

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

ANNUAL COMPLIANCE REPORT, 2008

Docket No. ACR2008

RESPONSE OF THE UNITED STATES POSTAL SERVICE IN OPPOSITION  
TO PUBLIC REPRESENTATIVE'S MOTION FOR DISCLOSURE OF  
PORTIONS OF THE NON-PUBLIC ANNEX  
(February 3, 2009)

On January 27, 2009, the Public Representative (PR) filed a motion requesting public disclosure of the core costing material filed by the Postal Service as part of the nonpublic annex portion of its FY 2008 Annual Compliance Report. The Postal Service hereby responds in opposition to that motion. The PR Motion grossly mischaracterizes as "useless" and "unusable" the public versions the Postal Service has provided of nonpublic materials, and highly exaggerates the magnitude of the challenges created by the Postal Service's split of materials between the public and nonpublic portions of the ACR. More fundamentally, though, the Commission is simply unable at present to provide the relief that the Public Representative is apparently seeking.

**Background**

The PR motion does not precisely list the nonpublic materials which the PR wishes to be covered by his motion. Presumably, however, when the motion refers to "core costing materials" (e.g., PR Motion at 1), the intent is to refer to

the same set of materials to which the Postal Service referred in its December 12<sup>th</sup> motion seeking the establishment of protective conditions to govern access to nonpublic “core costing materials.” Motion Of The United States Postal Service Requesting Establishment Of Protective Conditions To Govern Access To Certain Core Costing Documentation (December 12, 2008). On that basis, the PR Motion appears to request, at least primarily, that the Commission simply post on its website the following materials which the Postal Service has already filed in the nonpublic annex to its FY08 ACR:

- USPS-FY08-NP10 FY 2008 Group Specific Costs (Nonpublic Portion)
- USPS-FY08-NP11 FY 2008 Nonpublic Cost and Revenue Analysis (NPCRA) Report (Hard copy & Excel)
- USPS-FY08-NP12 FY 2008 Nonpublic Cost Segments and Components Report (Hard copy & Excel)
- USPS-FY08-NP13 FY 2008 CRA Model (Model Files, Cost Matrices, and Reports) (Nonpublic Version)
- USPS-FY08-NP14 FY 2008 CRA “B” Workpapers (Nonpublic Version)
- USPS-FY08-NP18 Cost Segment 3 Cost Pools & Other Related Information (Nonpublic Portion)
- USPS-FY08-NP19 FY 2008 Non-Operation Specific Piggyback Factors (Nonpublic Portion)
- USPS-FY08-NP21 In-Office Cost System (IOCS) Statistical and Computer Documentation (Nonpublic Version) (Source Code and Data on CD-ROM)
- USPS-FY08-NP22 City Carrier Cost System (CCCS) Statistical and Computer Documentation (Nonpublic Version) (Source Code and Data on CD-ROM)
- USPS-FY08-NP23 Rural Carrier Cost System (RCCS) Statistical and Computer Documentation (Nonpublic Version) (Source Code and Data on CD-ROM)

USPS-FY08-NP24 Transportation Cost Systems (TRACS) Statistical and  
Computer Documentation (Nonpublic Version)  
(Source Code and Data on CD Rom)

It was this group of materials which the Postal Service in December proposed be made available only under the terms of protective conditions to be established by the Commission.<sup>1</sup> In Order No. 155 (Dec. 23, 2008), the Commission rejected that proposal and declined to establish the requested protective conditions. Instead, the Commission chose an approach by which the Postal Service would file parallel public versions of the above materials, with competitive product information aggregated or redacted to avoid disclosure of information on specific competitive products. With its ACR filing, or shortly

