

**POSTAL REGULATORY COMMISSION****39 CFR Parts 3001, 3004, 3007****[Docket No. RM2018–3; Order No. 4403]****Non-Public Information****AGENCY:** Postal Regulatory Commission.**ACTION:** Proposed rulemaking.

**SUMMARY:** The Commission is proposing to amend its existing rules relating to non-public materials. The proposed rules ensure appropriate transmission and protection of non-public materials, maintain appropriate transparency, and modernize practice before the Commission. The Commission invites public comment on the proposed rules.

**DATES:** *Comments are due:* March 23, 2018.

**ADDRESSES:** Submit comments electronically via the Commission's Filing Online system at <http://www.prc.gov>. Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

**FOR FURTHER INFORMATION CONTACT:** David A. Trissell, General Counsel, at 202–789–6820.

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**I. Introduction**

The Postal Regulatory Commission (Commission) establishes a rulemaking docket to consider amending the Commission's rules relating to non-public information.

In 2009, the Commission adopted rules in 39 CFR part 3007 establishing a procedure for non-public treatment of certain materials filed by the Postal Service and other persons under 39 U.S.C. 503 and 504.<sup>1</sup> Practice before the Commission has developed since 2009. Therefore, this rulemaking proposes to replace, in their entirety, the existing rules appearing in 39 CFR part 3007. Additionally, the Commission proposes

<sup>1</sup> Docket No. RM2008–1, Order No. 225, Final Rule Establishing Appropriate Confidentiality Procedures, June 19, 2009.

to amend and move its rules regarding information requests to 39 CFR part 3001, subpart E. Further, the Commission proposes to update two rules appearing in 39 CFR part 3004 concerning the application of the Freedom of Information Act (FOIA)<sup>2</sup> to materials that are provided to the Commission with the reasonable belief that the materials are exempt from public disclosure. The proposed rules appear after the signature of this Order.

**II. Background**

The receipt, protection, and evaluation of non-public information are essential to the Commission's ability to carry out its regulatory duties under title 39 of the United States Code. For instance, to obtain approval for a competitive negotiated service agreement (NSA), the Postal Service must file commercially sensitive information with the Commission relating to customer identity; costs, revenues, and volumes; non-published rates; and certain technical details. This information allows the Commission to evaluate if the proposed NSA complies with the applicable statutory and regulatory requirements. Recognizing that public disclosure of certain information may be commercially harmful to the Postal Service, other persons, or both, existing 39 CFR part 3007 permits the filing of commercially sensitive information to be non-public (also known as "sealed" or "under seal"). At the same time, acknowledging the need for transparency, existing 39 CFR part 3007 provides for procedures to allow for a person to request that non-public materials be disclosed to the public (also known as "unsealed"). Moreover, existing 39 CFR part 3007 provides for procedures to allow for persons to request access to non-public materials, subject to protective conditions, in order to meaningfully participate in Commission proceedings.

Since the Commission adopted 39 CFR part 3007 in 2009, practice before the Commission has developed. For instance, proficiency with submitting documents online in a secure manner has improved. Also, since 2009, the Commission has received increasing amounts of non-public material, which may contain the proprietary material of the Postal Service, other persons, or both. For instance, the number of NSAs has increased significantly from 2009 to the present. In FY 2009, there were 23 Competitive domestic products consisting of NSAs in effect; in FY 2016,

<sup>2</sup> 5 U.S.C. 552.

there were 568 Competitive domestic products consisting of NSAs in effect.<sup>3</sup>

Also, the rules appearing in existing 39 CFR part 3007 focus on circumstances in which the non-public material is filed by the Postal Service in formal Commission proceedings that are assigned a docket designation. Although that is the case in most circumstances, persons other than the Postal Service have also provided non-public materials directly to the Commission. For instance, after obtaining access to non-public materials, persons have used that data and information in their own submissions made under seal.<sup>4</sup> Additionally, persons have submitted their own proprietary material under seal.<sup>5</sup>

These developments have added complexity and necessitated the changes and clarifications proposed in these rules. Therefore, to better reflect modern practice, the Commission proposes to revise existing 39 CFR part 3007, which contains rules relating to non-public materials provided to the Commission. These proposed changes take into account a number of considerations including:

- Ensuring appropriate levels of protection and secure transmission of non-public materials,
- Maintaining appropriate levels of transparency,
- Reducing the barriers to submit non-public materials and participate meaningfully in Commission proceedings,
- Facilitating prompt Commission adjudication of unresolved motions relating to non-public materials,
- Requiring the provision of information adequate to determine the appropriate level of non-public treatment (if any), and
- Improving the organization and understandability of the rules.

Additionally, the Commission proposes amending and moving rules relating to information requests, which are contained in the existing §§ 3007.2 and 3007.3, to a proposed 39 CFR part 3001, subpart E. Also, the Commission proposes to modernize the content of these rules to better reflect developments in Commission practice.

Further, the Commission proposes conforming changes to the

<sup>3</sup> Docket No. ACR2009, Annual Compliance Determination, March 29, 2010, at 118; Docket No. ACR2016, Annual Compliance Determination, March 28, 2017, at 81.

<sup>4</sup> See, e.g., Docket No. RM2016–12, Notice of Filing of UPS–LR–RM2016–12/1, UPS–LR–RM2016–12/NP1, and Application for Nonpublic Treatment, October 17, 2016.

