

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

Before Commissioners:

Ruth Y. Goldway, Chairman;
Mark Acton, Vice Chairman; and
Robert G. Taub

Competitive Product Prices
Parcel Select & Parcel Return Service
Parcel Select & Parcel Return Service Contract 5

Docket No. MC2014-1

Competitive Product Prices
Parcel Select & Parcel Return Service Contract 5
(MC2014-1)
Negotiated Service Agreement

Docket No. CP2014-1

ORDER DENYING MOTION REQUESTING ACCESS TO NON-PUBLIC MATERIALS

(Issued February 7, 2014)

I. INTRODUCTION

On November 22, 2013, Mark Jamison filed a motion pursuant to 39 C.F.R. § 3007.50 requesting access to the non-public Governors' Decision, contract, and workpapers filed by the Postal Service in the above-captioned dockets.¹ For the reasons discussed below, the Motion is denied without prejudice.

¹ Motion of Mark Jamison Requesting Access to Non-Public Materials, November 22, 2013 (Motion).

II. BACKGROUND

On October 17, 2013, the Postal Service filed with the Commission a request to add Parcel Select and Parcel Return Service Contract 5 to the competitive product list.² The Request included the contract, supporting workpapers, and Governors' Decision 11-6.³ The Postal Service asserted that portions of the contract, workpapers, and Governors' Decision are commercial information that would not be publicly disclosed under good business practice and, pursuant to 39 C.F.R. § 3007.21, applied for non-public treatment of those portions. Request, Attachment F at 1.

On October 18, 2013, the Commission issued an order noticing the filing, appointing a Public Representative, and providing interested persons with an opportunity to comment. Comments were filed by the Public Representative who concluded that it satisfied relevant statutory requirements.⁴

The Commission examined the contract and the supporting workpapers and concluded that the rates in the first year of the contract cover attributable costs and that the contract otherwise complies with 39 U.S.C. § 3633(a) and 39 C.F.R. § 3015.5.⁵ The Commission granted the Request on October 29, 2013. Order No. 1863 at 7. The contract took effect October 30, 2013, and it is scheduled to expire 5 years after that date. See Request, Attachment B at 13.

² Request of the United States Postal Service to Add Parcel Select and Parcel Return Service Contract 5 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data, October 17, 2013 (Request).

³ Decision of the Governors of the United States Postal Service on the Establishment of Prices and Classifications for Domestic Competitive Agreements, Outbound International Competitive Agreements, Inbound International Competitive Agreements, and other Non-Published Competitive Rates, March 22, 2011 (Governors' Decision No. 11-6).

⁴ Public Representative Comments on Postal Service Request to Add Parcel Select and Parcel Return Service Contract 5 to Competitive Product List, October 24, 2013, (PR Comments), at 3.

⁵ Order Adding Parcel Select & Parcel Return Service Contract 5 to the Competitive Product List, October 29, 2013 (Order No. 1863), at 4-5.

Mr. Jamison filed a Motion for access to non-public materials relating to the contract on November 22, 2013. On November 27, 2013, the Postal Service and Amazon Fulfillment Services, Inc. (Amazon) filed responses in opposition to the Motion.⁶ Amazon states that it is the contract partner in the above-captioned dockets. Amazon Response at 1.

On November 29, 2013, Mr. Jamison filed his own response to the Postal Service Response and the Amazon Response, together with a motion for leave to respond.⁷ On December 6, 2013, Amazon filed a response in opposition to the Motion for Leave to Respond.⁸ By letter dated January 15, Mr. Jamison requests that the Commission act on his Motion.⁹

III. PARTIES' POSITIONS

Motion. Mr. Jamison requests access to the contract, supporting workpapers, and Governors' Decision filed in the above-captioned dockets in order to conduct "an

⁶ Response of the United States Postal Service in Opposition to Motion for Access to Non-Public Materials, November 27, 2013 (Postal Service Response); Opposition of Amazon Fulfillment Services, Inc., to Motion of Mark Jamison Requesting Access to Non-Public Materials, November 27, 2013 (Amazon Response).

⁷ Response to United States Postal Service and Amazon Fulfillment Services Inc. Responses Opposing Access to Materials Filed Under Seal, November 29, 2013 (Jamison Response); Motion of Mark Jamison for Leave to File Response to United States Postal Service and Amazon Fulfillment Services Inc. Responses in Opposition to Motion Requesting Access to Unpublished Materials, November 29, 2013 (Motion for Leave to Respond).

⁸ Opposition of Amazon Fulfillment Services, Inc., to Motion of Mark Jamison for Leave to File Response to USPS and Amazon Responses, December 6, 2013 (Amazon Opposition). The Motion for Leave to Respond asserts that a response is necessary to respond to arguments in the Amazon Response that Mr. Jamison believes are not supported in fact. Motion for Leave to Respond at 1. Amazon opposes the Motion for Leave to Respond on the basis of 39 C.F.R. § 3007.50(c), which prohibits replies to answers filed in response to motions for access to non-public information under 39 C.F.R. § 3007.50(a) "[u]nless the Commission otherwise provides." Amazon Opposition at 1. Given the conclusion that the request for access is premature, the Motion for Leave to Respond is denied as moot.

⁹ Letter from Mark Jamison to Chairman Ruth Goldway, Commissioner Robert Taub, and Commissioner Mark Acton, Postal Regulatory Commission, dated January 15, 2014.

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 [39 U.S.C.] 3653 and specifically how this contract may relate to obligations of universal service and service to rural areas under [39 U.S.C.] 403 and 404.” Motion at 1. He asserts that he has no commercial relationship with the Postal Service, companies doing business with the Postal Service, or the mailing industry in general. *Id.* at 2. The Motion includes a signed copy of the protective conditions set out in Appendix A of 39 C.F.R. part 3007.

