resolving issues of the degree of protection that should be afforded to competitive products. *Id.* It observed that data about competitive products are more sensitive, and more likely to be afforded protection, than data about market dominant products. At the same time, it reminded the Postal Service that it had a duty to file “sufficient, detailed reasons” for seeking protection of **any** data at the time that the data is filed. *Id.* at 5.

²⁴ UPS Response at 4; PSA/DMA Response at 4; and Valpak Answer at 3.

²⁵ See PSA/DMA Response at 3; and Pitney Bowes Response at 2.

The Postal Service responded to Order No. 155 by noting that it had always planned to provide unprotected versions of the output reports that are included in its core costing materials by collapsing data about competitive products into a single row.²⁶ It explains that these reports compile data that has already been processed, and therefore it is a relatively simple task to collapse information about competitive products into a single line item without affecting the transparency or accuracy of the remaining product-level results for market dominant products.

As the Postal Service acknowledges, the same cannot be said for data systems that transform input data into outputs. It explains that its data systems are designed to comprehensively observe postal activity, observe rates of participation of various products in that activity, and distribute the costs of that activity to products based on those observations. Because market dominant and competitive products are often processed in the same operation, data on both market dominant and competitive products are interspersed and must be manipulated simultaneously. Response to Order 155 at 1-2.

The Postal Service cautioned that aggregating competitive product input data at the initial stage of this analysis before it is processed (by applying such things as weighting, piggybacking, or distribution algorithms) could yield output totals that are inconsistent with the output totals obtained when product-specific inputs are used. Therefore, the Postal Service states, it does not view aggregating competitive product data at the input stage, as Order No. 155 contemplated, “as a currently feasible option for producing reports, suitable for public disclosure.” *Id.* at 3. Nevertheless, it promised to attempt to reformat its basic data system reports in that manner. It warned, however, that such reformatted datasets might not function “as the requisite input datasets for

²⁶ These consist of the CRA, the CSC, Cost Segment 3 Cost Pool Information, and the Non-Operation Specific Piggyback Factors. See Response of the United States Postal Service to Commission Order No. 155, December 29, 2008, at 4 (Response to Order 155). Not mentioned by the Postal Service is the RPW report. This is a basic data system that also provides essential input to the CRA. The Postal Service provides this on a different cycle than the ACR (quarterly and, in mid-January, an adjusted annual version). In 2008 it unilaterally made the decision to collapse RPW data for competitive products into a single line item.

downstream processing” and therefore might not constitute a usable link of “the elements of an end-to-end collection and reporting system.” *Id.* at 6. Subsequently, the Postal Service filed “truncated” versions of its “core costing” data systems, accompanied by the disclaimer that the inputs that they contain might not be compatible with the rest of its cost model. See Notice of the United States Postal Service of Filing of USPS-FY08-34, 35, and 36, December 30, 2008.

C. The Public “Core Costing Materials” are Unusable

Tests confirm the Postal Service’s fears. The public versions of the Postal Service’s data system reports collapse or remove data that apply to specific competitive products. The CRA Cost Model, however, will not run when the public version of the basic data system reports are used as inputs. An analyst cannot replicate the totals that the Postal Service reports in the CRA using these datasets, and therefore cannot tell whether those totals are valid or not. Since program logs are often withheld, or numbers are hard coded, he cannot test any alternative inputs or methods, and cannot identify or evaluate the methods by which the numbers were derived.²⁷^

Public versions of downstream reports that make up the Postal Service’s core costing materials fare no better. For example, the public versions of the “B” Workpapers, and the Cost Segment 3 Cost Pools and Other Related Information, began life as linked spreadsheets revealing the source of each number, the method by which it was derived, and its destination. These have been converted to matrices of hard-coded numbers whose derivation cannot be ascertained, and whose destination cannot be identified. Consequently, these are incapable of either verification or analysis. Downstream of those materials are the public version of the Input/Output matrices that feed into the CRA Model. Information for individual competitive products has been

²⁷ It is for these reasons that the Commission’s proposed Periodic Reporting Rules would forbid the use of hard-coded numbers in the workpapers from which periodic reports are derived. See Order No. 104, proposed rule 3050.2(b)(3). The public “core costing materials” that the Postal Service has provided in this docket, therefore, conflict with the Commission’s proposed Periodic Reporting Rules.

redacted. Any change in a public model input, such as changing the variability of a MODS cost pool, will yield different total costs by product than is obtained by changing the same input in the private version of the CRA Model. This means that the public CRA Model distributes costs to products differently than the private CRA Model. An analyst has no way to diagnose the cause of the difference, and no grounds for choosing one result over the other.

It does not take much imagination to predict how far an analyst would get investigating either the cause or the effect of change in a CCS distribution key, a MODS cost pool variability, or a piggyback factor, if he were required to use only the “public core costing materials.” The “core costing materials” provide the product-level costs and determine the CRA adjustment factors that underlie the Postal Service’s cost avoidance models upon which worksharing discounts are based. For these reasons, if the “core costing materials” can not be analyzed or evaluated, worksharing discounts can’t be analyzed or evaluated either.