<sup>5</sup> See, e.g., Docket No. MT2016–1, Application of Pitney Bowes Inc. for Non-public Treatment of Response to Notice of Inquiry, May 12, 2016.

Commission's FOIA rules appearing in 39 CFR part 3004.

### III. Summary of Proposed Changes

To improve organization and clarity, the Commission proposes to divide 39 CFR part 3007 into four subparts. The proposed division into four subparts reorders most of the content appearing in existing 39 CFR part 3007. Further, the Commission proposes to move rules related to information requests appearing in existing §§ 3007.2 and 3007.3 to proposed subpart E of 39 CFR part 3001. Therefore, to achieve a simple and logical progression, the Commission proposes to delete the existing 39 CFR part 3007 and insert the proposed rules.

Proposed subpart A of 39 CFR part 3007 contains general provisions. Proposed subparts B, C, and D of 39 CFR part 3007 identify the three major pathways to interact with the rules relating to non-public materials. Proposed subpart B of 39 CFR part 3007 contains rules applicable to submitting non-public materials and seeking non-public treatment. Proposed subpart C of 39 CFR part 3007 contains rules applicable to seeking access to non-public materials. Proposed subpart D of 39 CFR part 3007 contains rules applicable to seeking public disclosure of non-public materials.

In addition to the proposed division of 39 CFR part 3007 into four subparts, the Commission proposes other organizational improvements, which include splitting, deleting, or combining existing rules. For instance, existing § 3007.10 contains four paragraphs describing the requirements for the submission of non-public materials in their redacted (public) and unredacted (non-public) forms. The requirements pertaining to the redacted version appear in existing § 3007.10(b) and (c); the requirements pertaining to the unredacted version appear in existing § 3007.10(a) and (d). To improve clarity and organization, the Commission proposes two separate rules regarding the submission of the redacted version (proposed § 3007.202), and the unredacted version (proposed § 3007.203).

On the other hand, proposed §§ 3007.301 and 3007.304 dispense with the division for access requests that pertain to general proceedings versus access requests that pertain to Annual Compliance Determination-related proceedings appearing in existing §§ 3007.40, 3007.41, 3007.42, 3007.50, 3007.51, and 3007.52. Because the procedures involved do not vary if the access request involves general proceedings versus compliance

proceedings, this proposed change simplifies the rules.

The Commission proposes to delete unnecessary rules in some instances. For example, the Commission dispenses with the use of the defined term "authorized representative" appearing in existing § 3007.1(a) because the term adds unnecessary complexity to the rules and does not precisely reflect the language of 39 U.S.C. 504(f)(1) and (2). The Chairman of the Commission is the presiding officer in proceedings conducted by the Commission *en banc*. The Chairman may also specifically designate a Commissioner or employee as a presiding officer to preside at hearings or conferences. 39 CFR 3001.5(e).

Proposed 39 CFR part 3007 makes linguistic updates aimed to improve clarity and precision. For instance, "third party" is used in existing 39 CFR part 3007 to refer to an individual or entity other than the Postal Service. Proposed 39 CFR part 3007 replaces "third party" with "person other than the Postal Service" throughout proposed 39 CFR part 3007 to better reflect this intent. This proposed change also better conforms with the usage of "person" and "party," which are defined terms in existing 39 CFR part 3001. Person includes natural persons (individuals) and legal persons (entities). 39 CFR 3001.5(f). Party includes the Postal Service as well as certain other persons (complainants, appellants, and intervenors). 39 CFR 3001.5(g).

The Commission reviews the proposed rules in each proposed subpart below.

#### A. General Provisions

The Commission proposes to amend 39 CFR part 3007 to reflect that it contains procedures to submit, request access to, or seek public disclosure of non-public materials provided to the Commission by the Postal Service or any other person. The proposed amendments also reflect that 39 CFR part 3007 applies regardless whether non-public materials are provided to the Commission through a filing that would otherwise be governed under §§ 3001.9 and 3001.10 of this chapter, which prescribe procedural requirements for filing of a written document that is required or authorized by statute, rule, regulation, order of the Commission, or direction of the presiding officer.

Section 504(g) of title 39 provides the Commission with authority to promulgate rules applicable to non-public materials provided by the Postal Service—regardless whether those non-public materials are provided through a

filing.<sup>6</sup> Because 39 U.S.C. 504(g) is silent as to the treatment of materials provided by persons other than the Postal Service, the Commission relies on its general authority under 39 U.S.C. 503 to promulgate rules applicable to non-public materials submitted by other persons. *See* 39 U.S.C. 503. Rules governing the treatment of non-public materials provided by persons other than the Postal Service are necessary for the Commission to carry out its functions under the Postal Accountability and Enhancement Act. Protection of such person's non-public materials is necessary to avoid inflicting competitive harm and impairing the ability of the Commission to obtain voluntary information from those persons.

Therefore, within the general provisions appearing in proposed subpart A of 39 CFR part 3007, the Commission proposes to explain the applicability of the rules (proposed § 3007.100) and to modify the defined terms (proposed § 3007.101). These proposed changes enable the procedures ensuring the secure transmission and confidential treatment of non-public materials appearing in proposed subpart B of 39 CFR part 3007 to apply to non-public materials regardless of who provides them to the Commission. The proposed changes also enable the public to request access or seek public disclosure of such materials through motions practice in accordance with proposed subparts C and D of 39 CFR part 3007.

