

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

MAIL PROCESSING NETWORK RATIONALIZATION
SERVICE CHANGES, 2011

Docket No. N2012-1

**UNITED STATES POSTAL SERVICE
ANSWER IN OPPOSITION TO MOTION FOR TERMINATION OF LIBRARY
REFERENCES USPS-LR-N2012-1/NP1 and NP14'S NON-PUBLIC STATUS**

Pursuant to 39 C.F.R. 3001.21, the United States Postal Service (Postal Service) files its Opposition to Motion for Termination of Library References USPS-LR-N2012-1/NP1 and NP14's Non-Public Status filed by Congressman Gerald E. Connolly (Motion).

Representative Connolly (or Movant) has not intervened in these proceedings, and therefore lacks standing to bring the present Motion. Further, if Representative Connolly did have standing, the Motion does not satisfy the requirements of a request for termination of non-public status as required by the Commission's rules. Finally, the Postal Service has made a sufficient showing that the nature and extent of the commercial injury that would be caused by public availability of the library references at issue outweigh the public interest in this instance.

I. Background

On December 9, 2011, the Postal Service filed its Notice of Filing of Applications for Non-Public Status for Certain Library References. Included in the Library References covered by the Notice was USPS-LR-N2012-1/NP1, Market Research Materials (Non-Public). On March 6, 2012, the Postal Service filed its Notice of Filing Library Reference USPS-LR-N2012-1/NP14, Non Public "All Sources" Quantitative

Market Research Materials. On March 13, 2012, Representative Connolly filed a Motion for Termination of Non-Public Status of Library References USPS-LR-N2012-1/NP1 and NP14.

The materials in USPS-LR-N2012-1/NP1 designated as non-public contain foundational (Category 2) information collected from market research respondents and customers of the Postal Service., i.e., customer specific information regarding past mailing history and future mailing plans. The materials in USPS-LR-N2012-1/NP14 designated as non-public contain disassociated (Category 5) materials for market research not relied upon in this docket (“All Sources Research”), but resembles in certain design aspects the market research contained in USPS-LR-N2012-1/NP1.

II. Representative Connolly Lacks Standing to Bring the Motion

Under the rules applicable to this proceeding,¹ Representative Connolly lacks standing to bring his Motion before the Commission. A party in this proceeding is defined by the Commission rules as the Postal Service, a complainant, an appellant, or a person who has intervened in this proceeding.² Representative Connolly does not fall into any of these categories; hence, he is not a party. Further, as the Presiding Officer identified in POR No. N2012-1/19, “any *party* may seek a change in protective status by providing specific and detailed statements as to why the materials should be made public.”³ As such, Representative Connolly lacks standing to bring this Motion.

¹ See 39 C.F.R. § 3001.71 (“The Rules of General Application in subpart A of [39 C.F.R. Part 3001] are applicable to proceedings on requests subject to this subpart.”). As such, the rules governing intervention discussed in this section apply to the current proceeding.

² 39 C.F.R. § 3001.5(g).

³ POR No. N2012-1/19 at 1 (March 6, 2012) (emphasis added).

Representative Connolly has not formally intervened in this matter. The Commission rules provide that formal Intervention can be made by a person claiming an interest of such a nature that intervention is allowed by the Postal Reorganization Act (84 Stat. 719, title 39, U.S.C.) as amended, or appropriate to its administration. A person filing a timely notice of intervention becomes a party to the proceedings, subject to a determination by the Commission that party status is not appropriate under the Act.⁴ The Commission set a deadline of December 30, 2011 for filing of notices of intervention.⁵ Representative Connolly has not filed such a notice of intervention, nor any motion for late acceptance.

To the extent that the Movant is attempting to intervene in this matter through the instant Motion, the effort must fail. Even assuming that the Motion is a sufficient description of the nature and extent of the Movant's interest in the issues to be decided as required for intervention under 39 C.F.R. § 3001.20(a), it fails in other pertinent and material respects to meet the requirements of 39 C.F.R. § 3001.20. For example, the Motion does not describe the classifications of postal service the Movant utilizes or his position with regard to the changes proposed by the Postal Service.⁶ Further, while the Motion describes why the Movant is interested in, and wishes to disclose publicly, the two library references, it fails to disclose the Movant's position on the proposed changes at issue in this proceeding.⁷ While the Motion asserts that the Movant needs access to the non-public information to formulate a position on the issues facing the Postal

⁴ 39 C.F.R. § 3001.20(e).

⁵ Order No. 1027 (Dec. 7, 2011).

⁶ 39 C.F.R. § 3001.20(b).

⁷ *Id.*

Service, the Motion resorts to speculation as to the eventual outcome of the proceedings.⁸ In short, the Motion to Terminate does not provide the information required for formal intervention under 39 C.F.R. § 3001.20.

