

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Competitive Post Office Box)
Service Enhancements)

Docket No. MC2012-26

PUBLIC REPRESENTATIVE SURREPLY TO UNITED STATES POSTAL SERVICE
OPPOSITION TO MR. DAVID B. POPKIN'S REQUEST FOR A
PRESIDING OFFICER INFORMATION REQUEST

(August 6, 2012)

I. INTRODUCTION

On July 27, 2012, the Postal Service filed a pleading that provides legal argument in support of its new claim¹ that participants are absolutely barred from filing motions requesting that the Commission issue Information Requests to the Postal Service in virtually all circumstances.² It also takes issue with some hyperbole that the Public Representative used in a related filing. *Id.*

The Postal Service has only very recently shifted its position on this topic and has not expounded upon its position with legal argument until its Reply.³ It surprised the

¹ This claim is new in the sense that the Postal Service has only taken this position very recently in Commission proceedings and did not take this position during the rulemaking associated with the Commission's promulgation of rule 39 U.S.C. 3007.3. See e.g., Opposition of the United States Postal Service to Mr. David B. Popkin's Request for a Presiding Officer's Information Request, July 24, 2012 (Opposition); see also Docket No. RM2008-1, Comments of the United States Postal Service in Response to Second Notice of Proposed Rulemaking, April 27, 2009.

² Response of the United States Postal Service in Opposition to the Public Representative's Motion for Leave to File a Response, July 27, 2012 (Reply).

³ See Opposition at 3-5.

Public Representative to learn that this was not an oversight by the Postal Service, but rather intentional action that is contrary to current Commission practice and different from positions it has repeatedly taken in the past.⁴

As the Public Representative stated previously, it agrees with the Postal Service that an information request is not going to resolve the issues raised in this case.⁵ The Public Representative initially weighed in on this matter to protect the public's future ability to file motions requesting that the Commission ask the Postal Service for additional information. The Public Representative has a serious concern that without such citations and corresponding legal argument, the Postal Service's assertions could be chilling public participation in Commission proceedings. The Public Representative remains concerned that the unsophisticated litigant who filed the underlying motion for an information request is not familiar enough with Commission rules to cite the applicable legal provisions. Thus, the Public Representative is in the awkward position of filing this pleading while disagreeing with the underlying relief sought.

II. ARGUMENT

Below, the Public Representative responds to the Postal Service's argument that, in virtually all circumstances, participants are barred from filing motions requesting that the Commission issue information requests. That argument is not persuasive for six reasons. First, it does not comport with Commission practice and precedent. Second, the Commission's general motions practice rule allows participants to file motions for virtually any type of relief, including information requests. Third, the text of the rule 3007.3 and interpretive aids strongly suggest that its scope should not be

⁴ See *e.g.*, Docket No. RM2008-1, Comments of the United States Postal Service in Response to Second Notice of Proposed Rulemaking, April 27, 2009; Docket RM2010-9, Response of the United States Postal Service in Opposition to the Public Representative's Motion for Issuance of Information Request and Adjustment to Procedural Schedule, August 3, 2010.

⁵ See *e.g.*, Public Representative Response To United States Postal Service Opposition To Mr. David B. Popkin's Request For A Presiding Officer Information Request, July 26, 2012.

limited to situations where non-public information is at issue. Fourth, if the Commission limits rule 3007.3 to only those cases dealing with non-public information, the Commission would be acting in an *ultra vires* manner when it issues information requests of its own accord. Fifth, because the status of non-public information can change, adopting the Postal Service's argument would make rule 3007.3 extremely difficult to administer. Finally, public policy considerations support allowing participants to file motions for information requests.

A. Commission Practice and Precedent Supports Participants' Abilities to File Motions for the Issuance of Information Requests

Parties routinely file motions for information requests.⁶ The Commission or the Chairman routinely issues information request based on those requests.⁷ Such activity occurs in a wide variety of Commission proceedings, more than just the extremely limited circumstances cited by the Postal Service.⁸

It is important to note that the Postal Service's position in this case on the appropriateness of motions for information requests is new. The Postal Service previously did not object to the issuance of information requests on the grounds that

⁶ See *e.g.*, Docket No. R2012-8, Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. Motion for Issuance of Information Request, May 14, 2012; Newspaper Association of America Motion for Issuance of Information Request, May 14, 2012; Docket No. R2011-5, Public Representative Motion for Issuance of Information Request, April 19, 2012. The Postal Service did not file any non-public materials in these cases.