The Commission observes that non-public materials may also be requested under FOIA in accordance with the procedures appearing in §§ 3004.30(d) (applicable to requests for records originating with the Postal Service) or 3004.30(e) (applicable to requests for records originating with third parties). The rules appearing in proposed subpart D of 39 CFR part 3007 are an alternative procedural mechanism to request public disclosure of materials that were provided to the Commission and claimed to be non-public.<sup>7</sup> The Commission may not deny a FOIA request simply because the materials are claimed to be non-public as defined under proposed § 3007.101(a). *See*

<sup>6</sup> Section 504(g) applies "[i]f the Postal Service determines that any document or other matter it provides to the Postal Regulatory Commission . . . at the request of the Commission in connection with any proceeding or other purpose under this title, contains information which is described in section 410(c) [of title 39], or exempt from public disclosure under section 552(b) of title 5." 39 U.S.C. 504(g)(1).

<sup>7</sup> *See* Docket No. RM2009–6, Order Establishing Procedures for the Freedom of Information Act, October 23, 2009, at 7 (Order No. 322).

Order No. 322 at 7. When a submitter makes a claim for non-public treatment, the materials claimed to be non-public will be accorded a presumption of non-public treatment. *See* proposed § 3007.102(a). However, no claim for non-public treatment has been “accepted” by the Commission unless the Commission makes a determination of non-public status, either in response to a motion or *sua sponte*. *See* Order No. 322, at 7; *see also* proposed § 3007.103. The Commission further observes that when deciding whether to disclose materials claimed to be non-public, balancing the interests of the parties in accordance with 39 CFR part 3007 offers no less protection than applying the exemptions under FOIA. *See* Order No. 322 at 7.

FOIA sets forth nine categories of information that are exempt from public disclosure. Two categories are particularly applicable to the types of information that is provided to the Commission and claimed to be non-public. First, 5 U.S.C. 552(b)(4) exempts “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” Second, 5 U.S.C. 552(b)(3) exempts information that is specifically exempted by another statutory provision, such as 39 U.S.C. 410(c)(2). Section 410(c)(2) of title 39 provides that the Postal Service shall not be required to disclose “information of a commercial nature, including trade secrets, whether or not obtained from a person outside the Postal Service, which under good business practice would not be publicly disclosed.” These categories align with the types of information protected under 39 U.S.C. 504(g).<sup>8</sup>

Proposed subpart A of 39 CFR part 3007 also incorporates several rules appearing in existing 39 CFR part 3007 concerning the treatment of non-public materials (proposed § 3007.102), types of Commission action to determine the non-public treatment to accord to materials that are claimed to be non-public (proposed § 3007.103), and the standard for determining whether to publicly disclose non-public materials (proposed § 3007.104).

#### *B. Submitting Non-Public Materials and Seeking Non-Public Treatment*

Proposed subpart B of 39 CFR part 3007 contains provisions applicable to submitting non-public materials and seeking non-public treatment. The

applicable procedures are unified to reflect their applicability to all submitters, regardless whether the materials are submitted by the Postal Service or other persons (proposed § 3007.200). The Commission proposes to set forth modernized and streamlined procedures and requirements for the application for non-public treatment (proposed § 3007.201), redacted version of the non-public materials (proposed § 3007.202), and unredacted version of the non-public materials (proposed § 3007.203). These proposed procedures would better accommodate the increasing volume of non-public material and technological advances in secure transmission.

The Commission retains and clarifies the protections available for any person with a proprietary interest in non-public materials that are submitted by someone else to the Commission (proposed § 3007.204). The Commission also proposes to add a rule to address instances in which non-public materials are inadvertently filed in a public document (proposed § 3007.205).

#### *C. Seeking Access to Non-Public Materials*

Proposed subpart C of 39 CFR part 3007 contains provisions applicable to seeking access to non-public materials, subject to protective conditions. The Commission proposes rules that set forth who may have access and how such access may be obtained (proposed §§ 3007.300 and 3007.301). The Commission also clarifies the obligations of a person who has obtained access to non-public materials. The Commission sets forth proposed rules applicable to the non-dissemination, use, and care of non-public materials (proposed § 3007.302), the potential sanctions for violating protective conditions (proposed § 3007.303), the procedural requirements associated with terminating and amending access (proposed § 3007.304), and the procedural requirements associated with producing non-public materials in non-Commission proceedings (proposed § 3007.305).

The Commission also proposes to move the three template forms appearing in existing Appendix A to part 3007, which aid persons seeking or certifying the termination of access to non-public materials, to proposed Appendix A to subpart C of part 3007. Changes are proposed to conform the content of these three template forms to the proposed rules and to improve readability.

#### *D. Seeking Public Disclosure of Non-Public Materials*

Proposed subpart D of 39 CFR part 3007 contains provisions applicable to seeking public disclosure of non-public materials—that is, requesting that the non-public treatment not be accorded to the materials. The Commission proposes a rule setting forth the procedure for a person to request that non-public materials be disclosed to the public through a motion (proposed § 3007.400). The Commission proposes to create a rule to address the administration and public disclosure of materials for which non-public treatment has expired after the passage of 10 years (proposed § 3007.401).

#### *E. Information Requests*

The Commission proposes to move material appearing in existing §§ 3007.2 and 3007.3, which relate to information requests, out of 39 CFR part 3007. Information requests may pertain to public or non-public material. Therefore, the Commission proposes to move these procedural requirements to 39 CFR part 3001 in a new proposed subpart E. The Commission also proposes revisions to modernize these procedures to better reflect current practice before the Commission.