As the foregoing discussion demonstrates, the public core costing materials that the Commission directed the Postal Service to produce are essentially useless to an analyst. For example, an analyst might want to investigate whether the cost coverage of Single-Piece Parcels had fallen below its attributable cost floor in FY 2008. With the public version of the core costing materials, the only thing that he could do is take the unit cost and the average unit revenue for Single-Piece Parcels on faith, and take it on faith that the cost coverage for Single-Piece Parcels would be “x.” (If he wanted to investigate the same thing for a competitive product, of course, there would not be any numbers to analyze, public or private.) One should recall that under the PRA, the public documentation would have allowed the analyst to trace the unit cost estimates back through the CRA cost model all the way to their input data sources, identify the processing steps, and the method applied in each step. To turn the basic documentation of the Postal Service’s costs and revenues into something that cannot be verified or analyzed mocks the goal of enhanced transparency and accountability

that Congress incorporated into the PAEA and pushes postal reform in the opposite direction.

D. Gutting the Postal Service's Core Costing Materials is Unnecessary

This evisceration of the documentation required for compliance review just described is entirely unnecessary. The justification for it is the Postal Service's supposition that it would suffer substantial commercial harm if the public were to know anything at all about the costs, volumes, or revenues of its specific competitive products. This supposition rests on a number of false premises embraced by the Postal Service that have gone essentially unexamined. None of them withstand examination.

1. The PAEA does not place the Postal Service in the shoes of others "in the business world," particularly with respect to its public disclosure obligations.

The Postal Service argues that

costing information for products as a whole, or for specific product features, tend to be highly confidential in the business world, and the Postal Service should be able to protect them in accordance with industry standards.

ACR 2008 at 70. As will be explained in more detail below, the legal standard that applies to the Postal Service's financial information is derived from the standard that governs privilege determinations in Federal civil litigation. The party seeking to withhold relevant information has the burden of showing that disclosing a specified kind of information is likely to cause substantial competitive harm of a particular kind. *Pacific Architects and Engineers v. U.S. Dept. of State*, 906 F.2d 1345 at 1347-48; *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir. 1985). What is required is a factual demonstration of the likelihood and magnitude of the expected harm, so that it can be balanced against the need of the stakeholders and the public. *Lee v. FDIC*, 923 F.Supp. 451, 455 (S.D.N.Y 1996), *Martin Marietta Corp. v. Dalton*, 974 F.Supp. 37, 40-41 (D.D.C. 1997). Without saying it directly, the Postal Service implies that it does not

need to make any kind of factual demonstration, and it has no need to undergo the balancing procedure described above. It apparently believes that it is sufficient to casually assert that private businesses do not customarily disclose the kind of information it wants to withhold. The premise is that if private business does not ordinarily disclose certain information, one can safely assume that its disclosure causes substantial competitive harm.²⁸

The Postal Service's generalization that "costing information for products as a whole . . . tend to be highly confidential in the business world" does not even begin to satisfy this requirement. A quick reference to readily available facts exposes this generalization as little more than an urban myth. The Postal Service's chief competitors report costs, volumes, revenues, and profit margins by product "segment." These segments are roughly comparable to the Postal Service's major competitive products. FedEx, for example, divides its business into a FedEx Express Segment (roughly comparable to Express Mail), a FedEx Ground Segment (roughly comparable to Priority Mail), and a FedEx Freight Segment (roughly comparable to Parcel Select). For each product segment, the FedEx Annual Report discloses seven categories of operating expense, capital expenditures, average daily volumes, average revenues per piece, average revenues per pound or per hundredweight, **and profit margins**. These are comparable to the Postal Service disclosing average unit attributable costs, volumes, revenues, and profit margins for Express Mail, Priority Mail, and Parcel Select. In addition, the FedEx Annual Report discloses such financial details as volumes and revenues for seven product categories within the FedEx Express Segment (comparable to rate categories within the Postal Service's Express Mail). It also discloses the exact formula by which it calculates its fuel surcharges for its various product segments.

²⁸ Conclusory assertions that a trade secret/commercial information privilege applies to information about a business's products or service contracts are routinely made in Federal civil litigation and regulatory hearings and just as routinely rejected. This is because generalized claims of privilege are so easily made, and so difficult to disprove that secrecy would quickly replace disclosure, both in civil litigation and regulatory hearings. *Public Citizen Health Research Group v. FDA*, 185 F.3rd 898 at 906 (D.C. Cir. 1999).

Even if it had been true that private business does not disclose financial data by product, it would not have brought such data for the Postal Service's competitive products within the trade secret/commercial information privilege. This is because the PAEA does not place the Postal Service in the shoes of others "in the business world" with respect to its disclosure obligations.²⁹

The PAEA requires the Postal Service to make a factual showing that substantial commercial harm is likely to result from disclosure of any financial information that it wants to withhold, and that the likely harm outweighs

the public interest in maintaining the financial transparency
of a government establishment competing in commercial
markets.

(Emphasis supplied.) 39 U.S.C. § 504(g)(3)(A).

