

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

COMPETITIVE PRODUCT PRICES)
PARCEL SELECT & PARCEL RETURN SERVICE) Docket No. MC2014-1
PARCEL SELECT & PARCEL RETURN SERVICE CONTRACT 5)

COMPETITIVE PRODUCT PRICES)
PARCEL SELECT & PARCEL RETURN SERVICE CONTRACT 5) Docket No. CP2014-1
(MC2014-1))
NEGOTIATED SERVICE AGREEMENT)

**OPPOSITION OF AMAZON FULFILLMENT SERVICES, INC.,
TO MOTION OF MARK JAMISON REQUESTING ACCESS
TO NON-PUBLIC MATERIALS**

(November 27, 2013)

Pursuant to 39 C.F.R. § 3007.50(b)(1), Amazon Fulfillment Services, Inc. (“Amazon”) respectfully submits this answer to the November 21 Motion of Mark Jamison Requesting Access to Non-Public Materials. Amazon is a party to the contract Mr. Jamison seeks to obtain in full. For the reasons explained here, the motion should be denied.¹

The non-public version of the contract contains specific commercial information—including specific postal price and escalation terms, volume projections and ZIP code and implementation information—that has extreme competitive sensitivity

¹ This pleading is timely. *See* 39 C.F.R. § 3007.50(b)(1) (establishing three-day period for answering to a motion for access to non-public materials when the motion is accompanied by a signed certificate of compliance). The three-day period does not include Saturdays and Sundays, however. 39 C.F.R. § 3001.15.

to Amazon. The Commission’s rules specifically require, as a condition for disclosure of non-public information to third persons, that the movant provide a “detailed statement” of “justification for access” to the information, including “reference to the materials’ relevance to compliance under” chapter 36 of title 39, U.S. Code. 39 C.F.R. § 3007.50(a)(1). Mr. Jamison has not satisfied—and cannot satisfy—that requirement.

BACKGROUND

A. Amazon

Amazon Fulfillment Services, Inc., is a subsidiary of Amazon.com, Inc., an on-line e-commerce and mobile e-commerce retailer. Through its websites, Amazon.com offers its customers millions of unique products to be sold by the company and by third parties across dozens of product categories. Customers access Amazon’s websites directly and through the company’s mobile websites and apps. Amazon fulfills customer orders in several ways, including through fulfillment centers and warehouses, and through digital delivery. In the United States, Amazon ships its merchandise, and the merchandise of independent sellers who have contracted with Amazon to fulfill their orders, through the United States Postal Service and private carriers such as UPS and FedEx.

The global retail marketplace in which Amazon operates is intensely competitive. The company’s current and potential competitors include: (1) physical-world retailers, publishers, vendors, distributors, and manufacturers; (2) other online e-commerce and mobile e-commerce sites; and (3) media companies, web portals, comparison shopping websites, and web search engines, either directly or in collaboration with other retailers.

Principal competitive factors in Amazon's retail businesses include selection, price, and convenience, including fast and reliable fulfillment.

B. The Amazon-USPS Contract

The contract at issue is a negotiated contract between Amazon and the Postal Service for competitive parcel shipping services including Parcel Select and Parcel Return Service. These are competitive services not of general applicability within the meaning of 39 U.S.C. § 3632(b)(3). A novel feature of the contract is its provision for Sunday package delivery. Since November 10, 2013, the Postal Service has been providing Sunday delivery for Amazon in New York and Los Angeles, the two largest metropolitan areas in the United States. Amazon and the Postal Service plan to roll out the Sunday delivery service to a large portion of the U.S. population in 2014, and have disclosed that Dallas, Houston, New Orleans, and Phoenix will be among the additional geographies where the service will eventually be offered.

C. Mr. Jamison

The movant, Mark Jamison, is a retired Postal Service employee. According to previous filings by Mr. Jamison with the Commission, he was postmaster of Webster, North Carolina, for 14 years until his retirement from the Postal Service in 2012.