#### *F. Conforming Changes to 39 CFR Part 3004*

The Commission proposes to make conforming changes to reflect that the submission procedures appearing in subpart B of 39 CFR part 3007 apply to all instances in which materials that are provided to the Commission with the reasonable belief that the materials are exempt from public disclosure.

### **IV. Section-by-Section Analysis of the Proposed Changes to 39 CFR Part 3007**

As described below, the Commission proposes to amend 39 CFR part 3007 by replacing the existing heading and text of the rules.

*Proposed heading identified in 39 CFR part 3007.* The Commission proposes to revise the heading to reflect that 39 CFR part 3007 applies to non-public materials provided to the Commission rather than merely the treatment of non-public material filed by the Postal Service.

#### *A. Proposed Subpart A of Part 3007—General Provisions*

*Proposed subpart A of part 3007.* The Commission proposes to add subpart A to 39 CFR part 3007 containing general provisions.

*Proposed § 3007.100 Applicability.* Proposed § 3007.100 identifies that proposed 39 CFR part 3007 applies

<sup>8</sup> Section 504(g) applies “[i]f the Postal Service determines that any document or other matter it provides to the Postal Regulatory Commission . . . contains information which is described in section 410(c) of this title, or exempt from public disclosure under section 552(b) of title 5.” 39 U.S.C. 504(g)(1).

when: (1) The Postal Service claims that any materials it provides to the Commission contain non-public information; (2) any other person claims that any materials provided to the Commission contain non-public information; (3) the Commission is determining what type and degree of confidential treatment should be accorded to the materials claimed to be non-public; or (4) the Commission is determining what protective conditions should apply to those accessing non-public materials.

*Proposed § 3007.101 Definitions.*

Proposed § 3007.101(a) is based on the definition of non-public materials appearing in existing § 3007.1(b).

Proposed § 3007.101(a) modifies the existing definition of non-public materials to reflect the inclusion of materials that are claimed to contain information that is described in 39 U.S.C. 410(c) or exempt from public disclosure under 5 U.S.C. 552(b). Such information is protectable if provided by the Postal Service to the Commission pursuant to 39 U.S.C. 504(g)(1), 3652(f)(1), or 3654(f)(1). Such information is defined as non-public materials under existing § 3007.1(b) if the claim for non-public treatment is made by the Postal Service. This proposed change reflects the Commission's practice to treat such information as non-public material regardless of who submits the materials and regardless of who makes the claim for non-public treatment. This proposed change clarifies that non-public information includes commercially sensitive information, whether it belongs to the Postal Service or any other person.<sup>9</sup>

Proposed § 3007.101(a) adds that materials cease to be non-public (except for inadvertent public filings corrected in accordance with proposed § 3007.205) if the person making the submission publicly discloses the materials, subject to the consent of each affected person with a proprietary interest in the materials (if applicable).

<sup>9</sup> Such information is protectable under 5 U.S.C. 552(b)(4), which exempts from public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential."

Further, if the information is provided by the Postal Service, then the information is also protectable under 5 U.S.C. 552(b)(3) and 39 U.S.C. 410(c)(2). Section 552(b)(3) of title 5 exempts from public disclosure information that is specifically exempted by another statutory provision, such as 39 U.S.C. 410(c)(2). Section 410(c)(2) of title 39 provides that the Postal Service shall not be required to disclose "information of a commercial nature, including trade secrets, whether or not obtained from a person outside the Postal Service, which under good business practice would not be publicly disclosed."

This proposed change is made to reflect that consensual voluntary public disclosure of materials that were initially claimed to be non-public has been used to resolve issues of whether public or non-public treatment should apply in some instances. This proposed change also protects the interests of a person other than the submitter that has a proprietary interest in the materials in those instances where the interests of the person making the submission may not be the same as the interests of another person other than the submitter that has a proprietary interest in the materials.

Proposed § 3007.101(b) provides a definition for the term submitter. The usage of this term helps to unify several procedural rules that apply to the Postal Service and any other person that provides non-public materials to the Commission. Consistent with § 3001.5(f) of this chapter, this proposed rule uses person to include both a natural person (individual) and a legal person (entity).<sup>10</sup>

*Proposed § 3007.102 Treatment of non-public materials.* Proposed § 3007.102(a) incorporates existing § 3007.23, which informs the reader that the Commission will not disclose or allow access to non-public materials, except as provided by 39 CFR part 3007, and adds a cross-reference to the Commission's FOIA provisions described in 39 CFR part 3004. Proposed § 3007.102(b) retains the content of existing § 3007.60.

*Proposed § 3007.103 Commission action to determine non-public treatment.* Proposed § 3007.103 informs the reader about and provides examples of the types of action that the Commission may take after receiving non-public materials. Proposed § 3007.103 informs the reader that the Commission may seek additional information to determine the non-public treatment, if any, to be given. Consistent with practice, proposed § 3007.103 identifies examples such as the issuance of information requests, preliminary notices, or interim orders. Proposed § 3007.103 also states that the Commission may issue an order containing a description of the non-public treatment granted and timeframe for which non-public treatment is accorded (if any). Proposed § 3007.103 also states that the Commission may amend the non-public treatment accorded (if any). For example, an amendment may occur if a person files

<sup>10</sup> 39 CFR 3001.5(f) provides "Person means an individual, a partnership, corporation, trust, unincorporated association, public or private organization, or governmental agency."

a motion for disclosure under proposed § 3007.400 or § 3007.401. Proposed § 3007.103 also provides that issuance of the order or amendment may occur without a motion.