Congress thus drew a fundamental distinction between the public disclosure obligations of ordinary private business, to which no particular public interest in transparency attaches, and the public disclosure obligations of a government entity **competing with** private business. The public interest in transparency in the commercial operations of a government agency wielding monopoly power and competing against private business is far greater than the public interest in the transparency of an ordinary private business. Misuse of that monopoly power puts both the mailing public and the monopoly's competitors at risk. It is those interests that are protected by the transparency mandated by the PAEA.³⁰

²⁹ Privately capitalized businesses have no public disclosure obligations. If they are not in a regulated industry, they can withhold information for any reason, or for no reason. What they are in the habit of not publicizing is not a reliable indicator of what would cause substantial competitive harm to the Postal Service. The same is true of publicly held corporations. Their disclosure obligations are largely defined by the Securities and Exchange Commission. Those disclosure obligations are designed to protect stockholders, not to protect one corporation from the competition of others. They are not intended to define the parameters of commercial sensitivity.

³⁰ See S. Rep. No. 108-318 at 1, which states that the core legislation that what was to become the PAEA "guarantees a higher degree of transparency to ensure fair treatment of customers of the Postal Service and those companies competing with the Postal Service's competitive products."

2. The Postal Service's public disclosure obligations are defined more by the need of the Commission, with the help of the public, to effectively police the boundary between its monopoly and competitive earnings, than by the Postal Service's tactical pricing freedom over competitive products.

The Postal Service advances the theory that the PAEA meant its disclosure obligations to shrink in inverse proportion to its expanding freedom over competitive rates. At page 70 of its FY 2008 ACR, it asserts that the growth of its NSA activity for competitive products "require[s] reassessment to achieve an equilibrium that respects the Postal Service's enhanced competitive role, and the Commission's new responsibilities."

The Postal Service, of course, was free to negotiate NSAs under both the former law (the Postal Reorganization Act) and the PAEA. The PAEA does, however, allow the Postal Service more tactical freedom to select competitive product prices and discounts than under the former law. Under the PAEA, the Commission now has what could be characterized as a strategic role, rather than a tactical role to play in the pricing of competitive products.

It is the Commission's duty, with the public's help, to ensure that the Postal Service's earnings in monopoly markets are not misused in the Postal Service's competitive markets. It is true that the Commission no longer passes judgment on whether rates for competitive products are reasonable and appropriate, as it did under the PRA. Under the PAEA, however, the Commission still plays a strategic role overseeing competitive products. Congress was aware that policing the boundary between monopoly earnings and competitive earnings would be difficult. It created a multitude of mechanisms to help maintain that boundary. Chief among them is the cap mechanism. They also include the set of section 3633 requirements that each competitive product be priced above its attributable cost, that competitive products as a group not cross-subsidize market dominant products, and that competitive products maintain a minimum contribution to overhead that is specified by the Commission. They include the requirement that competitive product revenue be maintained in a separate

fund (see section 2011), and that separate accounts be established for competitive products that will allow a Federal income tax to be imputed to competitive products as a group (see section 3634). Finally, they include the complaint mechanism (see section 3662).

This set of Commission-administered safeguards belies the notion, promoted in some quarters, that the PAEA turns oversight of the Postal Service's competitive operations over to market forces, and substitutes market forces for transparency and accountability. More than any other part of the regulatory regime that the PAEA establishes, the various mechanisms for policing of the boundary between market dominant and competitive products that the PAEA mandates define the public interest in transparency in the Postal Service's financial information. It is the Commission's and the public's duty to ensure that these elaborate safeguards are effective. The only way that they can be made to work is through access to financial information about the Postal Service's products. Consequently, more than any other features of the PAEA regulatory scheme, the need to make these policing mechanisms work defines the Postal Service's public disclosure obligations.

With respect to policing the boundary between monopoly and competitive earnings, one of the Commission's most important roles is to ensure that each competitive product covers its attributable costs. See 39 U.S.C. § 3633(a)(2). As the Postal Service itself emphasizes, it is in its core costing materials that the "cost splits between competitive and market dominant products are developed." Motion at 2-3. If the public does not have the right to see how the Postal Service's integrated cost models distribute costs between market dominant and competitive products, how could the public ever play a role in evaluating compliance with this requirement, and how could it ever bring a complaint if this requirement were not met? This example illustrates how the safeguards mandated by the PAEA will break down under the Postal Service's approach to disclosure.

3. Expanding the Postal Service's authority to withhold information is incompatible with the PAEA's basic strategy of substituting transparency and accountability for "hands on" regulation of competitive product rates.

The Postal Service cites no language of the PAEA and no legislative history to support its theory that its tactical pricing freedom over competitive products expands its authority to withhold information from the public about those products. In granting the Postal Service greater freedom to price competitive products, Congress was aware that it was expanding the risk that the Postal Service would misuse that freedom. The Postal Service asks the postal community to infer that Congress chose to deal with this added risk by adding secrecy to the mix, compounding the risk that the new freedom would be misused. It is more logical to draw the opposite inference—that the PAEA grants the Postal Service greater pricing freedom in exchange for greater transparency concerning how that freedom is used. United Parcel Service comments

In exchange for granting the Postal Service increased flexibility to change rates, PAEA strengthened the Commission's regulatory authority and mandated increased public transparency into the Postal Service's finances and operations. As a result, PAEA 'guarantees a higher degree of transparency to ensure fair treatment of customers of the Postal Service and those companies competing with the Postal Service's competitive products.'