Amazon. Amazon opposes the Motion. It asserts that the contract contains commercial information of “extreme competitive sensitivity,” including price and escalation terms, volume projections, and ZIP Code and implementation information. Amazon Response at 1. It argues that disclosure of this information would cause competitive harm to both Amazon and the Postal Service, because it would give competitors insight into Amazon’s cost structure and plans for implementation of the Sunday delivery program. *Id.* at 5-6.

Amazon contends that Mr. Jamison has failed to provide a sufficient justification for access to the requested non-public information. *Id.* at 6. It argues that if the Commission allows Mr. Jamison access to the information to determine whether the contract is consistent with statements in the Request, “every document filed partly or wholly under seal would have to be open to public disclosure on demand....” *Id.* (emphasis in original). Similarly, it contends that allowing access to any person that expresses a desire to determine whether rates, fees, and services under a contract would establish a standard that “is so broad and content-free” that any request for access could satisfy it. *Id.* at 7.

Additionally, Amazon asserts that the Postal Service has no obligation to provide universal service on Sundays or under competitive negotiated service agreements. *Id.* at 7-9. Finally, it argues that granting the Motion has the potential to reduce the ability of the Postal Service to compete with private carriers for package delivery, given the

risk that confidential business information could be disclosed to individuals seeking access for compliance purposes. *Id.* at 10.

Postal Service. The Postal Service also opposes the Motion. It states that, in its view, the requested materials are “information of a commercial nature, which under good business practice would not be publicly disclosed.” Postal Service Response at 1. It asserts that disclosure would cause clear commercial injury to the Postal Service and to Amazon, by allowing competitors and prospective contract partners to gain advantages in negotiating similar contracts. *Id.* at 2. It also asserts that disclosure could have a significant negative effect on its ability to enter negotiated service agreements, because it could not assure its contract partners that information submitted to the Commission would remain confidential. *Id.* at 2-3.

The Postal Service argues that the Motion lacks a detailed statement of justification for access as well as a compelling justification for access. *Id.* at 3. It notes that the Commission has already determined that the contract complies with chapter 36 of title 39, United States Code, and that the Commission will review the contract for compliance each year as part of its Annual Compliance Determination (ACD). *Id.* The Postal Service argues that a “vague reference” to section 3653 and the ACD is not sufficient reason to allow access to the requested information. *Id.* Similarly, it opines that the Commission’s rules require a higher standard for access than simply expressing a desire to determine whether the Postal Service’s description of non-public materials is consistent with those materials. *Id.* at 4. Finally, the Postal Service argues that the Motion is insufficiently detailed because it does not explain why the Postal Service would be obligated to provide universal service on Sundays or in connection with a negotiated service agreement or why the requested information would help Mr. Jamison make arguments in a proceeding under 39 U.S.C. 3653 or 3662. *Id.*

IV. COMMISSION ANALYSIS

The Commission's rules allow any person to file a motion requesting access to non-public materials relevant to compliance under 39 U.S.C. § 3653. 39 C.F.R. § 3007.50(a). The motion must contain 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" and a list of relevant affiliations, including relationships with the party requesting access and whether that party is affiliated with the delivery services, communications or mailing industries. *Id.* In determining whether to grant a motion for access to non-public materials relevant to compliance, the Commission is required to "balance the interests of the parties based on Federal Rule of Civil Procedure 26(c)." 39 C.F.R. § 3007.52.

Pursuant to 39 U.S.C. § 3653, the Commission conducts an annual review of the Postal Service's compliance with the provisions of chapter 36 of title 39, United States Code, and the service standards in effect for the fiscal year. The annual review process for each fiscal year begins when the Postal Service submits its Annual Compliance Report (ACR) to the Commission, not later than 90 days after the end of the fiscal year. 39 U.S.C. § 3652(a). For each competitive contract in effect during that fiscal year, the ACR must identify the rates and service features under the contract and estimate the contract's costs, volumes, and revenues. 39 C.F.R. § 3050.21(g).

Upon receipt of the ACR, the Commission issues a notice and order providing the opportunity for comment on the ACR by users of the mails, affected parties, and the Public Representative. 39 U.S.C. § 3653(a). The Commission issues its ACD for a fiscal year not later than 90 days after the date on which the Postal Service submits the ACR for that fiscal year. *Id.* at 3653(b).

The Postal Service filed its Annual Compliance Report for FY 2013 on December 27, 2013.¹⁰ Because Parcel Select and Parcel Return Service Contract 5 took effect on October 30, 2013, approximately one month after the end of fiscal year 2013, the FY 2013 ACR does not contain information concerning Parcel Select and Parcel Return Service Contract 5. As a consequence, the contract is not subject to review in Docket No. ACR2013, the current compliance review proceeding. Therefore, in the absence of any current compliance issue relevant to Parcel Select and Parcel Return Service Contract 5, the Motion is denied as premature.

Federal Rule of Civil Procedure 26(c) requires the movant to make a good faith attempt to confer with other affected parties in an effort to resolve the dispute without court action. In the spirit of that rule, the Commission encourages Mr. Jamison to confer with the Postal Service and Amazon in an effort to resolve the request for access in a mutually agreeable fashion.

V. ORDERING PARAGRAPH

It is ordered:

The Motion of Mark Jamison Requesting Access to Non-Public Materials, filed November 22, 2013, is denied without prejudice.

By the Commission.

Ruth Ann Abrams
Acting Secretary

¹⁰ Docket No. ACR2013, United States Postal Service FY 2013 Annual Compliance Report, December 27, 2013.