The procedures described in proposed § 3007.103 remain consistent with existing § 3007.32(a). The process contained in existing § 3007.32(b) through (d) is eliminated because if a preliminary notice is issued, it shall specify the time allotted for response and reply (if any).

*Proposed § 3007.104 Standard for public disclosure of non-public materials.* Proposed § 3007.104 incorporates the content appearing in existing § 3007.33. Proposed § 3007.104(a) modifies the language appearing in existing § 3007.33(a) because the existing rule did not appear to contemplate situations where materials containing Postal Service non-public information were submitted by another person (such as a person granted access to non-public Postal Service materials) or were provided by the Postal Service outside of a filing. Proposed § 3007.104(b) modifies the content of existing § 3007.33(b) by replacing the reference to "a third party" to more precisely reflect that rule applies to material that is claimed to be non-public because it contains the proprietary information of any person other than the Postal Service.

*B. Proposed Subpart B of Part 3007—Submitting Non-Public Materials and Seeking Non-Public treatment*

*Proposed subpart B of part 3007.* The Commission proposes to add subpart B to 39 CFR part 3007 containing rules applicable to submitting non-public materials to the Commission and seeking non-public treatment of those materials.

*Proposed § 3007.200 General requirements for submitting non-public materials and seeking non-public treatment.* Proposed § 3007.200 explains the process to provide non-public materials to the Commission applicable to all submitters. Proposed § 3007.200(a) requires the provision of three things on the same business day—an application for non-public treatment, a redacted version of the non-public materials, and an unredacted version of the non-public materials. Consistent with existing practice, the application for non-public treatment and the redacted version of the non-public materials are public documents. Consistent with existing practice, the unredacted version of the non-public materials shall be submitted under seal. Proposed § 3007.200(a) unifies aspects of the content of existing

§§ 3007.10, 3007.20(a), 3007.21(a), and 3007.22(a).

Proposed § 3007.200(a) also addresses situations that are not adequately addressed in the existing rules. Existing §§ 3007.20(a) and 3007.21(a) require the Postal Service to file an application whenever it files non-public material. However, the existing rules do not clearly address the procedural requirements applicable if the Postal Service submits non-public material to the Commission outside of a filing made in accordance with §§ 3001.9 and 3001.10 of this chapter. Such submissions are permissible, subject to the Commission's *ex parte* policy appearing in 39 CFR part 3008. Requiring that the Postal Service submit an application for non-public treatment, a redacted version of the non-public materials, and an unredacted version of the non-public materials would facilitate the Commission's determination of non-public treatment (if any) that should be accorded to those materials and would better ensure that confidential treatment is properly accorded to those non-public materials. Moreover, those proposed requirements would facilitate the Commission's resolution of motions practice related to those materials.

Moreover, although existing § 3007.22(a) sets forth the requirements of an application made by a third party, that existing rule appears to contemplate situations where a person other than the Postal Service files an application for non-public treatment of a Postal Service filing that contains the person's non-public information. This option is preserved under proposed § 3007.204. However, the existing rules are silent regarding whether a person other than the Postal Service that submits non-public materials (either by formal filing or by informal submission) must include an application. Existing § 3004.70(a) reflects that a third party submitting materials claimed to be non-public to the Commission "may" lodge an application for non-public treatment. Requiring the submission of an application by any submitter of non-public materials would promote fairness and would facilitate the Commission's determination of the type and degree of non-public treatment (if any) that should be accorded to those materials.

Proposed § 3007.200(b) requires that before submitting non-public materials to the Commission, each submitter contact any affected person who may have a proprietary interest in non-public materials. This proposed rule expands the application of existing § 3007.20(b) to Postal Service submissions made outside formal filings and to

submissions made by persons other than the Postal Service. The proposed change would better ensure the protection of an affected person's proprietary material by giving the affected person an opportunity to file an application for non-public treatment and address its confidentiality concerns directly with the Commission.

*Proposed § 3007.201 Application for non-public treatment.* Proposed § 3007.201(a) retains the same burden of persuasion appearing in existing § 3007.21(b) and expands it to apply to all submitters.

Proposed § 3007.201(b) sets forth the required contents of an application. Existing §§ 3007.21 and 3007.22 require slightly different content requirements based on whether the application is made by the Postal Service or any other person. Proposed § 3007.201(b) makes the requirements uniform. In addition to simplifying the procedural rules, this better ensures that the Commission will receive adequate justification of an application. The information sought will aid the Commission's determination of the non-public treatment, if any, to be accorded to the materials.

The proposed uniform content requirements appearing in proposed § 3007.201(b)(1), (3) through (8) remains substantially the same as existing § 3007.21(c)(1), (3) through (8). Proposed § 3007.201(b)(1), (3) through (8) contain changes to improve clarity and update cross-references.

Proposed § 3007.201(b)(2) is based on existing § 3007.21(c)(2), which requires the Postal Service to identify any third party known to have a proprietary interest in the materials or a designated Postal Service employee to notify each affected third-party (if identification of the third party is sensitive). Proposed § 3007.201(b)(2) applies this requirement to all applications (even if made by a person other than the Postal Service) and modifies this requirement as follows.