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<sup>1</sup> In a footnote on page 2, the PR Motion also suggests that an RPW report for FY08 has not been provided, and that effective public participation in the ACR review requires access to RPW data. (Also according to that footnote, however, necessary RPW data could be provided via a report which protects commercially sensitive information by aggregating data for individual competitive products on one line.) The PR Motion is correct only in the limited sense that a separate document entitled "FY08 Annual RPW Report" has not been provided, but incorrect in the sense that the FY08 Quarter Four RPW Report contains a separate presentation of Quarter 4 Year-To-Date (YTD) data which, for all practical purposes in this context, provides the exact same data as would an FY08 Annual RPW Report. The Quarter Four RPW report was provided by letter to the Commission on December 12, 2008, and can be found on the Commission's website, both on the December 12 daily listings, and on the list of Periodic Reports. Indeed, it was that Quarter Four RPW Report which Order No. 155 cited on page 4 as the model for parallel public versions with competitive data collapsed. Moreover, Commission Information Request No. 2 (January 23, 2008), Item 3, also refers to the same Quarter 4 YTD RPW data, although in this instance citing to the copy of that report appearing on the Postal Service website. Therefore, any suggestions that FY08 RPW data have yet to be provided, or that compliance review has consequently been impeded, would clearly be unfounded. Finally, of course, revenue and weight data by product are also provided in the CRA (Cost and Revenue Analysis) report itself. But, to be in line with past practice, the Postal Service will shortly be issuing an FY08 Annual RPW Report.

thereafter, the Postal Service provided parallel public versions of those materials in accordance with Order No. 155, but noted some specific limitations in the utility of those public versions, relative to their nonpublic counterparts. See Response of the United States Postal Service to Commission Order No. 155 (Dec. 29, 2008).<sup>2</sup>

### **1. The PR Motion Conflates Two Distinct Issues**

Unintentionally or not, the PR Motion glosses over a critical distinction in its discussion of ACR materials. There are three logical sets of ACR materials, by virtue of the existence of two types of products – market dominant and competitive. Some materials relate to market dominant products. Some materials relate to competitive products. But these two groups of materials overlap, in the sense that there are materials which intrinsically relate to both market dominant and competitive products. Thus, the three relevant sets of ACR materials are: 1) the set relating exclusively to market dominant products, 2) the

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<sup>2</sup> To be clear, for each nonpublic version listed above, there is a matching public version. Collectively, in this pleading, the two sets of materials are referred to respectively as the “nonpublic versions” and the “public versions.” The mapping is as follows:

USPS-FY08-NP10	USPS-FY08-33
USPS-FY08-NP11	USPS-FY08-1
USPS-FY08-NP12	USPS-FY08-2
USPS-FY08-NP13	USPS-FY08-31
USPS-FY08-NP14	USPS-FY08-32
USPS-FY08-NP18	USPS-FY08-7
USPS-FY08-NP19	USPS-FY08-24
USPS-FY08-NP21	USPS-FY08-37
USPS-FY08-NP22	USPS-FY08-34
USPS-FY08-NP23	USPS-FY08-35
USPS-FY08-NP24	USPS-FY08-36

set relating exclusively to competitive products, and 3) the overlap set relating to both types of products. Visually, one can imagine a Venn diagram of two overlapping circles, one with vertical lines, one with horizontal lines, and an overlap section with a crosshatch of vertical and horizontal lines.

In seeking the establishment of protective conditions in December, the Postal Service was focusing on the set of overlap materials. Realizing that some mechanism needed to be established to allow parties wishing nothing more than to analyze the full circle of market dominant product information access to the overlap set of materials, as well as the set of exclusively market dominant materials, the Postal Service proposed a protective conditions approach. As noted on page 3 of its December motion:

... the Postal Service recognizes that even reviewers who wish to focus exclusively on market dominant products, and who may have no interest in competitive products, could be frustrated in their attempts to analyze cost attributions and distributions if they cannot get access to material portions of the core cost documentation. The Postal Service's proposed resolution of this dilemma is to identify a set of materials filed in the nonpublic annex which consists of core costing documentation, and to request the establishment of protective conditions to govern access to that set of materials.

In Order No. 155, however, the Commission decided upon a different approach to dealing with the overlap material, and instead directed the Postal Service to use redaction and aggregation to produce parallel public versions of the nonpublic core costing material. Order No. 155, though, recognized the distinction between overlap material, on the one hand, and material relating exclusively to competitive products, on the other hand, and acknowledged the heightened need for protection of the latter type of material. Order No. 155 (Dec.