In the past few years, Mr. Jamison has expressed his views about his former employer in comments to the Commission, letters to the editor, and contributions to a postal blog on www.savethepostoffice.com. In that blog, Mr. Jamison has commented

that the “postal rate system has become a morass of embedded privilege,”² business mailers “are doing fine,”³ and the Postal Service is a “wholly owned subsidiary of Mailers Inc.”⁴ He has also opined, among other things, that PMG Donahoe lied in recent testimony to the Senate,⁵ and “Donahoe and the [Board of Governors] have demonstrated an unrestrained contempt for Congress, the rule of law, and most importantly, the American people.”⁶

Mr. Jamison did not participate in the MC2014-1 and CP2014-1 dockets in which the Commission approved the Amazon-Postal Service contract, and he does not claim that he needs access to the non-public version of the contract for the purpose of reopening these dockets. Rather, Mr. Jamison seeks access to the sealed documents under 39 C.F.R. § 3007.50, which allows persons to get access to non-public material for the purpose of challenging the lawfulness of postal rates, classifications or operating practices in the next annual compliance review proceeding under 39 U.S.C. § 3653. *See* 39 C.F.R. § 3007.50(a). Specifically, he asserts that he needs the non-public materials “for the purpose of conducting an independent evaluation of the contract to determine if it meets the terms and conditions asserted by the Postal Service in its filing and if the rates, fees, and/or services offered in the contract comport with section 3653 and specifically how this contract may relate to the obligations of universal service and service to rural areas under section 39 [U.S.C. §§] 403 and 404.”

² www.savethepostoffice.com/path-postal-nirvana-entitlement-program-mail-industry.

³ *Id.*

⁴ www.savethepostoffice.com/usps-wholly-owned-subsiidiary-mailers-inc.

⁵ www.savethepostoffice.com/shades-deception-pmg-testifies-senate.

⁶ www.savethepostoffice.com/its-presidents-day-good-bad-and-bog.

ARGUMENT

To gain access to a nonpublic document under Rule 3007.50, a movant must submit a “detailed statement providing justification for access, including reference to the materials’ relevance to compliance under chapter 36 of title 39 of the U.S. Code.” 39 C.F.R. § 3007.50(a)(1). “Any person requesting access must file a motion, which includes a statement justifying why access should be granted, and stating how the requested materials are relevant to the Commission’s annual determination of compliance under 39 U.S.C. 3653.” Order No. 225 in Docket No. RM2008-1 (June 19, 2009) at 17. Once such a showing has been made, the Commission, in “determining whether to grant a request for access to non-public materials relevant to compliance,” shall “balance the interests of the parties based on Federal Rule of Civil Procedure 26(c).” 39 C.F.R. § 3007.52; Order No. 194 in Docket No. RM2008-1 (March 20, 2009) at 29.

These standards require denial of Mr. Jamison’s motion for access. Disclosure of the non-public information at issue would cause competitive harm to Amazon as well as the Postal Service. This information includes the specific prices that Amazon must pay, the other pricing terms Amazon is subject to, and lists of the destination ZIP codes covered by the contract, including the specific ZIP codes where Amazon and the Postal Service may initiate Sunday delivery. The pricing information is obviously commercially sensitive; disclosure would give competitors of Amazon valuable insights into its cost structure.⁷ Like a company’s business or marketing plans, the ZIP code lists are also

⁷ The courts have repeatedly shielded analogous pricing and cost information from public disclosure. *Canadian Commercial Corp. v. Dept. of Air Force*, 514 F.3d 37 (D.C. Cir. 2008); *McDonnell Douglas Corp. v. U.S. Dept. of Air Force*, 375 F.3d 1182 (D.C. Cir. 2004); *Gulf & Western Indus., Inc. v. United States*, 615 F.2d 527 (D.C. Cir. 1979); *Shermco Indus., Inc. v. Secretary of the Air Force*, 613 F.2d 1314 (5th Cir. 1980); *MCI*

competitively sensitive information because they reveal the geographic areas and communities where Amazon and the USPS may next commence the Sunday delivery program, and reflect the strategy and potential timing for future implementation of the program.⁸ Accordingly, this material may not be disclosed to Mr. Jamison unless he satisfies 39 C.F.R. § 3007.50 and 3007.52.

