

ORDER NO. 2436

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

Before Commissioners:

Robert G. Taub, Acting Chairman;
Tony Hammond, Vice Chairman;
Mark Acton;
Ruth Y. Goldway; and
Nanci E. Langley

Annual Compliance Report, 2014

Docket No. ACR2014

ORDER GRANTING CONTINUED ACCESS TO NON-PUBLIC MATERIALS

(Issued April 13, 2015)

By motion dated March 27, 2015, United Parcel Service (UPS) requested “continued access to a subset of the compliance-related non-public materials to which the Commission previously granted UPS’s outside counsel and consultants access.”¹ On April 3, 2015, the Postal Service filed an answer to the Motion.² The Motion is granted.

¹ United Parcel Service, Inc.’s Motion Requesting Continued Access to Non-Public Materials Under Protective Conditions, March 27, 2015, at 1 (Motion).

² Response of the United States Postal Service to UPS Motion for Continued Access to Non-Public Materials, April 3, 2015 (Response).

I. BACKGROUND

On December 29, 2014, the Postal Service filed its Annual Compliance Report (ACR) for fiscal year 2014.³ The Commission subsequently granted three UPS outside counsel and consultants access to 13 non-public files that had been submitted in connection with the 2014 ACR.⁴ Access to these files was later given to 10 additional personnel associated with UPS's outside counsel and consultants.⁵ Access to the non-public files was subject to protective conditions. See Order No. 2321 at 2; see also Order No. 2326 at 2.

II. The Motion

UPS seeks continued access to eight specific library references identified in Exhibit 1 to its Motion.⁶ It asserts that “these particular library references...include the data that is most directly relevant to how the Postal Service is (or is not) attributing costs to competitive products.” Motion at 5. It seeks continued access for a period of 90 days from the date of the Commission's order granting such access. *Id.* at 7.

UPS asserts that the files to which it seeks continued access “are directly related to compliance issues generally” and “are directly relevant to analyses UPS would like to conduct regarding the Postal Service's compliance with...39 U.S.C. § 3633.” *Id.* at 2. UPS represents that the contemplated analyses are intended to “inform future [UPS]

³ United States Postal Service FY 2014 Annual Compliance Report, December 29, 2014 (2014 ACR).

⁴ Order Granting Request for Access, January 15, 2015 (Order No. 2321).

⁵ Order Granting Second Request for Access, January 16, 2015 (Order No. 2326).

⁶ The eight library references are: Library Reference USPS-LR-NP10, December 29, 2014 (Competitive Product Incremental and Group Specific Costs); Library Reference USPS-LR-NP11, December 29, 2014 (Non-Public CRA); Library Reference USPS-LR-NP12 (Non-Public Cost Segments and Components); Library Reference USPS-LR-NP13 (Non-Public CRA Model); Library Reference USPS-LR-NP14 (CRA B Workpapers); Library Reference USPS-LR-NP19 (Piggybacks); Library Reference USPS-LR-NP20 (Mail Processing Costs by Shape); Library Reference USPS-LR-NP22 (City Carrier Costing System) (collectively, Exhibit 1 Library References).

comments...regarding next year's Annual Compliance Report...[and to]...inform UPS's forthcoming petition to the Commission on compliance-related issues." *Id.*⁷

UPS asserts that continuing access to the Postal Service's 2014 ACR library references is contemplated by rule 3007.50(a), 39 C.F.R. § 3007.50(a), which gives persons the right to request "continued access to...non-public materials relevant to compliance." Motion at 3. UPS also cites Order No. 194⁸ for the proposition that the Commission has previously recognized that persons may require access to non-public materials in order to participate effectively in an "ongoing or upcoming annual determination of compliance." Motion at 3. Finally, UPS suggests that continuing access to the Exhibit 1 Library References would enhance the quality of the initial version of its anticipated petition and would avoid undue delay and expense. *Id.* at 2, n.2.

III. Postal Service Response

The Postal Service states that it "would very strongly oppose the UPS motion if the only rationale offered in support were the possibility of informing comments in a subsequent ACR." Response at 2. In its view, a grant of continuing access based upon such rationale "would, as a practical matter, destroy the intended limited duration of access and replace it with one of perpetual access." *Id.* The Postal Service also expresses concern that the alleged usefulness of continued access to non-public materials in preparing a future rulemaking petition could be used as a pretext to enable a "general fishing expedition." *Id.* The Postal Service, nevertheless, acknowledges that the circumstances presented here suggest that UPS intends to use continuing access to the Exhibit 1 Library References for the purposes stated. *Id.* at 2-3. The Postal Service

⁷ In comments on the Postal Service's 2014 ACR, UPS announced its intent to file a petition to institute a proceeding to evaluate Postal Service costing methodologies and analytical principles used by the Commission in carrying out its responsibilities under 39 U.S.C. § 3633. See Comments of United Parcel Service on Postal Service's 2014 Annual Compliance Report, February 2, 2015, at 3.