23, 2008) at 4. Therefore, while the Postal Service's ability to achieve perfectly what the Commission contemplated in Order No. 155 may be a legitimate topic for discussion, the scope of such discussion would necessarily be limited to the ability to analyze market dominant products.

The PR motion, however, appears to be motivated by an entirely different agenda. As made clear in the very first paragraph on the first page of the motion, the PR wants to be able to submit public comments discussing the full range of materials provided in the ACR regarding both market dominant and competitive products. PR Motion at 1. The thrust of the PR motion is thus not about the overlap materials, it is about the competitive product materials. Even if the Postal Service had been able to submit a set of parallel public versions which perfectly resolved the overlap dilemma, such that complete analysis of every conceivable aspect of market dominant product costs could be entirely conducted using available public material, the true objective of the PR motion would not be met. Simply stated, what the PR really seeks to do is to cast all product-level competitive data into the public domain. He devotes the entire second half of his motion towards achievement of this ultimate objective. The earlier portion of the motion discussing the overlap material (i.e. the public versions of the nonpublic material), is thus, in some sense, just a distraction. Nonetheless, the overblown allegations made in the initial portion of the motion warrant response, despite their lack of relevance both to proper treatment of purely competitive product data, and to the critical deficiency of the motion – the absence of statutory authority to provide the relief requested.

## **2. The Public Versions of Nonpublic Materials Are Neither “Useless” Nor “Unusable”**

At various places in the PR Motion, the public versions of nonpublic materials are mischaracterized as “useless” and “unusable.” PR Motion at 1, 3, 19, 20. In reality, there is a wealth of highly useful and usable information in those materials. The Public CRA shows revenue, volume, cost, and cost coverage for all market dominant products. The Public Cost Segments and Components Report breaks those product costs down into the much finer level of detail associated with cost segments and components. Product information by mail processing cost pool can be obtained from USPS-FY08-7, and the “B” workpapers in USPS-FY08-32 provide insight into a variety of very detailed cost allocations. If the PR’s comments are intending to suggest, for example, that the public version materials are so “useless” that parties reviewing the ACR and attempting to evaluate compliance with regard to the market dominant products would be just as well off if the Postal Service had not provided any of those materials, such a suggestion would be absurd on its face.

Moreover, the PR motion includes passages that could easily create misimpressions about the quality of the public versions. For example:

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.

PR Motion at 3 (footnote omitted). A literal reading of this passage might suggest that the Postal Service was warning that public version reports included

totals which do not match the nonpublic versions of the same reports, immediately calling into question whether the data in the public versions are distorted. In fact, that is not the case – when the public version reports display totals, by construction, those totals are the same as the totals in the nonpublic version of the same report. Instead, any difficulty is more subtle, and discrepancies in results were only hypothesized by the Postal Service if someone attempted to use public version input data to rerun models, rather than with respect to the results shown in the public version reports actually filed by the Postal Service.

The PR Motion appears to be premised on the erroneous notion that, unless every analyst has an equal opportunity to conduct an end-to-end replication of the Postal Service's data presentation, the objective of accountability cannot be realized. See PR Motion at 19-21. In reality, however, as long as the Commission has the capability of replicating those calculations, there is little, if any, marginal value to other analysts conducting such an exhaustive replication exercise. We know this because, as the PR Motion suggests, the opportunity for end-to-end replication did exist under the PRA, and yet there were very few, if any, rate case parties who attempted the feat.<sup>3</sup> And to the extent that any did, they were more than likely motivated by the possibility,

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<sup>3</sup> The Postal Service is aware of no rate case intervenor who routinely started with output data from the general ledger and all of the data collection systems, and traced that data through all of the intermediate steps to the ultimate base year costs shown in the CRA and the Cost Segments and Components. Recall that, until relatively recently, much of that process would have involved substantial mainframe programming. Instead, rate case intervenors quite reasonably tended to focus only on those parts of the process of particular relevance to the issues of interest to them.

under the PRA, of proposing to substitute their own alternative methodologies at various steps along the way to achieve different results (i.e., different costs, leading to different recommended rates).