Mr. Jamison has failed to make the threshold showing required by 39 C.F.R. § 3007.50(a)(1). The first of his purported justifications for gaining access to the non-public contract material—to evaluate whether the actual contract is consistent with the Postal Service’s description of the contract—proves too much. If this purported reason were sufficient, *every* document filed partly or wholly under seal would have to be open to public disclosure on demand, since sealing a document by definition prevents third parties from determining for themselves whether the sealed material comports with its public summary. This interpretation of Rule 3007.50(a)(1) would nullify the protection for non-public material offered by 39 C.F.R. Part 3007.

The second purported reason offered by Mr. Jamison—to determine whether the “rates, fees, and/or services offered in the contract comport with [39 U.S.C.] section 3653”—merely parrots the ultimate question to be decided in a section 3653 annual compliance review proceeding. 39 U.S.C. § 3652(a)(1), 3653(b). Here again, the

Worldcom, Inc. v. General Services Admin., 163 F.Supp.2d 28 (D.D.C. 2001); *Braintree Electric Light Dept. v. Dept. of Energy*, 494 F.Supp. 287 (D.D.C. 1980).

⁸ “Business and marketing plans by their nature usually contain information that would cause competitive harm if disclosed.” *National Community Reinvestment Coalition v. National Credit Union Admin.*, 290 F.Supp.2d 124, 135 (D.D.C. 2003); *see also Public Employees for Environmental Responsibility v. Office of Science and Technology Policy*, 2012 WL 3126778 (D.D.C. 2012) (organization’s “internal strategy for accomplishing its advocacy mission” should be shielded from public disclosure).

purported rationale is so broad and content-free that, were it approved, *any* request for access to non-public information could be couched in a way that satisfied the standard.

Mr. Jamison’s third rationale—to determine “how this contract may relate to the obligations of universal service and service to rural areas under section 39 403 and 404”—is no better. To the extent that Mr. Jamison’s point can be discerned, he seems to be suggesting that the Amazon-Postal Service contract might violate 39 U.S.C. §§ 403 and 404 because the contract does not offer Sunday delivery of Amazon packages to every town and hamlet in the United States, but only to a subset of ZIP codes. This theory, however, does not come close to stating a valid claim under 39 U.S.C. § 3653 or any of the other provisions of Title 39, including Sections 403 and 404. None of these provisions requires that each contract with a shipper for a competitive product apply to every ZIP code in the United States.

The Postal Service offers mail delivery to most addresses in the United States, but plainly is under no obligation to deliver to any of those addresses on Sunday. The operative Congressional funding resolutions have mandated six-day delivery, not seven. *See, e.g.*, Pub. L. No. 112-74, 125 Stat. 786, 884 (Dec. 23, 2011). Moreover, the Postal Service has no obligation to provide delivery on uniform terms without regard to cost: the universal service obligation (“USO”) is “tempered by, and subject to, reasonable economic and efficiency limitations.” PRC Docket No. PI2008-3, *Report on Universal Postal Service and the Postal Monopoly* (December 19, 2008) at 19. The Postal Service’s discretion to balance universality of service with cost and practicality recurs throughout the law: the Postal Service need only “serve *as nearly as practicable* the entire population of the United States,” 39 U.S.C. § 403(a), “maintain an *efficient* system

of collection, sorting and delivery of the mail nationwide,” *id.*, § 403(b)(1), and “establish and maintain postal facilities of such character and in such locations, that postal patrons throughout the Nation will, *consistent with reasonable economies of postal operations*, have ready access to essential postal services,” *id.*, § 403(b)(3) (emphasis added).