Proposed § 3007.201(b)(2) requires the application to identify a foundational fact—whether the submitter, any person other than the submitter, or both have an interest in the non-public materials. This proposed change would improve transparency, especially for persons seeking access or public disclosure of the non-public materials. This proposed change is reflective of the growing complexity related to the non-public materials submitted to the Commission. In simple scenarios, the non-public material belongs solely to the submitter. In more complex instances, the non-public material is a reproduction of the proprietary information of a business

partner of the submitter or non-public material to which the submitter has granted access. Scenarios that are even more complex exist when the submitter manipulates the proprietary information of another person and comingles it with the submitter's own proprietary information.

Depending on whether the proprietary interest of the submitter, any person other than the submitter, or both is implicated, the application must provide contact information for an individual designee of the submitter pursuant to § 3007.201(b)(2)(i), each person other than the submitter pursuant to § 3007.201(b)(2)(ii), or both pursuant to § 3007.201(b)(2)(iii).

If the submitter's interest is implicated, proposed § 3007.201(b)(2)(i) requires that the application identify an individual (such as an employee, executive, or attorney) designated by the submitter to accept actual notice of a motion related to the non-public materials or notice of the pendency of a subpoena or order requiring production of the materials.

If the proprietary interest of any person other than the submitter is implicated, proposed § 3007.201(b)(2)(ii) requires that the application identify each affected person. Consistent with existing § 3007.21(c)(2), the application need not identify each affected person (other than the submitter) if identification would be sensitive. The application also need not identify each affected person (other than the submitter) if identification would be impracticable. This proposed change reflects situations not contemplated by existing § 3007.21(c)(2), such as if multiple persons speaking multiple languages were affected.<sup>11</sup> Consistent with existing § 3007.21(c)(2), if each affected person is not identified, the submitter shall identify an individual designated by the submitter to provide notice to each affected person. Moreover, if the submitter does not identify each affected person, whether that identification were asserted to be sensitive or impractical, proposed § 3007.201(b)(2)(ii) requires that the application provide an explanation. This proposed change better ensures that the sensitivity or impracticability exceptions to identifying each affected person would not be overused and would be consistent with the past instances of when impracticability was

<sup>11</sup> See, e.g., Docket No. R2017-1, Notice of the United States Postal Service of Filing USPS-LR-R2017-1/NP1, October 12, 2016, Attachment 1 at 2 n.2.

asserted as a basis not to identify each affected person.

If the proprietary interest of both the submitter and another person are implicated, proposed § 3007.201(b)(2)(iii) requires the application to comply with the requirements of both § 3007.201(b)(2)(i) and (ii). Proposed § 3007.201(b)(2)(iii) permits the submitter to designate the same individual to serve as the designated point of contact on behalf of the submitter and any other affected person whose identification is asserted to be sensitive or impracticable. Designating the same individual would likely reduce the burden on the submitter and any person attempting to contact the designee.

Proposed § 3007.201(c) allows incorporation by reference to streamline applications that support the submission of non-public materials that have previously been claimed to be non-public by a prior application. Incorporation by reference may be particularly appropriate if a person granted access to non-public materials submitted by another person reproduces or otherwise uses those non-public materials in a submission to the Commission. In such instances, referring back to the original application would likely be sufficient to meet the burden of persuasion, identify the persons with a proprietary interest in the non-public materials, and reduce the burden involved in drafting the application. Proposed § 3007.201(c) imposes requirements to ensure that the prior application is clearly identified, which facilitates evaluation of the prior application by the members of the public and the Commission. Any application that incorporates by reference a prior application that is accessible through the Commission's website (<http://www.prc.gov>) must provide the date, docket number, and name of the filer of the prior application. In all other circumstances, the application must attach the document that is being incorporated by reference.

*Proposed § 3007.202 Redacted version of the non-public materials.* Proposed § 3007.202 provides the requirements applicable to the submission of the redacted (public) version of the non-public materials.

Consistent with existing § 3007.10(c), proposed § 3007.202(a) explains that submitters must graphically redact (blackout) the material that is claimed to be non-public. Proposed § 3007.202(a) also incorporates the prohibition on excessive redactions (blacking out material that is not non-public), which appears in existing § 3007.10(b), and

expands its applicability to all submitters. This proposed rule will promote fairness and improve transparency.

Proposed § 3007.202(b) incorporates the requirement that the Postal Service justify the use of any other redaction method and specifically identify the alterations made to the document, which appears in existing § 3007.10(c), and expands its applicability to all submitters so as to promote fairness and improve transparency. Proposed § 3007.202(b) modifies existing requirements, in § 3007.10(c), to justify the use of another redaction method, stating with particularity the competitive harm associated with using the blackout method, to also allow the application to state with particularity the practical difficulty associated with using the blackout method. Based on experience under the existing rules, the Commission expects that the use of a redaction method other than the blackout method will continue to be rare.

Consistent with existing § 3007.10(b), proposed § 3007.202(c) provides that electronic versions of redacted materials must be filed in a searchable format. Proposed § 3007.202(c) permits the use of a non-searchable format only if accompanied by a certification that providing a searchable format would be impracticable. Based on experience under the existing rules, the Commission expects that such an occasion would occur rarely as most non-public materials are filed in .doc, .pdf, .xls, or similar formats.

*Proposed § 3007.203 Unredacted version of the materials.* Proposed § 3007.203 sets forth the manner for submission of the unredacted version of the non-public materials.