As the Postal Service understands the current ACR process which replaced PRA rate cases, however, the intent now is to eliminate consideration of methodological alternatives, and simply put new fiscal year data into established methodologies.<sup>4</sup> When the Commission has full access to the nonpublic versions in order to ensure that the Postal Service properly followed established procedures, it is unclear how a party is, in any practical sense, harmed by having to take “on faith” that, for example, a cost coverage presented by the Postal Service and verified by the Commission is correct. See PR Motion at 20.<sup>5</sup>

The Postal Service is certainly not suggesting that the public versions it submitted in this ACR proceeding are ideal, or even nearly so. As noted when they were filed, while it may be possible with enough time and effort to construct public versions that could sustain parallel end-to-end processing, one week was not sufficient to achieve that result. But since, as indicated above, parties are so unlikely to attempt end-to-end processing, that shortfall is hardly significant.

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<sup>4</sup> Thus, it is unclear why the PR Motion complains of the inability of analysts, for example, to change the variability of a given MODS cost pool. PR Motion at 20. The ACR process is not designed to explore changes in such variabilities. Rather, it is designed merely to produce the costs associated with the established methodologies, including the existing mail processing variabilities.

<sup>5</sup> Once again, however, even if one is unwilling to take “on faith” the Commission’s ability to verify reported cost coverages for *market dominant* products, the remedy is not to require disclosure of information on individual *competitive* products, but rather to seek a functioning parallel public version that allows full replication of costs and costs coverages for individual market dominant products, as well as for competitive products as a whole.

More significant is the hardwiring of spreadsheets that wipes out formulas, and the consequent inability of analysts to track numbers back and forth through the materials. The short-term solution to this, however, has been for the Postal Service to work with analysts who made inquiries about arranging a work-around regarding specific materials. In response to such discussions, the Postal Service has attempted to do piecemeal what it previously was unable to do comprehensively, and, per these requests, has furnished two parties additional information which better serves their specific needs, while still shielding data on individual competitive products. Overall, however, contrary to what is claimed in the PR Motion, parties have been able to conduct substantial in-depth analysis on market dominant products.<sup>6</sup> The range and scope of comments filed on January 30 confirm that, and certainly belie the suggestion (PR Motion at 20) that “worksharing discounts can’t be analyzed or evaluated either.”

The Postal Service recognizes that, if the approach of parallel public/nonpublic versions is to be maintained, a better job needs to be done to make the public versions more conducive to the types of analysis in which some

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<sup>6</sup> It cannot escape comment that the PR, with full access to both public and nonpublic versions, chose to file a motion alleging the futility of analysis of the public versions, while the parties whose access was limited to the public versions forged ahead with their own analysis, in some instances pragmatically seeking assistance from the Postal Service. The point here is not to suggest that all (or even any) analysts working with the public version material were happy with the change in presentation format from last year, but rather to show that the situation is not nearly so dire as the PR Motion suggests. These circumstances also underscore the true motivation for the PR Motion, which is not improvement in the public versions of overlap material, but disclosure of competitive product information.

party representatives may wish to engage.<sup>7</sup> Notwithstanding the possibility for improvement, however, the PR Motion is totally off base to assert that the existing materials are either “useless” or “unusable.” For most purposes, they are more than sufficient to show cost information at the level of detail from which useful and valid conclusions can be drawn. In other instances, while the format of the materials has made it more cumbersome to track the flow of data, the information necessary to understand the results can ultimately be found. But, as noted earlier, the putative shortcomings of the public versions is fundamentally not the root of the PR’s motion. The PR wants all competitive product-level data to be disclosed, and even a perfectly functioning set of public versions, allowing full analysis of market dominant products, would still not satisfy the PR’s objective. If the PR were truly concerned about real or imagined deficiencies in the overlap material, the remedy would be to seek improvements in that material,