⁷ See *e.g.*, Docket No. R2012-8, Chairman's Information Request No. 3, May 15, 2012; Docket No. R2011-5, Chairman's Information Request No. 1, April 22, 2011; see *also* Docket No. R2011-5, Response of the United States Postal Service to Public Representative Motion for Issuance of Information Request, April 26, 2011 ("the Public Representative filed a motion pursuant to Commission Rule 3001.21 requesting that the Commission direct the Postal Service to respond to six questions [T]he questions posed by the Public Representative were incorporated into a Chairman's Information Request issued on April 22, 2011...").

⁸ The Postal Service appears to argue that 3007.3(c) would render 3010.65(c) superfluous. See Reply at 5 n.11 and accompanying text. However, 3010.65(c) deals with requests for questions to be asked "during the public hearing." 39 CFR 3010.65(c). It does not address written information requests submitted to the Postal Service.

such requests were barred by Commission rules.⁹ Even in the proceeding giving rise to the Commission's promulgation of rule 3007.3, the Postal Service did not contend that the rule applies only to information requests for non-public information. Instead, it stated:

Under newly proposed rule 3007.3(b),^[10] any person would be permitted to file a motion asking the Commission to issue a data or information request to the Postal Service when that person believes the requested materials are likely (within the meaning of proposed rule 3007.2) to materially assist the Commission in its conduct of proceedings, in the preparation of reports, or in the performance of its functions under title 39.¹¹

This statement appears to acknowledge that participants in Commission proceedings may have valuable insight into the Commission's responsibilities to "assist[ing] the Commission in its conduct of proceedings, in the preparation of reports, or in the performance of its functions under title 39." *Id.* It also appears to recognize that such insight is not limited to only those circumstances where non-public information is at issue.

Additionally, in that rulemaking proceeding, Valpak's comments succinctly recite the history of motions for information requests. It states, with respect to proposed rule 3007.3:

This proposed provision apparently derives from Valpak's motions practice in Docket No. ACR2008 (see Docket No. ACR2008, Valpak Motion for Issuance of Commission Information Request Concerning Core Costing Data on Detached Address Labels). See, e.g., Order No. 194, p.

⁹ See e.g., Docket RM2010-9, Response of the United States Postal Service in Opposition to the Public Representative's Motion for Issuance of Information Request and Adjustment to Procedural Schedule, August 3, 2010; see also Docket RM2010-9, Public Representative Motion for Issuance of Information Request and Adjustment to Procedural Schedule, July 23, 2010.

¹⁰ Proposed Rule 3007.3(b) was renumbered as Rule 3007.3(c) in the Commission's final rule.

¹¹ Docket No. RM2008-1, Comments of the United States Postal Service in Response to Second Notice of Proposed Rulemaking, April 27, 2009.

14. See *also* Docket No. RM2008-4, Postal Service Reply Comments, pp. 4-5.

Although the Commission declined to permit parties to file discovery directly with the Postal Service, Valpak is hopeful that the Commission's rules could work well, assuming the Commission acts promptly on such motions to direct responses from the Postal Service, and then monitors Postal Service responses to ensure that they are complete and timely.¹²

Thus, it would be contrary to Commission practice and precedent to bar participants from filing motions requesting that the Commission issue information requests for any types of materials – public or non-public.

B. The Commission's General Motions Practice Rule Allows Participants to File Motions for Information Requests

The Postal Service's argument that participants are barred from filing motions requesting that the Commission issue Information Requests fails to take into account the Commission's general procedural rule allowing for motions practice. Rule 3001.21(a) states that:

An application for an order or ruling not otherwise specifically provided for in this part shall be by motion. Motions shall set forth with particularity the ruling or relief sought, the grounds and basis therefor, and the statutory or other authority relied upon, and shall be filed with the Secretary and served

39 CFR 3001.21. This general provision allowing for motions practice does not carve out an exception barring motions for the issuance of information requests. Indeed, sophisticated parties who file motions for the Commission to issue information requests

¹² Docket No. RM2008-1, Valpak Direct Marketing Systems, Inc. and Valpak Dealer's Association, Inc. Initial Comments Regarding Second Notice of Proposed Rulemaking to Establish a Procedure for According Appropriate Confidentiality, April 27, 2009.

routinely cite this rule in their motions.¹³ Unsophisticated litigants may not have the capacity to conform with such citation practice. However, the failure of unsophisticated litigants to cite proper legal authority should not bar them from being allowed to request otherwise appropriate relief.