⁸ Docket No. RM2008-1, Second Notice of Proposed Rulemaking to Establish a Procedure for According Appropriate Confidentiality, March 20, 2009, at 6 (Order No. 194).

is also reassured by UPS's self-imposed 90-day limit on continued access. *Id.* at 3. However, the Postal Service asserts that "the Commission will also need to evaluate whether a rulemaking proceeding as contemplated by the UPS Motion is likely to be appropriate." *Id.*

IV. Discussion

UPS makes its request for continuing access pursuant to 39 C.F.R. § 3007.50. Motion at 1. That provision authorizes persons to file motions "requesting access to, or continued access to, non-public materials relevant to compliance under 39 U.S.C. § 3653." Section 3653 of title 39, governs Commission proceedings on the Postal Service's ACRs. One of the subjects reviewed in a Commission ACR proceeding conducted under section 3653 is compliance with the requirements of section 3633.⁹ UPS alleges that continuing access to the Exhibit 1 Library References is "directly related to compliance issues generally...and they are directly relevant to analyses UPS would like to conduct regarding the Postal Service's compliance with its obligations under 39 U.S.C. § 3633." Motion at 2.

The Postal Service "rejects any suggestion that...usefulness in preparing comments regarding a future ACR...constitutes an adequate basis to allow continued access...[and that it]...would very strongly oppose the UPS motion if [that were] the only rationale offered in support [of the UPS motion]." Response at 2.

UPS has, however, offered a second basis for continued access, namely, its stated intent to file a rulemaking petition. The Postal Service accepts UPS's representation regarding an anticipated rulemaking as more than "vague statements of future intentions." *Id.* The Postal Service finds further confirmation of "the plausibility of the claimed intended use...[in UPS's]...voluntary limitation...of its request to 90 days." *Id.* at 3.

⁹ See FY 2014 Annual Compliance Determination Report, March 27, 2015, at 4, 71 (2014 ACD).

The Postal Service's only apparent reservation to the adequacy of UPS's second basis for continued access is expressed by the Postal Service's suggestion that the Commission might "conclude that the continued access sought by UPS is...not warranted" in light of the Commission's statement on page 85 of the 2014 ACD that "[a]t this time, the issues raised in the [UPS] comments do not warrant initiation of a proceeding to investigate the methodology the Postal Service uses to attribute total postal costs." *Id.* at 3.

The Commission concludes that, while UPS's first basis may not be sufficient for granting continued access to the Exhibit 1 Library References, its second basis is sufficient to warrant such access for the 90-day period requested. The Commission's conclusion in this regard is informed by the work that UPS has already performed toward its contemplated rulemaking petition. Further, the Commission interprets the Postal Service's discussion of the second basis offered by UPS as acquiescence to UPS's reliance upon that alternative basis.

The Commission's statement in the 2014 ACD that the issues raised by UPS in its comments in the ACR proceeding did not warrant initiation of a proceeding to investigate the methodology for attributing total postal costs does not preclude granting the pending UPS Motion. As evidenced by the qualifying introductory phrase "[a]t this time", the Commission's statement in the 2014 ACD was based upon then-current information available to the Commission. In its Motion, UPS asserts that at the time it filed its comments in the ACR proceeding, it had not had sufficient time to analyze the data files. Motion at 2. By requesting continued access to the Exhibit 1 Library References, UPS seeks an opportunity to develop an adequate basis for initiation of a Commission proceeding. If, after being afforded an opportunity for further review of the Exhibit 1 Library References, UPS files its anticipated petition for rulemaking, the petition may be granted only if the Commission is persuaded that a proceeding is warranted on the basis of the information and arguments presented.

V. ORDERING PARAGRAPHS

It is ordered:

1. United Parcel Service, Inc.'s Motion Requesting Continued Access to Non-Public Materials Under Protective Conditions, filed March 27, 2015, is granted.
2. Continued access to the non-public materials identified on Exhibit 1 to the United Parcel Service, Inc. Motion granted herein shall be for a period of 90 days from April 13, 2015.
3. The outside counsel and consultants previously given access by Order Nos. 2321 and 2326 to the non-public materials covered by Ordering Paragraph 2, shall continue to have access to such materials for a period of 90 days from April 13, 2015.

By the Commission.

Shoshana M. Grove
Secretary