UPS Response to Postal Service Motion at 2 citing S. Rep. No. 108-318 at 1 (2004).

The Postal Service's view conflicts with the many indications in the PAEA that Congress thought it was enhancing, rather than diminishing the Postal Service's transparency relative to the former regulatory regime under the PRA. See 39 U.S.C. § 3622(b)(6) which makes "increasing transparency of the ratemaking process" one of the objectives of the PAEA. In addition, the PAEA requires the Commission to produce, at last count, 19 separate reports on the Postal Service each year, most of them encompassing both market dominant and competitive products.

The most important evidence that Congress intended the PAEA to enhance, rather than diminish the financial transparency of the Postal Service, is new section 504(g). Under the PRA, the Commission, acting in its quasi-judicial capacity, determined the scope of the Postal Service's disclosure obligations. The Commission played this role, however, only when a rate case or other formal hearing was pending. Apart from formal hearings, section 410(c) effectively authorized the Postal Service to define for itself its obligation to disclose commercial information. For example, section 410(c)(2) authorized it to withhold any commercial information that would not be disclosed "under good business practice" regardless of whether disclosure would cause commercial harm.³¹

Under the PAEA, in contrast, the Postal Service may only **nominate** commercial information that it thinks should be withheld from the public under section 410(c)(2), together with its detailed description of the "nature and extent of the likely commercial injury" that disclosure would cause, and submit the information to the Commission in a nonpublic annex. See 39 U.S.C. § 504(g)(1). The Commission then rules on the commercial sensitivity of the information nominated, balancing the specific harm alleged against "the public interest in maintaining the financial transparency of a government establishment competing in commercial markets." 39 U.S.C. § 504(g)(3)(A).³²

This fundamentally reforms disclosure policy as it existed under the PRA. Under the PRA, the Commission determined what the Postal Service's disclosure obligations were only during rate cases. Apart from rate cases, it could only plead with the Postal Service to voluntarily provide the information that it needed to do its job. Under the

³¹ Section 504(g)(1) authorizes the Postal Service to file information of the kind described in 39 U.S.C. § 410(c) or 5 U.S.C. § 552(b). For present purposes, the only relevant provision is 39 U.S.C. § 410(c)(2) which, read in isolation of the remainder of the PAEA, authorizes the Postal Service to withhold commercial information "which under good business practice would not be disclosed." The courts have interpreted this provision so broadly that the Postal Service can invoke it without showing any competitive harm. See *Wickwire Gavin v. USPS*, 356 F.3d 588, 594-597 (4th Cir. 2004).

³² This allocation of responsibilities takes effect once the Commission has adopted regulations implementing section 504(g).

PAEA, the Commission determines what the Postal Service's disclosure obligations are with respect to any information that it needs to perform its regulatory functions.³³ In adopting the PAEA, Congress recognized that a transparency trap door existed under the PRA and decided to close it. It subordinated the "good business practice" withholding authority in the PRA [39 U.S.C. § 410(c)(2)] to the comprehensive authority of the Commission to decide disclosure issues found in 39 U.S.C. § 504(g) of the PAEA. It is noteworthy that this authority isn't limited to financial information relating to market dominant products, as the Postal Service seems to think, but extends to "any purpose" under title 39.

Section 504(g)(1) says

the Postal Service shall, at the time of providing [what it considers confidential] such matter to the Commission, notify the Commission, in writing, of its determination (and the reasons therefor).

It is significant that the PAEA places the burden of demonstrating the need for withholding information on the Postal Service at the time that it files information. This is particularly clear with respect to the annual compliance reports that the Postal Service files with the Commission. Section 3652 governs the Postal Service's annual compliance reports. Section 3652(f) states that

the Postal Service shall, at the time of providing such matter to the Commission, notify the Commission of its determination, in writing, and describe **with particularity** the documents (or portions of documents) or other matter for which confidentiality is sought and the reasons therefor.

(Emphasis supplied.) The phrase "with particularity" modifies both the phrases "documents (or portions of documents)" and the phrase "reasons therefor."

The procedural steps prescribed in section 540(g) contrast with disclosure procedure under the PRA. Under the PRA, disclosure issues typically required multiple

³³ Section 540(g)(1) directs the Postal Service to nominate information for protection, and directs the Commission to rule on that request, where the Commission has requested information "in connection with any proceeding **or other purpose** under this title." (Emphasis added.)

rounds of pleadings (objections, answers, motions to compel, and responses) before the issue was finally decided by the Commission. The process often took more than a month to run its course. Withholding information from public disclosure for more than a month was usually not fatal in the context of a 10-month PRA-style hearing, but it usually is fatal in a 90-day proceeding, which is the norm under the PAEA.

Knowing this, Congress, in section 504(g), sought to adapt the resolution of disclosure disputes to the new, highly compressed compliance and rate review proceedings mandated by the PAEA. Accordingly, the procedure prescribed in section 504(g) is designed to provide a path for expedited resolution of disclosure disputes. It dispenses with the need for multiple rounds of pleadings, allowing the issue to go straight from the initial filing of the document to resolution by the Commission, unless the Commission determines that more extensive debate is warranted.