C. The Text of Rule 3007.3 and Its Interpretive Aids Strongly Suggest that Its Scope Should Not Be Limited To Situations Where Non-public Information Is At Issue.

The Commission also promulgated a specific regulation, 39 CFR 3007.3 expressly allowing for parties to file motions for the issuance of information requests. That rule, 39 CFR 3007.3 even cross references rule 39 CFR 3001.21. However, the Postal Service appears to argue that the Commission should limit the scope of 39 CFR 3007.3 disregard based on the title of part 3007.¹⁴ Based on part 3007's title, the Postal Service asserts, rule 3007.3's allowance for information request motions is limited to non-public materials.

It is important to note that the Postal Service is not arguing that the title of the rule 3007.3 governs its scope. The title of rule 3007.3 is "Data or Information Requests." Nowhere does the rule title state or suggest that it applies to only non-public materials.¹⁵ Instead, the Postal Service erroneously argues that the title of the grouping of rules located in part 3007 limits its scope to only information requests for "non-public"

¹³ See e.g., Docket No. R20012-8, Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. Motion for Issuance of Information Request, May 14, 2012; Newspaper Association of America Motion for Issuance of Information Request, May 14, 2012. The Postal Service did not file any non-public materials in these cases.

¹⁴ A "part" is a grouping of rules that has a separate title to make it easier for the reader to find regulations. They are not regulations themselves.

¹⁵ In contrast, rules 3007.10 through 3007.60 do use the term "non-public" in the rule title. The remaining rules in part 3007, 39 U.S.C. 3007.61 and 3007.62 use the term "non-public" in the text of the rule. If indeed all of the rules in part 3007 applied only to non-public information, the Commission would not have had to use the term "non-public" in those rule title headings or in the rule text. Such status would have been implied.

information. This argument is not persuasive for three reasons. First, the generalized title headings of groups of regulations should not be used to interpret the scope of particular rules. Second, the text of the Commission's rules clearly dictate that rule 3007.3 is not limited to non-public information. Third, the Commission's section-by-section analysis and preamble to rule 3007.3 strongly suggest that rule 3007.3 is not limited to non-public materials.

1. The Content of the Commission's Rules, Rather than the Generalized Titles of Groups of Regulations, Should Be Given Weight in Interpreting Their Scope

The Commission should not place too much weight on the titles of groups of rules to interpret a particular rule's scope.¹⁶ They are far from perfect at describing their complete contents. For example, all of the rules found in part 3007, along with all of the Commission's rules (Parts 3000 to 3060) fall under a grouping of rules called "subchapter A."¹⁷ Subchapter A rules are titled "Personnel." If the Commission is to rely on the title of subchapter A to interpret the scope of those rules falling under subchapter A, one would have to come to the conclusion that all of subchapter A rules are dealing with Postal Regulatory Commission personnel and do not apply to the Postal Service. This absurd result should be avoided, and the Postal Service should recognize that the titles of groups of the Commission's rules are not highly specific in

¹⁶ The Public Representative is aware of no "tenets of statutory interpretation" suggesting that the Commission interpret its rules by ignoring the text of the rules and instead looking at the title of the part in which the rule exists. *Contra Brotherhood of Railroad Trainmen v. Baltimore & O. R. Co.*, 331 U.S. 519, 529 (1947) ("Factors of this type have led to the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text...[T]hey cannot undo or limit what the text makes plain."); *see also Garner v. Houck*, 312 S.C. 481, 486 (1993) ("Although the title and headings are part of the statute, they may not be construed to limit the plain meaning of the text... For interpretative purposes, the title of a statute and heading of a section are of use only when they shed light on some ambiguous word or phrase and as tools available for resolution of doubt, but they cannot undo or limit what the text makes plain.").

¹⁷ A "subchapter" is a grouping of "parts" of regulations that has a separate title to make it easier for the reader to find regulations. They are not regulations themselves.

their details. The content of the rules, rather than their generalized titles of groups of regulations, should be given weight in interpreting the scope of Commission rules.