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<sup>7</sup> A good five pages of the PR Motion (pages 11-16) are devoted to discussion of the potential complications that ensue from the establishment of protective conditions, and, in particular, to condemnation of the amendment to the standard protective conditions proposed by the Postal Service in December. Since Order No. 155 rejected the request for protective conditions, it seems strange that the PR Motion would nonetheless be written as if the matter were still open for debate. The Postal Service is willing to acknowledge that, in part for some of the reasons articulated in the PR Motion, the parallel version approach favored by the Commission turns out to be a better solution than the protective condition approach initially advanced by the Postal Service, and is prepared to improve the parallel versions it provides in the future. For whatever it may be worth at this point in time, however, the Postal Service submits that the effects of the modification it proposed to the standard protective conditions would have been much more modest than the PR Motion suggests, and that the potential commercial harm of disclosure of detailed cost information to customers with whom the Postal Service might be negotiating competitive NSAs requires much more balanced consideration than the PR Motion admits.

not disclosure of all nonpublic product-level material on individual competitive products.

### **3. The Statute Does Not Permit the Procedures Advocated by the PR Motion**

Not only is the PR seeking the wrong solution for purposes of addressing the problem he purports to identify, but the solution he proposes is beyond the scope of the Commission's statutory authority. Subsection (f) of section 3652 specifies the treatment of information submitted by the Postal Service in its ACR for which confidentiality is claimed:

#### **(f) Confidential Information –**

- (1) In general – If the Postal Service determines that any document, or other matter, which it provides to the Postal Regulatory Commission in a nonpublic annex under this section or under subsection (d) contains information which is described in section 410(c) of this title, or exempt from public disclosure under section 552(b) of title 5, 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 therefore.
- (2) Treatment – Any information or other matter described in paragraph (1) to which the Commission gains access under this section shall be subject to paragraphs (2) and (3) of section 504(g) in the same way as if the Commission had received notification with respect to such matter under section 504(g)(1).

Subsection (g)(2) of section 504 explicitly limits the disclosure of information and materials so-provided:

(3) Except as provided in paragraph (3), *no officer or employee of the Commission may, with respect to any information as to which the Commission has been notified under paragraph (1) –*

(A) *use such information for purposes other than the purposes for which it is supplied; or*

(B) *permit anyone who is not an officer or employee of the Commission to have access to any such information.*

(Emphasis added).

Subsection (g)(3)(A), upon which the PR principally relies to argue for mandatory public disclosure, specifies:

(3)(A) Paragraph (2) shall not prohibit the Commission from publicly disclosing relevant information in furtherance of its duties under this title, *provided that the Commission has adopted regulations under section 553 of title 5, that establish a procedure for according appropriate confidentiality to information identified by the Postal Service under paragraph (1).* In 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.

(Emphasis added).

Contrary to the PR's motion, which rests fundamentally on his far-reaching mischaracterizations of Postal Service materials and unbalanced policy arguments, the limitation and the condition precedent prescribed by the statute

could not be clearer. As the PR acknowledges on page 8 of his motion, the Commission has not yet issued final rules governing disclosure in these circumstances, as required under subsection (g)(3)(a). According to the plain terms of these provisions, the Commission thus lacks the authority at present to supersede the determination of nonpublic status and to disclose the information for which the Postal Service has claimed confidentiality.

Indeed, the PR cautions that the Commission should not attempt to resolve issues affecting disclosure, amid the complicated mix of competing interests protected in the statutory scheme, without a “comprehensive analysis of the commercial sensitivity of the Postal Service’s financial information.” PR Motion at 2. The PR suggests that this analysis take place in a supplemental round of comments in the pending periodic reporting rulemaking docket. *Id.* Furthermore, in that docket the Commission itself defers to the establishment of rules in Docket No. RM2008-1.<sup>8</sup> In this regard, the PR characterizes his motion as an “interim solution for purposes of this docket.” PR Motion at 2. As evident from the clear prescription in sections 3652 and 504, however, his solution is one that the statute simply does not permit.