The Commission's rules also provide that a person may appear as a limited participator and may, *inter alia*, present evidence, be cross-examined and file briefs or proposed findings.⁹ However, as the Motion fails to "[s]et forth the nature and extent of the intervenor's interest in the proceeding," the Motion also fails to meet the requirements for limited participation.¹⁰

This Motion, if recognized at all by the Commission, should be considered an informal expression of Representative Connolly's views under 39 C.F.R. § 3001.20b, which provides that a person may file with the Commission an informal written statement of views, setting forth a concise statement of the issue or issues to which the comments apply and a clear statement of views, opinions or suggestions which the person wishes to lay before the Commission.¹¹ As such, the Motion could be made a part of the Commission's files, but does not require any further action by the Commission.

III. The Postal Service Has Shown Sufficient Justification for Non-Public Treatment of Library References USPS-LR-N2012-1/NP1 and NP14

In determining whether to publicly disclose non-public materials filed by the Postal Service, the Commission must balance "the nature and extent of the likely commercial injury identified by the Postal Service against the public interest in

⁸ 39 C.F.R. § 3001.20(b).

⁹ 39 C.F.R. § 3001.20a.

¹⁰ 39 C.F.R. § 3001.20a(a).

¹¹ 39 C.F.R. § 3001.20b.

maintaining the financial transparency of a government establishment competing in commercial markets.”¹² In determining whether to disclose non-public materials in which the Commission determines a third-party has a proprietary interest, the Commission shall balance the interests of the parties based on Federal Rule of Civil Procedure 26(c).¹³

The Commission’s rules further require that, whenever the Postal Service files non-public materials with the Commission, the Postal Service must also file an application for non-public treatment of the materials, and include in the application a specific and detailed statement setting forth eight factors supporting the application for non-public treatment.¹⁴

The Postal Service has satisfied the requirements outlined in 39 C.F.R. § 3007.21 and Order No. 225 with respect to its applications for non-public treatment of Library References USPS-LR-N2012-1/NP1 and NP14.¹⁵ As explained in the respective applications, both library references at issue contain commercially sensitive information, including the Postal Service’s proprietary data describing competitive product performance and market research on specific market segments. Further, USPS-LR-N2012-1/NP1 contains customer specific responses regarding actual mail

¹² 39 U.S.C. § 504(g)(3)(A). *See also* 39 C.F.R. § 3007.33(a).

¹³ 39 C.F.R. § 3007.33(b). Under this rule, the decision whether to allow public disclosure is based on a determination whether the Postal Service has shown "good cause" to protect the third party materials, which in this case would be left to the discretion of the Commission. *See also* 39 U.S.C. § 504(g)(3)(B).

¹⁴ 39 C.F.R. § 3007.21.

¹⁵ PRC Order No. 225, Final Rules Establishing Appropriate Confidentiality Procedures, Docket No. RM2008-1, June 19, 2009.

volume mailed in the past and projections of what would be mailed in a post-implementation environment.¹⁶

With respect to the commercially sensitive information, the Postal Service has met the requirements of 39 U.S.C. § 504(g)(3)(A) and 39 C.F.R. § 3007.33(a). Namely, the Postal Service has shown that the nature and extent of the likely commercial injury caused by its competitors obtaining product performance data and segment-specific market research outweighs the public interest in financial transparency with respect to this data.

With respect to the respondent-specific data contained in USPS-LR-N2012-1/NP1, the Postal Service has met the requirements of 39 U.S.C. § 504(g)(3)(B) and 39 C.F.R. § 3007.33(b) by showing that the balance of interests of the parties favors non-public treatment of respondent specific information provided in the non-public materials. This is particularly true given the opportunity for intervenors to seek access to the non-public materials pursuant to 39 C.F.R. § 3007.40. Further, as explained in the Postal Service's application for non-public treatment, Commission practice has long supported maintenance of confidentiality of survey respondents' specific information.

As the Postal Service explained in its applications for non-public treatment, the library references contain commercially sensitive data and should be treated as non-public pursuant to 39 C.F.R. § 3007.21 and Order No. 225.

IV. The Motion is Procedurally and Substantively Deficient and Should be Denied

Pursuant to 39 U.S.C. § 3001.31, a request that the Commission publicly

¹⁶ The Application for Non-Public Treatment of USPS-LR-N2012-1/NP14 asserts that this reference also contains respondent specific information. However, the Postal Service has realized that respondent-specific information is aggregated to customer segment and application levels in this library reference.

disclose non-public materials must include “a specific and detailed statement justifying why the non-public materials should be made public, giving specific recognition to any pertinent rationale(s) provided in the application for relief submitted pursuant to §3007.21 or § 3007.22.” In other words, the Commission’s rules require that the Motion give specific recognition to the rationales provided by the Postal Service in its applications for non-public treatment, which Movant fails to do.