2. The Commission Should Interpret the Scope of Rule 3007.3 by Referring to the Rule Referencing its Scope

The Commission should interpret the scope of rule 3007.3 by referring to the rule referencing its scope. The Commission's rule addressing the scope of part 3007 is found in rule 3007.2. That rule states:

The Commission or its authorized representative may require the Postal Service to provide any information, documents, and things in its possession or control, or any information, documents, and things that it can obtain through reasonable effort and expense, that are likely to materially assist the Commission in its conduct of proceedings, in its preparation of reports, or in performance of its functions under title 39 of the U.S. Code. Information, documents, and things the Postal Service may be required to provide, include, but are not limited to, paper hard copy and electronically stored data and materials—including writings, notes, e-mails, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation into a reasonably usable form; or any tangible things.

39 CFR 3007.2. That broad rule does not appear to limit the scope of part 3007 to non-public information. Indeed, it does not appear to discuss any distinction between public and non-public materials, as argued by the Postal Service.

To allay any doubt that the rule 3007.3's scope is governed by rule 3007.2, rule 3007.3 actually cross-references rule 3007.2 as the foundation for its scope limitations. Rule 3007.3(a) states that the "Commission or its authorized representative may issue data or information requests to the Postal Service seeking information, documents, and

things covered by § 3007.2.” 39 CFR 3007.3(a).¹⁸

3. The Commission’s Section-by-Section Analysis and Its Preamble Suggest that Rule 3007.3 is not Limited to Non-Public Materials.

The Commission’s section-by-section analysis and its preamble of its rules strongly suggest that rule 3007.3 is not limited to non-public materials.¹⁹ In the Commission’s section-by-section of rules 3007.3 and 3007.2, the Commission stated:

Rule 3007.3 Data or information requests. This rule provides that the Commission, or its authorized representative, may issue data or information requests to the Postal Service concerning materials covered by rule 3007.2. Under this rule, a person may request that the Commission issue such a request....

Id. The Commission further stated, with respect to rule 3007.2 that it was intended to encompass a wide variety of materials. The Commission confirmed:

Rule 3007.2 Scope. This provision sets forth the scope of information, documents, and things that the Commission (or its authorized representative) may require the Postal Service to provide in connection with the Commission’s responsibilities under title 39. It is intended to encompass information, documents, and things in whatever form likely to materially assist the Commission in fulfilling its statutory responsibilities.

Id. None of these Commission statements suggest that these rules are intended to be limited to non-public information. Rather, they convey a broad intent to allow the Commission to request information (and by extension allow parties to ask the Commission to request information) that is “likely to materially assist the Commission in fulfilling its statutory responsibilities.” *Id.*

¹⁸ Paragraph (c) of rule 3007.3 appears to allow parties to request that the Commission issue an information request under paragraph (a). It would be quite difficult for the Postal Service to argue that the scope of paragraph (a) of rule 3007.3 was governed by rule 3007.2 but paragraph (c) was limited to only non-public materials.

Finally, it is useful to review the Commission's preamble regarding the second proposed rulemaking regarding rule 3007.3. There, the Commission stated the following:

[I]n Docket No. ACR2008, Valpak asked the Commission to issue an information request. Valpak "believes that participants should be permitted to request information directly from the Postal Service on the record...." *Id.* at 1. Since participants' requests may be burdensome, duplicative, irrelevant, or involve objections or confidentiality concerns for the Postal Service, the Commission formalizes the process by which a person may request the Commission to issue an information request by changing proposed rule 3007.3. Under proposed rule 3007.3(b)^[20], any person may make a motion requesting that the Commission issue an information request to the Postal Service. Such a motion must include a detailed statement of support explaining how the materials sought will be relevant and material to the Commission's duties under title 39.²¹

It is important to note that Valpak's Motion for an Information Request in Docket No. ACD2008 was seeking costing data on detached address labels.²² The Public Representative is not aware of any non-public data regarding such information.

The Commission further stated in its preamble with respect to its second proposed rulemaking on rule 3007.3:

When the Commission identifies information that it needs for the preparation of reports, for the conduct of "proceedings," or other functions under the PAEA, the normal procedure contemplated for obtaining that information will be the issuance of data or information requests under

¹⁹ Docket No. RM2008-1, Order No. 225: Final Rule Establishing Appropriate Confidentiality Procedures, June 19, 2009 at 11.

²⁰ Proposed Rule 3007.3(b) was renumbered as Rule 3007.3(c) in the Commission's final rule.

²¹ Order No. 194 - Second Notice of Proposed Rulemaking to Establish a Procedure for According Appropriate Confidentiality, March 20, 2009 at 14 (footnote omitted) (Second Proposed Rulemaking).