Further evidence that Congress intended the PAEA to enhance, not diminish, the financial transparency and accountability of the Postal Service is found in section 3652(e)(1), which governs the Postal Service's annual compliance reports. There, Congress authorized the Commission to

prescribe the content and form of public reports (**and any nonpublic annex and supporting matter relating to the report**) to be provided by the Postal Service under this section.

(Emphasis added.) It is clear from this language that Congress expected the Commission to take the initiative in determining what portions of the Postal Service's annual compliance reports would be public, and what portions would not.

- E. The Postal Service's Core Costing Materials Do Not Qualify as Privileged Under Applicable Standards
 - 1. The common law trade secret/commercial information privilege is not an absolute privilege.

Section 504(g)(3)(A) of the PAEA states

[I]n determining the appropriate degree of confidentiality to be accorded information identified by the Postal Service under paragraph (1), the 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.

This balancing test is essentially the same one that applies in civil litigation in Federal courts and formal administrative hearings. In Federal civil litigation, disputes about whether, and to what degree, commercially valuable information should be disclosed turn on whether the information qualifies for protection under the trade secret/commercial information privilege recognized in Federal common law. This is a qualified privilege. As with all evidentiary privileges, “[d]isclosure rather than protection is the rule because of the overriding interest requiring that each party be empowered to obtain all evidence needed to prove his case.” See Gelhorn, *The Treatment of Confidential Information by the Federal Trade Commission: The Hearing*, 116 U. Penn. L. Rev. 401, 410 (1968). In regulatory proceedings, the privilege is entitled to even less weight because the public interest, as well as the rights of private parties, is at stake. See *Clark v. FTC*, 128 F.2d 542 (9th Cir. 1942).

Section 504(g)(3) requires the Postal Service to demonstrate the “nature and extent of the likely commercial injury,” and requires the Commission to balance the injury demonstrated against the “public interest . . . in transparency.” This section of the PAEA applies essentially the same balancing procedure and standards by which the common law trade secret/commercial information privilege is applied in Federal civil

litigation to the Commission's determinations of the Postal Service's public disclosure obligations. It applies this standard to the submissions of the Postal Service in section 504(3)(A) and to the submissions of any participant in 504(3)(B).

Congress incorporated the common law trade secret/commercial information privilege into exemption (b)(4) to the Freedom of Information Act (FOIA).³⁴ Consequently, the best guide for determining the contours of the trade secret/commercial information privilege is the wealth of case law interpreting exemption (b)(4).³⁵

In determining whether the Postal Service's financial information would qualify for the privilege, the courts would require the Postal Service, as the party seeking to withhold information, to demonstrate a "likelihood" of "substantial competitive injury" from disclosure. *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cr. 1974), with specific and direct evidence. *National Parks and Conservation Ass'n v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976). "Conclusive" or "speculative" claims of injury are insufficient. *Hercules v. Marsh*, 839 F.2d 1027, 1030 (4th Cir. 1988); *CNA Financial v. Donovan*, 830 F.2d 1132, 1152 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 977 (1988).

It would be required to show "with specificity" that disclosure "will work a clearly defined and serious injury." *Publiker Industries, Inc. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984). "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning" do not support a good cause showing. *Cipollone v. Liggett*

³⁴ In the context of a FOIA request, 5 U.S.C. § 552(b)(4) exempts from mandatory disclosure "trade secrets and commercial or financial information obtained from a person **that is privileged or confidential.**" (Emphasis added.)

³⁵ The FOIA (b)(4) exemption case law provides the relevant standard for determining whether the Postal Service's financial information falls within the qualified trade secret/commercial information privilege. If the information falls within the privilege, it is withheld, regardless of allegations of special public need for disclosure. FOIA (b)(4) exemption case law does not, however, determine the outcome of the balancing test that Federal civil courts, and the Commission, are to apply. The balancing test requires a consideration of the need of stakeholders and the public for disclosure, while FOIA litigation does not. When the need of the public is added to the balance, as it is in Commission proceedings, it shifts the balance further toward disclosure.

Group, Inc., 785 F.2d 1108, 1122 (3d Cir. 1986), *cert denied*, 484 U.S. 976 (1987). The Postal Service has the burden of justifying the confidentiality of each and every document sought to be covered by a protective order. *Id.*, and *Pansy v. Borough of Stroudsburgh*, 23 F.3d 772, 786-87 (3d Cir. 1994). It must then apply precise and certain reasons for claiming injury with particularity to the records in question. *Black v. Sheraton Corp.*, 371 F. Supp. 97 (D.D.C.).

Recognizing that this is what the applicable legal standards require, the Commission's proposed rules governing confidential information would require the Postal Service to include with material that it submits in a nonpublic form:

"A specific and detailed description of the materials claimed to be non-public in a manner that . . . would allow a person to thoroughly evaluate the basis for the claim that they are non-public;"

A rationale for claiming that material would "qualify for a particular evidentiary privilege recognized by federal civil courts, in particular Federal Rule of Civil Procedure 26(c);"

A "particular identification of the nature and extent of commercial harm alleged and the likelihood of such harm;" and

"At least one specific hypothetical, illustrative example of each alleged harm[.]"

See Docket No. RM2008-1, Notice of Proposed Rulemaking to Establish a Procedure for According Appropriate Confidentiality, August 13, 2008, proposed rule 3007.21.