Consistent with existing § 3007.10(d), proposed § 3007.203(a) requires that upon submitting the unredacted version of the non-public materials, each page or portion of a paper or electronic version be marked in a manner reasonably calculated to alert custodians to the confidential nature of the materials. Consistent with existing § 3007.10(a), proposed § 3007.203(a) also reflects that non-public materials may not be submitted through the Filing Online method accessible through the Commission's public website (<http://www.prc.gov>). This is a public website and does not allow for the submission of non-public documents to the Commission.

Proposed § 3007.203(b) sets forth additional requirements pertaining to the filing of the unredacted version of the non-public materials. Proposed § 3007.203(b) applies in lieu of

§§ 3001.9 and 3001.10 of this chapter, which prescribe procedural requirements for filing of a written document that is required or authorized by statute, rule, regulation, order of the Commission, or direction of the presiding officer. Such filings made in accordance with §§ 3001.9 and 3001.10 of this chapter (either using the Filing Online method accessible through the Commission's public website or via hand delivery) are available to the public. Therefore, proposed § 3007.203(b) sets forth how such filings shall be performed for the unredacted versions of the non-public materials.

Proposed § 3007.203(b)(1) requires filing of the unredacted version of the non-public materials in sealed envelopes marked "Confidential. Do Not Post on Web," consistent with existing § 3007.10(a). Existing § 3007.10(a) requires filing of both electronic (via compact disc (CD) or digital video disc (DVD)) and hard copy (paper) versions of the non-public materials. To reduce the burden, proposed § 3007.203(b)(1) allows the filer to provide only the electronic version. If it is impracticable to submit the electronic version, proposed § 3007.203(b)(1) permits the filer to provide the paper version instead.

The Commission is exploring the use of an alternative system to allow secure online transmission of non-public materials. This alternative system would significantly increase speed and reduce the overall burden, especially for submissions that are frequent, voluminous, or both. Therefore, proposed § 3007.203(b)(2) sets forth the requirements associated with use of any alternative system approved by the Commission. Proposed § 3007.203(b)(2) provides that the Secretary has the authority to approve the use of a secure alternative system to file non-public materials online. It also states that no other system may be used to file non-public materials online. It also provides the Secretary with authority to set forth any minimum requirements associated with using an alternative system. If a filer fails to comply with any of the Secretary's requirements, the Secretary would have discretion to impose requirements specific to a particular filer. The Secretary may also revoke a filer's eligibility to use the alternative system and to require the filer to provide non-public materials in accordance with proposed § 3007.203(b)(1).

*Proposed § 3007.204 Protections for any other person with a proprietary interest.* Proposed § 3007.204 incorporates existing § 3007.20(c), which informs the reader that any

person other than the submitter with a proprietary interest in non-public materials filed with the Commission may lodge an application for non-public treatment. Proposed § 3007.204 expands the applicability of this requirement to involve submissions made outside of filings and illustrates the procedural mechanisms by which an affected person may raise confidentiality concerns with the Commission.

*Proposed § 3007.205 Non-public materials inadvertently filed publicly.* Proposed § 3007.205 pertains to instances in which a person discovers that information that could have been filed non-publicly is contained within a public filing made in accordance with §§ 3001.9 and 3001.10 of this chapter. Proposed § 3007.205 instructs the person to notify Dockets by telephone to remove the non-public material from the publicly available material. The person must file an application for non-public treatment and the non-public materials within one business day of this request to Dockets. Proposed § 3007.205 states that the Secretary has the discretion to impose additional filing requirements on any filer that repeatedly invokes this rule. The Commission expects this proposed rule will be invoked rarely. The Commission website is public and the Commission expects that filers will transmit documents using a reasonable degree of care for any non-public information. This proposed rule outlines a process to minimize exposure of sensitive information that may occur due to a filer's error.

#### *C. Proposed Subpart C of Part 3007—Seeking Access to Non-Public Materials*

*Proposed subpart C of part 3007.* The Commission proposes to add subpart C to 39 CFR part 3007 containing rules applicable to seeking access to non-public materials. These rules allow non-public materials to remain under seal and allow specific persons to access the materials subject to protective conditions.

*Proposed § 3007.300 Eligibility for access to non-public materials.* Proposed § 3007.300(a) incorporates existing § 3007.24(a), which provides that non-public materials may be disclosed to Commission and reviewing court personnel. Proposed § 3007.300(a) adds clarifying language to indicate that such disclosure may be made without the need for issuance of an order.

Proposed § 3007.300(b) codifies the standard of ineligibility for access that was included in the sample Statement of Protective Conditions provided in existing Appendix A to part 3007. Proposed § 3007.300(b) provides that persons involved in competitive

decision-making shall not be granted access to non-public materials and defines the terms consistent with the language appearing in existing Appendix A to part 3007. Codifying this standard in the proposed rules, rather than only in the Statement of Protective Conditions, will enhance uniformity and protection against competitive harm without impeding the ability to participate in Commission proceedings.