#### **4. The PR Motion Misstates the Intent of the PAEA Regarding the Handling of Confidential Postal Service Information**

Additionally, the Public Representative’s arguments are premised upon a skewed reading of the Postal Accountability and Enhancement Act (PAEA), as

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<sup>8</sup> Notice of Proposed Rulemaking Prescribing Form and Content of Periodic Reports, Order No. 104, Docket No. RM2008-4, at 15 (August 22, 2008)

reflected at page 5 of its motion. There, the Public Representative claims that 39 U.S.C. § 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 obliged to disclose to the public.

This assertion reflects a misunderstanding of the role established for the Postal Regulatory Commission under 39 U.S.C. § 504(g).

Under 39 U.S.C. § 410(b)(1), the Postal Service is subject to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Accordingly, its records are subject to mandatory public disclosure, unless they meet the terms of the narrowly crafted exemptions in FOIA subsection 552(b). By operation of FOIA § 552(b)(3), the Postal Service also is permitted to exempt from public disclosure any of its records that meet the terms of additional exemptions specified in 39 U.S.C. § 410(c). The Postal Service has implemented regulations for the purpose of processing FOIA requests, issuing responses to FOIA requests and making final agency decisions under the FOIA.<sup>9</sup> Those final agency decisions are subject to judicial review.<sup>10</sup>

Consistent with the public policy of enhanced postal accountability, the PAEA authorizes the Commission to engage in oversight of matters relating to

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<sup>9</sup> See 39 C.F.R. § 265; also Handbook AS-353, *Guide to Privacy, the Freedom of Information Act, and Records Management*.

<sup>10</sup> See 5 U.S.C. § 552(a)(4)(B) and 39 C.F.R. § 265.7(f)(2). In light of these public disclosure requirements, it is misleading for the PR to suggest at page 5 of its motion that the Postal Service seeks to place itself in the shoes of private business. The Postal Service recognizes that its status as government agency competing in commercial markets imposes upon it certain extraordinary public reporting obligations. The Postal Service seeks nothing more than the full protection of the limitations on such disclosure that are recognized by the PAEA.

postal products, prices and services beyond the scope formerly permitted by the PRA. However, section § 504(g) does not establish the Postal Regulatory Commission as a general overseer of the Postal Service's exercise of its responsibilities under the FOIA.<sup>11</sup>

The PR is correct in stating that new 39 U.S.C.:

[s]ection 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 will be submitted in its nonpublic annex.”

PR Motion at 5. However, as reflected in 39 U.S.C. § 504(g), the PAEA recognizes that some information submitted by the Postal Service to the Commission for the conduct of its newly expanded oversight responsibilities includes data that the Postal Service is authorized to withhold from public disclosure.<sup>12</sup>

Congress enacted 39 U.S.C. § 504(g) in recognition of the prospect of tension between the public interest in protecting the Postal Service<sup>13</sup> from commercial injury and the public interest in maintaining the financial transparency

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<sup>11</sup> At page 5, the PR also argues that, before the enactment of the PAEA, 39 U.S.C. § 410(c)(2) “defined the Postal Service’s public disclosure obligations when a rate case is not pending.” The PR’s historical observations reflect a myopic view of the world as having been circumscribed by Postal Rate Commission litigation and the Commission’s formerly more narrow periodic reporting requirements. Irrespective of the pendency of dockets in which the Commission’s Rules of Practice and Procedure (39 C.F.R. § 3001 *et seq.*) governed litigant access to postal information, the Postal Service was authorized to routinely apply FOIA exemptions -- such as are reflected in 39 U.S.C. § 410(c)(2) -- in the broader world outside of those dockets, even while such dockets were pending. This is still the case today under the PAEA.

<sup>12</sup> Either under FOIA § 552(b)(4) or 39 U.S.C. § 410(c)(2), for instance.