2. Under applicable standards, competitive product data at the product level or above do not qualify for the trade secret/commercial information privilege.

The Postal Service's assertion of a categorical privilege over its "core costing materials" is conclusory and indiscriminate. It falls far short of meeting the legal burden imposed by the PAEA and reflected in the Commission's proposed confidentiality rules. By its explanation of competitive harm as well as by its behavior, the Postal Service has taken the position that any commercial information about a specific competitive product is, by definition, harmful. This per se approach to the determination of competitive harm is precisely the approach that the applicable legal standards cited above disallow. The Postal Service has not made a showing of the "nature and extent of the likely commercial injury" that disclosing specific categories of information would cause to specific competitive products as section 504(g)(3)(A) requires.

What the law requires in this context is a particularized, factual demonstration of likely competitive harm that disclosing specific categories of information would cause to specific competitive products in specific markets. The Postal Service has offered, instead, only the following abstract generalizations:

Costing information for products as a whole, or for specific product features, tend to be highly confidential in the business world, and the Postal Service should be able to protect them in accordance with industry standards. The ability of the Postal Service to negotiate favorable contracts could be severely compromised if costing information becomes available either to the customers with whom the Postal Service is negotiating, or to competitors who might also be seeking to negotiate contracts with the same customers. Postal Service's competitors, for example, could use such information to target their efforts and undercut the Postal Service's prices. The Postal Service is aware of no competitor or private shipping company of comparable size and scope that releases similar information to the public.

* * *

Access to virtually any cost information on competitive products may give [potential NSA clients] an advantage in the negotiation process

FY 2008 ACR at 70-71. As noted above, readily available facts contradict this characterization of industry custom. See pages 22-23. The Postal Service also seeks support by referencing information relating to international mail and to billing determinants that it withhold under the PRA. FY 2008 ACR at 69. This reference is inaccurate as well.³⁶

Though its claim that any cost information **of any kind** about competitive products **may** be competitively harmful is vague, speculative, and unproven, the Postal Service filed all product-level information about its competitive products under seal in its FY 2008 ACR.³⁷ It was undeterred by the fact that acting on its claim required it to conceal the vast majority of documentation about market dominant products. This behavior reflects an unstated assumption that the harm of disclosing cost information of any kind about any competitive product is so clear and so serious that it should nullify the fundamental objective of the PAEA of “[i]ncreasing the transparency of the ratemaking process” for market dominant products. See 39 U.S.C. § 3622(b)(6). The Postal Service behaves as though the trade secret/commercial information privilege is

³⁶ Prior to the passage of the PAEA, the detailed categories of data that the Postal Service alleged were commercially sensitive were limited to geographically-specific cost, volume, or revenue data (e.g., data by specific processing plant or data for specific ZIP Code pairs), system-wide billing determinants, and attributable costs for individual international mail products. Billing determinants break down product volume by weight, presort level, type of indicia, etc. The Commission allowed the Postal Service to file them for competitive products on a one-year lag. See 39 CFR § 3001.102(a)(10). Under the PRA, all of the Postal Service’s disclosures of information on its international mail services were voluntary. Contrary to the representation at page 69 of its FY 2008 ACR, it provided average volumes and revenues for individual international mail services for each annual report to Congress that the Commission prepared. The rationale for protecting geographically-specific data was that it could provide a competitor with information that he might use to target his advertising after learning that sales in certain local markets were more dense, and therefore more profitable to target for advertising purposes. A rationale for protecting current billing determinant data was never agreed upon or fully articulated. See Docket No. RM2005-1, Advance Notice of Proposed Rulemaking, November 8, 2004, citing Order No. 839 at 7-8; see also Comments of the United Parcel Service in Response to Notice of Proposed Rulemaking on Periodic Reporting Rule, February 10, 2003, at 3-5.

³⁷ It did the same thing in its annual competitive products price change docket (Docket No. CP2009-8).

categorical. It shows no recognition whatever that commercial harm is a matter of degree, varies depending on the context, or is subject to countervailing statutory goals.

A legitimate analysis of the commercial harm to any of the Postal Service's competitive products has to take into account the nature of the product involved, the market in which it competes, and the manner in which it is priced. The Postal Service's competitive products consist primarily of Express Mail, Priority Mail, Parcel Select, and the various international mail counterparts to these products. They differ from market dominant products in that their prices are computed from a bewilderingly complex matrix of weight, zone, cube, entry point, machinability, payment method, and annual volume. As the table below shows, the distinct rates actually charged for most individual competitive products (such as Parcel Select or International Surface Airlift) number in the hundreds or, more typically, the thousands.