Consistent with these standards, “the Postal Service exercises considerable flexibility in determining how it delivers the mail.” *Report on Universal Postal Service and the Postal Monopoly, supra*, at 29. Thus, for example, the Commission or the courts have held that:

- The Postal Service need not offer overnight Express Mail letter service to all cities nationwide. PRC Op. R77-1 (1978) at 411-412. (At the time of the decision, the Postal Service offered Express Mail in only 47 cities. *Id.*)
- The Postal Service need not provide door delivery to detached houses in a development even though it provided door delivery to townhouses in the same development. *Parsons v. USPS*, 380 F.Supp. 815 (D.N.J. 1974).
- The Postal Service could require homeowners who moved their mailboxes more than six feet in from the curb to collect their mail at a local post office instead of receiving door or mailbox delivery. *Grover City v. USPS*, 391 F.Supp. 982 (C.D. Cal. 1975).
- The Postal Service could decline to provide mail delivery to a university-owned apartment for unmarried students, and provide only bulk delivery of mail to the university’s central mailroom. *Egger v. USPS*, 436 F.Supp. 138 (W.D. Va. 1977). This was so even though the Postal Service provided for

delivery to married students living in similar housing nearby, and to unmarried students living in similar university-owned apartments in another part of the same town. *Id.*

- The Postal Service could decline to provide free post office box service or general delivery service to homeless persons living in Seattle. *Currier v. Potter*, 379 F.3d 716 (9th Cir. 2004), *cert. denied sub nom. Seattle Housing and Resource Effort v. Potter*, 545 U.S. 1127 (2005).

Even more important, neither the courts nor the Commission have ever held that a Postal Service contract with an *individual* mailer must establish delivery to all of the addresses in the United States, or any substantial region of it. To the contrary, a provision added by the Postal Accountability and Enhancement Act of 2006 specifically authorizes the Postal Service to offer rates and classes “*not of general applicability in the Nation as a whole or in any substantial region of the Nation.*” 39 U.S.C. § 3632(b)(3) (emphasis added). *See also Newspaper Association of America v. PRC*, No. 12-1367 (D.C. Cir., Nov. 15, 2013) at 4 (upholding NSA with Valassis that offered postage discounts “only to new mailing programs initiated in markets in which Valassis has an *existing* program”). Indeed, the defining characteristic of both contracts for competitive products and NSAs for market dominant products is the rates or service are *not of general applicability*. 39 C.F.R. §§ 3010.5 and part 3015.⁹

⁹ The Commission has also held that trial or experimental service can be more limited in scope than permanent service. *See, e.g.*, Order No. 721, Docket No. MT2011-2, *Market Test of Experimental Product—Gift Cards* (April 28, 2011) (approving offer of an experimental competitive product, Gift Cards, via contract with a single credit card issuer). Docket No. MC2002-2, *Experimental Rate and Service Changes to Implement Negotiated Service Agreement with Capital One* (May 15, 20013) at 42 (“Experiments

Finally, in balancing the parties' interests on this issue, the Commission should consider the longer-term consequences of failing to enforce Rule 3007.50(a)(1) rigorously. Competitive package service, much of it under non-public contracts, has been a notable bright spot for the Postal Service in recent years. But users of the Postal Service's competitive package products have alternatives to the Postal Service—from UPS, FedEx, and smaller private carriers. Shippers who enter into rate and service contracts with these private carriers have the assurance of knowing that the terms of those contracts are not subject to public disclosure by regulators.¹⁰ If the price of contracting with the USPS were to include the risk that the confidential business information embodied in a contract will be available to any curiosity-seeker who professes an interest in the information for compliance review under 39 U.S.C. § 3653, the Postal Service's ability to compete effectively with private carriers for package delivery would be greatly reduced.

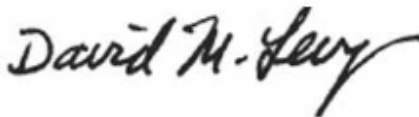
may limit participation, typically on a first-come first-served basis, or through limiting the geographic extent of the experiment.”).

¹⁰ Congress abolished the obligation of motor carriers to file their rates and services in tariffs almost 20 years ago. Trucking Industry Regulatory Reform Act of 1994, Pub. L. No. 103-31, 103rd Cong., 2nd Sess., § 206, 108 Stat. 1673, 1684-86 (1994).

CONCLUSION

Mr. Jamison's request for access to the non-public version of the Amazon-Postal Service contract must be denied for failure to establish good cause under 39 C.F.R. § 3007.50(a)(1).

Respectfully submitted,

A handwritten signature in black ink that reads "David M. Levy". The signature is written in a cursive, slightly slanted style.

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