<sup>13</sup> The injury could be to the Postal Service, to postal customers (mailers or addressees), or others to whom postal records pertain.

of a government agency competing in commercial markets. When the Postal Service provides information to the Commission necessary for the exercise of its regulatory responsibilities, this subsection authorizes the Postal Service to notify the Commission if the disclosure of such information could result in commercial injury. In the event that questions arise, section 504(g)(3)(A) authorizes the Commission to establish procedures for resolving whether it is necessary to make certain commercially (or otherwise) sensitive information public in the course of carrying out its regulatory responsibilities. The statute gives the Commission latitude to make such information public, to make it available under protective conditions, or to limit disclosure to *in camera* inspection.<sup>14</sup>

Subsection 504(g) was not enacted for the purpose of sacrificing the public interests protected by 39 U.S.C. § 410(c) on the altar of “transparency.” Instead, subsection 504(g)(3)(A) incorporates the exemptions in 5 U.S.C. § 552(b) and 39 U.S.C. § 410(c) as factors for the Commission to consider in balancing the risk of economic injury vs. the goal of enhanced accountability. Thus, contrary to page 5 of the PR’s motion, section 504(g)(3)(A) does not direct the Commission to put its thumb on the scales to create a bias in favor of public disclosure.

The Postal Service respects the Commission’s responsibility to assess such matters as whether competitive postal products are being subsidized with earnings from market-dominant postal products and whether their prices

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<sup>14</sup> Procedures to implement 39 U.S.C. § 504(g)(3)(A) were proposed in the form of rules submitted for notice and comment in PRC Docket No. RM2008-1, Order No. 96, Notice of Proposed Rulemaking to Establish a Procedure for According Appropriate Confidentiality (August 13, 2008).

generate sufficient revenue to cover their costs. When appropriate inquiries are undertaken by the Commission, either periodically or in response to questions from outside parties, consistent with past practice, section 504 (g)(3)(A) authorizes the Commission to establish procedures limiting access to certain postal data to parties registered as participants in its dockets, and to restrict access to certain agents of those parties under protective conditions. Under appropriate circumstances, this degree of “transparency” may best serve the overarching interest in accountability.

**5. The PR Motion Does Not Accurately Describe Public Reporting By the Postal Service’s Competitors**

While ultimately claiming on page 23 to reject the relevance of what information the Postal Service’s competitors disclose and what information they shield to the issue of how Postal Service data should be treated, the PR Motion on page 22 also attempts to describe the reporting practices of those competitors. Needless to say, the Postal Service does not agree that the level and type of reporting by its competitors is irrelevant to consideration of what level and type of reporting is appropriate for the Postal Service’s competitive products. It is not possible to expect a level playing field if the Postal Service suffers needless commercial harm by virtue of disclosure requirements not shared by its competitors. On that basis, when it comes time to reach the merits of the treatment of specific postal information, the Postal Service views the examination of how comparable information is treated by its competitors as both useful and

necessary. The attempt of the PR Motion to describe such reporting practices, however, is not accurate.

For example, the PR Motion claims:

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).

PR Motion at 22. This passage mischaracterizes FedEx's product segments. FedEx Express is not "roughly comparable to Express Mail." Rather, it is more inclusive: it embraces all of FedEx's domestic air products ranging from overnight to 3-day. Nor is FedEx Ground "roughly comparable to Priority Mail," or FedEx Freight "roughly comparable to Parcel Select." FedEx Ground is more inclusive, with elements of Priority Mail, Parcel Select, Parcel Return Service, and market dominant Package Services, and the freight market is something distinct from any of our current mail service offerings. Conspicuously absent, of course, is any discussion of UPS reporting practices.

It is perhaps not surprising that the PR Motion is not entirely reliable as a source of information on competitor reporting, when the same motion discounts the relevance of that information. Since there is no statutory authority for the Commission currently to make the public disclosure which the PR Motion seeks, the Postal Service sees no point in attempting to address the matter comprehensively in this opposition. At the appropriate

time, however, accurate assessment of the type of information cited in the PR Motion will be highly useful in conducting the type of balancing test specified in section 504(g).

### **Conclusion**

Rather than seeking improvements in the public version materials filed by the Postal Service, the PR Motion seeks blanket disclosure of product-level competitive product data. As explained above, not only would this be the wrong solution to the problem identified in the PR Motion, but it is one for which the Commission lacks the necessary statutory authority. The PR Motion to disclose the nonpublic annex material should be denied.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing document in accordance with Section 12 of the Rules of Practice and Procedure.

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