NUMBER OF DISTINCT PRICES CHARGED FOR EACH COMPETITIVE PRODUCT

Domestic Products

<u>Product/ Price Category</u>	<u>Number of Prices</u>	<u>Product Totals</u>	<u>Notes</u>
Express Mail			
Express Retail (inc. flat-rate prices)	569		
Express Commercial Base (inc. flat-rate prices)	569		
Pickup On Demand	1		
Sunday or Holiday Delivery	1		
Express Mail Commercial Plus (inc. flat-rate prices)	569		
Small Flat Rate Box	1		
Total Express Mail		1,710	
Priority Mail			
Priority Retail (inc. flat-rate prices)	500		
Priority Commercial Base (inc. flat-rate prices)	500		
Pickup On Demand	1		
Priority Mail Commercial Plus (inc. flat-rate prices)	500		
Small Flat Rate Box	1		
Total Priority Mail		1,502	
Parcel Select			
Parcel Select Machinable DBMC	140		
Parcel Select NonMachinable DBMC	288		
Parcel Select Machinable DSCF	35		
Parcel Select Nonmachinable DSCF	72		
Parcel Select DDU	72		
Parcel Select Inter-Barcoded	252		
Parcel Select Intra-Barcoded	180		
Parcel Select Machinable BMC Presort	245		
Parcel Select Nonmachinable BMC Presort	504		
Parcel Select Machinable OBMC Presort	245		
Parcel Select Nonmachinable OBMC Presort	504		
Total Parcel Select		2,537	1/
Parcel Return Service (PRS)			
PRS Machinable RBMC	140		
PRS Nonmachinable RBMC	288		
PRS RDU	72		
Total PRS		500	
Premium Forwarding Service			
Premium Forwarding Service	2		
Total PFS	2		

Notes:

1/ Does not include volume or loyalty incentives

International Products

Product/ Price Category	<u>Number of Prices</u>	<u>Product Totals</u>	<u>Notes</u>
International Expedited Services			
GXG (Outbound)	568		1/
Express Mail International (Outbound)	534		2/
Flat Rate Envelope	10		
Total International Expedited Services		1,112	
EMI Inbound			3/
Priority Mail International			
PMI Parcels (Outbound)	666		
Flat Rate Envelope (Outbound)	10		
Flat Rate Small Box (Outbound)	10		
Flat Rate Regular Box (Outbound)	10		
Flat Rate Large Box (Outbound)	10		
Total Priority Mail International		706	
Air Parcel Post (Inbound)			3/
International Priority Airmail (IPA)			
Presort (Outbound)			
Per Piece			
Full Service	9		
ISC Drop Ship	9		
Per Pound			
Full Service	9		
ISC Drop Ship	9		
Worldwide non-Presort Mail (Outbound)			
Per Piece			
Full Service	1		
ISC Drop Ship	1		
Per Pound			
Full Service	1		
ISC Drop Ship	1		
IPA M-Bags (Outbound)			
Full Service			
1-11 pounds	9		
12-66 pounds	495		
ISC Drop Ship			
5-11 pounds	63		
12-66 pounds	495		
Total IPA		1,102	

International Products (continued)

International Surface Air Lift

Full Service and ISC Drop Shipment

Per Piece

Full Service 9

ISC Drop Ship 9

Per Pound

Full Service 9

ISC Drop Ship 9

M-

Bags

Full Service

1-11 pounds 9

12-66 pounds 495

ISC Drop Ship

5-11 pounds 63

12-66 pounds 495

Total International Surface Air Lift**1,098****International Direct Sacks--M-Bags (Outbound)**

Airmail M-Bags

1-11 pounds 9

12-66 pounds 495

Total International Direct Sacks--M-Bags (Outbound)**504**

Inbound Surface Parcel Post (at non-UPU rates)

3/

International Ancillary and Special Services

3/

Notes:

- 1/ Does not include the number of rates associated with the 10% Online Pricing Incentive discount.
- 2/ Does not include the number of rates associated with the 8% Online Pricing Incentive discount, Permit Imprint Incentive discount, or Corporate Account Incentive discount.
- 3/ A number of rates are associated with inbound mail, specifically, Inbound EMI, Inbound Air Parcel Post, or Inbound Surface Parcel Post (at non-UPU rates), whose rates are established by the UPU (Inbound Air Parcel Post), or by bilateral or multilateral agreements (Inbound EMI and Inbound Surface Parcel Post (at non-UPU rates)). There are also a number of rates associated with International Ancillary Special Services and stand-alone Special Services. The number of rates associated with these products has not been computed.

This means that few, if any, users of these products pay rates that are based on the product's average unit cost, average unit revenue, or other average unit figure. Consider the business mailer trying to choose between a competitive Postal Service product, for example Parcel Select, and comparable products from the Postal Service's competitors. To minimize its shipping charges, it has to make complex comparisons of pound charges, cube charges, zone charges, distance tapers, pick-up service charges,

tracking charges, surcharges for accelerated delivery, surcharges for rural delivery, and insurance charges. For competitive international products like International Priority Airmail, pricing is similarly complex. Rates must take into account regional or even country-specific rate regimes and customs clearance service features and fees. Often a business mailer must use special software to make these comparisons, or hire a consultant to do it.

Knowing the average unit cost (or average unit revenue, or volume) of a competitive product conveys little of value to someone deciding how to compete with or negotiate with the Postal Service, for the simple fact that the rates the mailer pays are not based on, or tied to, product-average figures. This applies to a mailer negotiating a competitive product NSA or International Customized Mailing Agreement (ICM) with the Postal Service. Knowing average product unit costs does not tell the mailer the avoidable cost underlying any applicable worksharing discounts, which ones have high or low passthroughs, or how much particular operational or mail characteristic modifications that the mailer proposes to make might save the Postal Service.