²² Docket No. ACD2008, Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. Motion for Issuance of Commission Information Request Concerning Core Costing Data on Detached Address Labels, January 20, 2009.

proposed rule 3007.3. Data or information requests in the proposed rules are similar to requests that were issued in the former Postal Rate Commission's international mail dockets as part of its preparation of its reports to Congress on international mail. The proposed rules contemplate that, **where it perceives it to be necessary**, the Postal Service or third party with a proprietary interest in the materials would file an application for non-public treatment under proposed rule 3007.20 with regard to data or information provided in response to a request issued by the Commission.

Second Proposed Rulemaking at 16-17 (emphasis added). This preamble statement seems to suggest that responses to information requests issued under 3007.3 are not always going to contain non-public information. Thus, it does not appear as though the Commission intended for the scope of rule 3007.3 to be limited to requests to non-public materials.

D. The Commission's Authority to Issue Information Requests is More Broad than the Postal Service Implies

Another issue with the Postal Service's interpretation of rule 3007.3 as applicable only to requests for non-public materials is its internal inconsistency. The Postal Service concedes that the Commission has the ability to issue information requests in a wide variety of dockets.²³ However, it does not explain the basis for that Commission authority. If the Commission's authority to issue information requests were derived from 39 CFR 3007.3, and the Postal Service's argument were correct (i.e., that 39 CFR 3007.3(c) is limited to non-public information) then the Commission's authority to issue information requests would also be limited to circumstances where the Commission is requesting non-public information. Thus, to keep 39 CFR 3007.3 internally consistent, and to ensure that the Commission is not operating in an *ultra vires* manner, the

²³ Opposition at 3. It is a peculiar distinction to make in that it would be acceptable for the Commission to ask *sua sponte* for information that it believes it requires, but other parties cannot make suggestions as to what information should be obtained.

Commission should interpret the scope of 3007.3 more broadly than only applying to information requests for non-public information.

E. The Fact that the Status of Non-Public Information Can Change Supports a Finding that Rule 3007.3 Is Not Limited to Non-public Information

The Postal Service's interpretation of 3007.3 falls apart when one considers the nature of non-public information and the Commission's responsibilities under 39 U.S.C. 504(g). Under the Commission's rules, the status of information initially filed as non-public information can be changed by the Commission. The Commission summarized the procedures as follows:

The non-public materials would initially be protected from disclosure until the Commission decides to disclose or grant access to the non-public materials, following a request for termination of non-public status, a request for access during a proceeding, or a request for access to materials relevant to compliance under proposed rules 3007.31, 3007.40, or 3007.50, respectively. Before acting on its own initiative, or in response to a request to require disclosure of or access to non-public materials, the Commission will give interested parties an opportunity to respond.

Second Proposed Rulemaking at 17. Thus, although the Postal Service intends for materials to be non-public, the Commission can make them public. Put another way, whether materials are truly non-public is not determined until after they are filed. Additionally, a party is not necessarily going to be aware of whether the information it seeks is going to result in a Postal Service application for non-public treatment. Therefore, adopting the Postal Service's interpretation of rule 3007.3 would make it extremely difficult to administer.

F. Public Policy Considerations Support a Finding that Rule 3007.3 Is Not Limited to Non-public Information

As a policy matter, the Postal Service asserts that participants should not feel disenfranchised because they can submit their concerns as comments. Reply at 5.

There are several problems with this suggestion. First, many Commission proceedings are under enormous time pressure. If parties were required to wait until comment deadlines prior to seeking information, this could severely slow Commission decisions. In other situations, like the Commission's annual compliance determination, the Commission has statutory deadlines it must meet. Waiting until the comment period ends prior before obtaining necessary information from the Postal Service could result in the Commission not having all relevant information prior to mandatory deadlines. Second, Postal Service responses to information requests inform participant comments. Typically, Commission information requests issued prior to comment deadlines result in more meaningful and insightful comments from participants. This is because participants' comments are based on more complete information and a better understanding of the Postal Service's request or proposal.

Finally, it is important to keep in perspective the nature of motions for information requests. These motions are simply requests that the Commission issue an information request to the Postal Service. The Commission can always deny or delay ruling on such motions. There is no burden on the Postal Service to provide the requested information unless the Commission makes a finding that the request is justified.

III. CONCLUSION

For the reasons discussed above, the Commission should clarify that participants may file motions requesting that the Commission issue information requests in proceedings such as this one.

Respectfully Submitted,

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