For the reasons discussed below, the Motion does not provide “fact or argument sufficient to tip the commercial injury versus financial transparency balancing test provided by 39 C.F.R. § 3007.33 in favor of public disclosure,”¹⁷ nor does it provide any reason to disregard the third-party interests at stake. The Motion is insufficient to rebut the presumption of non-public treatment of the library references.

a. The Motion Ignores Commission Guidance Regarding Applications to Terminate the Non-Public Status of Library References

Similar to the situation described in Presiding Officer’s Ruling No. N2012-1/19, the Movant did not first review the library references at issue prior to filing his Motion. As the Commission explained in that ruling, “[i]n general, it would be advisable for any party seeking to unseal a library reference to review and become familiar with the material under seal prior to filing any future motion.”¹⁸ Had Representative Connolly first timely intervened in this case and then taken the step of seeking access to the non-public materials pursuant to 39 C.F.R. § 3007.40 as the Commission suggests prior to

¹⁷ POR No. N2012-1/19 at 6 (March 6, 2012).

¹⁸ *Id.*

seeking termination of non-public status, his arguments in favor may have been “better informed . . . as to whether or not the material requires protective treatment.”¹⁹

b. The Motion Does Not Satisfy the Applicable Rules for Requesting Disclosure of Non-Public Information

The Motion asserts that there is value in the public and policy makers gaining access to information regarding the revenue impact of the Postal Service’s proposed revision of service standards at issue in this proceeding.²⁰ However, the Motion does not provide any “specific and detailed statement justifying why the non-public materials should be made public, giving specific recognition to any pertinent rationale(s) provided in the application for relief submitted pursuant to §3007.21 or § 3007.22.”²¹

Instead, the Motion acknowledges that the Postal Service has asserted that release of the information could provide an advantage to its competitors, but fails to address that very issue.²² Nowhere does the Motion address the Postal Service rationales that disclosure would (a) reveal confidential information collected from market research respondents and Postal Service customers under conditions of confidentiality; and (b) give competitors of the Postal Service an advantage in targeting market segments with an advertising program that emphasizes the positive vectors of its own

¹⁹ *Id.*

²⁰ Motion at 2. To the extent that Representative Connolly is seeking access to the materials on behalf of legislators for policymaking purposes, Representative Connolly should coordinate with the responsible Oversight Committee Chair. The Commission’s proceedings are not intended as a method for securing information about the Postal Service by individual members Congress.

²¹ 39 U.S.C. § 3001.31.

²² Motion at 3.

products with enhanced foreknowledge of what is important to the target customer segment.²³

Further, the Motion fails to address the interests of the Postal Service in protecting proprietary information obtained from third parties based upon assurances of confidentiality. Thus, the Motion does not meet the requirements of 39 C.F.R. § 3007.33(b).

Finally, the Motion does not consider that the library references contain commercially sensitive or proprietary information other than “revenue impact information.” However, given the Postal Service’s applications for non-public treatment, and the interrogatories to which these references have been identified as responsive, it is clear that the library references contain significant information not identified by the Motion as likely to provide public benefit. For example, USPS-LR-N2012/NP14 was produced in response to DFC/USPS-T12-9 which requested “all documents not already filed that relate to market research of any type” Further, the Postal Service’s historical competitive product performance contained in these references would not consist of “revenue impact information.” As such, the non-public designation of these materials should not be terminated.

²³ Had the Movant intervened in the case, he would have had standing to move for access to the non-public information pursuant to 39 C.F.R. § 3007.40. However, this Motion would also fail under that Rule, as it does not include a detailed statement providing justification for access, a list of affiliations with the requesting party, and, if expedited procedure is desired, an executed copy of protective conditions by the requestor. Further, the Commission’s practice has been to require persons seeking access to non-public materials to agree to use the materials solely for purposes of the applicable proceeding. Thus, even if Representative Connolly was allowed access to the non-public materials, he would have to agree in advance not to disseminate the materials to the public (at least absent a ruling allowing same).

V. Conclusion

In sum, if recognized at all, the Motion should be denied as it fails to comply with the requirements for early termination of non-public status. Further, the Motion fails to provide “fact or argument sufficient to tip the commercial injury versus financial transparency balancing test provided by 39 C.F.R. § 3007.33 in favor of public disclosure.”²⁴ For these reasons, the Postal Service respectfully requests that Representative Connolly’s Motion for Termination of Non-Public Status of Library References be denied.

Respectfully submitted,

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²⁴ POR No. N2012-1/19 at 6 (March 6, 2012).