The Postal Service's generalization that "the ability of the Postal Service to negotiate favorable contracts could be severely compromised if costing information becomes available" is implausible when applied to a competitive product's average attributable cost. A potential NSA client who learns the average attributable cost of Parcel Select, for example, would still be a long way from making a useful inference as to the unit attributable cost of his own mail or the avoidable cost of its worksharing elements. The passthroughs that result from Postal Service rate design seem to bear no systematic relationship to avoided cost. Passthroughs for market dominant products, for example, vary from under 30 percent to over 500 percent. Assuming that the Postal Service takes the same approach to designing competitive rates, the discounts that a mailer would pay under a competitive NSA would be similarly unpredictable, even if the mailer knew the relevant avoided costs. Of course, because the Postal Service has placed all competitive product avoidable cost models under lock and key, the public no longer knows either the avoided costs associated with

competitive worksharing discounts or the passthroughs that the Postal Service targets. Neither does a mailer negotiating a competitive NSA with the Postal Service. That leaves the mailer, for all practical purposes, in the dark when he negotiates specific discounts for a competitive product. That is where the Public Representative's motion, if it were granted, would leave him.

For these reasons, the average unit attributable cost of a competitive product like Parcel Select mail would not qualify as information likely to lead to substantial commercial injury under the applicable legal standard. To carry its burden of persuasion under the applicable case law or the Commission's proposed confidentiality rules, the Postal Service would have to describe a specific, plausible scenario under which a potential Parcel Select NSA client would gain a significant advantage in negotiating special rate concessions for any particular set of mail characteristics, simply because he knew a product's average unit attributable cost. It is possible that the Postal Service could do this with respect to a few competitive products. The point is, it hasn't.

The Postal Service's "demonstration" of competitive harm, such as it is, focuses on the Postal Service's negotiations of NSAs and ICMs. It is clear from the case law, however, that information that might be of some use to a competitor, but only in a vague

or speculative way, does not qualify for the trade secret/commercial information privilege. This is true even in the context of competitive bidding for contracts.³⁸

For more than 30 years, the Postal Service publicly disclosed the average unit costs, volumes, and revenues for its competitive products to allow their rates to be reviewed against statutory standards in formal, on-the-record hearings conducted under the PRA. It also publicly disclosed the avoided costs that provided the basis of worksharing discounts for specific competitive subclasses. The disclosures were voluntary, and were subject to essentially the same balancing of the interests of mailers and the public in transparency against potential commercial harm to the Postal Service that is now embodied in section 504(g) of the PAEA. The Postal Service never demonstrated, nor, to this Public Representative's knowledge, even alleged that disclosing the average unit costs, volumes, or revenues of a competitive subclass or its workshare rate categories caused it competitive harm. Competitive harm was only alleged by the Postal Service from disclosing data at a much finer level of detail.

One might ask precisely what has changed going from the PRA to the PAEA that suddenly turns the average unit cost, volume, or revenue of specific competitive products from harmless information that the Postal Service did not ask the Commission to protect into the equivalent of nuclear secrets. The Postal Service cites increased NSA and ICM activity. This activity has increased, but there was substantial ICM activity prior to the passage of the PAEA. This increased activity might justify the continued protection of avoided cost data underlying worksharing discounts for competitive products and continued protection of financial data for individually negotiated contracts for those products. It does not, however, justify an effort to conceal product-average data, and thereby force the Postal Service's core costing

³⁸ In the context of competitive bidding on contracts, courts applying the trade/secret commercial information privilege usually require average contract figures to be disclosed where they reflect many components, some of which a competitor could not quantify. See *Acumenics Research & Technology v. U.S. Department of Justice*, 843 F.2d 800 at 807-08 (4th Cir. 1988); *GC Micro Corp. v. Defense Logistics Agency*, 33 F.3d 1109, 1114-15 (9th Cir. 1994); *Pacific Architects and Engineers v. U.S. Dept. of State*, 906 F.2d 1345 at 1347-48 (9th Cir. 1990); *Martin Marietta Corp. v. Dalton*, 974 F. Supp. 37 (D.D.C. 1997), 40-41; *Racal-Milgo government Systems, Inc. v. Small Business Admin.*, 559 F. Supp. 4, 6 (D.D.C. 1981).

documentation underground. It is far from self evident why the Postal Service would consider this difference of degree enough to justify drastically redefining its public disclosure obligations to exclude almost all basic financial information about all of its products, justify requiring a new, draconian restriction on those who can access this information even under seal, and to withhold information that relates exclusively to competitive products even from the Commission.

It may be argued that in tough economic times, the Postal Service should be given every conceivable advantage in its dealings with both its competitors and its customers. But these economic times are just as tough for its competitors and its customers. The Postal Service should be afforded a reasonable degree of protection of its truly sensitive competitive product data. But product-average information for a competitive product should only be withheld after the Postal Service identifies a plausible scenario by which disclosing it would cause substantial competitive harm of a specific kind to that particular product. It has yet to do so.

Malin Moench
Public Representative

Postal Regulatory Commission
901 New York Avenue, NW, Suite 200
Washington, DC 20268-0001
(202) 789-6823; FAX (202) 789-6861
e-mail: malin.moench@prc.gov