Proposed § 3007.300(c) mirrors existing § 3007.24(b) by explaining the circumstances and cross-referencing the relevant provision for other persons to obtain access (via proposed § 3007.301). Existing §§ 3007.40(a) and 3007.50(a) provide that a person may request access to non-public materials during a proceeding or relevant to compliance under 39 U.S.C. 3653. Through past practice, the Commission has determined that 3007.50(a) applies while a 39 U.S.C. 3653 compliance proceeding (proceedings using the designation “Docket No. ACR”) is pending.<sup>12</sup> Proposed § 3007.300(c) unifies existing §§ 3007.40(a) and 3007.50(a) to apply to an access request made for the purpose of aiding participation in a pending Commission proceeding (including a compliance proceeding). Consistent with past practice, proposed § 3007.300(c) also expands the scope to allow a person to seek access for the purpose of aiding the initiation of a proceeding before the Commission.<sup>13</sup> Any person seeking to view non-public materials for other purposes may file a motion for disclosure pursuant to proposed § 3007.400 or § 3007.401 or a FOIA request under 39 CFR part 3004.

*Proposed § 3007.301 Motion for access to non-public materials.* Proposed § 3007.301 concerns requests for access to non-public materials. This proposed rule combines the material of existing §§ 3007.40, 3007.42, 3007.50, and 3007.52, which have separate access rules for non-public materials based on whether or not the person seeking access seeks to use the materials in a compliance proceeding or other type of proceeding. Because this

<sup>12</sup> See, e.g., Docket No. MT2016–1, Order No. 3319, Order Authorizing Market Test of Global eCommerce Marketplace (GEM) Merchant, May 25, 2016, at 24 n.41; Docket Nos. MC2014–3 and CP2014–3, Order No. 2047, Order Denying Motion Requesting Access to Non-public Materials, April 11, 2014 (denying as premature a motion for access seeking non-public pricing information and estimated volumes and costs to determine compliance of the NSA at issue because the motion was filed before the filing of the applicable Annual Compliance Report).

<sup>13</sup> See, e.g., Docket No. ACR2014, United Parcel Service, Inc.'s Motion Requesting Continued Access to Non-public Materials Under Protective Conditions, March 27, 2015, at 2.

distinction does not produce a material difference in procedures, the Commission proposes to unify this content for simplicity.

Proposed § 3007.301(a) combines language appearing in existing §§ 3007.40 and 3007.50, which instruct the person seeking access to file a motion. Proposed § 3007.301(a) also adds an instruction that any part of the motion revealing non-public information must be filed under seal.

Proposed § 3007.301(a) also adds instructions pertaining to the docket in which the motion must be filed. The motion must be filed in the docket in which the non-public materials sought were filed or are intended to be used, if such a docket (open or closed) exists. The Commission expects that an existing docket (open or closed) would accommodate most, and quite likely all, motions for access filed. However, if no docket (open or closed) meeting either of those conditions exists, then the motion shall be filed in the G docket for the applicable fiscal year.

Presently, any document filed with the Commission that is not associated with specific docket designation is by default categorized as a periodic report.<sup>14</sup> The Commission creates the G docket designation to serve as the administrative default designation. If the Commission determines that it is more convenient, expeditious, or otherwise appropriate to resolve any issue arising in a G docket in a different docket(s), the Commission may consolidate or sever proceedings. 39 CFR 3001.14.

The Commission expects that the filing of a motion for access in a G docket would be rare—limited to situations in which the materials sought were not filed in an existing docket (open or closed) and the movant proposes to use the materials to initiate a Commission proceeding. Any movant considering filing in a G docket should telephone Dockets personnel to discuss whether a more appropriate docket exists.

Proposed § 3007.301(b) sets forth the content requirements for the motion based on the material appearing in existing §§ 3007.40(a) and 3007.50(a). Proposed § 3007.301(b)(1) requires identification of the non-public documents for which access is sought. Consistent with existing §§ 3007.40(a)(1) and 3007.50(a)(1), proposed

<sup>14</sup> Existing docket designations are: A (Post office appeals), ACR (Annual Compliance Review), C (complaint), CP (competitive products), IM (international mail), MC (mail classification), MT (market test), N (nature of service), PI (public inquiries), R (rate), RM (rulemaking), SS (special study), and T (tax).

§ 3007.301(b)(2) requires a detailed statement justifying the access request.

Proposed § 3007.301(b)(2) also specifies the minimum information necessary to justify the request, which may vary if the movant proposes to use the materials in a pending Commission proceeding or to initiate a Commission proceeding.

Proposed § 3007.301(b)(2)(i) pertains to using the materials in a pending Commission proceeding. In this instance, the motion must identify all proceedings in which the movant proposes to use the materials and how those materials are relevant to those proceedings. This proposed rule is designed to provide additional guidance to movants regarding the justification required for access requests. Also, because in past practice, parties have sought to use non-public materials in multiple dockets, this proposed rule is designed so as to ensure that adequate justification is provided relating to each docket at issue.

Proposed § 3007.301(b)(2)(ii) pertains to using the materials to aid initiation of a proceeding before the Commission. In that instance, the justification required must describe the subject of the proposed proceeding, how the materials sought are relevant to that proceeding, and the expected timeframe to initiate that proceeding. This proposed rule is designed to provide additional guidance to movants regarding the justification required in these instances.

Proposed § 3007.301(b)(3) remains consistent with existing requirements, in §§ 3007.40(a)(2) and 3007.50(a)(2), to list relevant affiliations.

Proposed § 3007.301(b)(4) requires the movant to indicate whether actual notice has been provided to each person identified in the application under § 3007.201(b)(2). This proposed change will make it clear whether the expedited deadline for a response under proposed § 3007.301(c) applies.

If the motion states that actual notice has been provided to any person, the motion should identify the individual receiving actual notice, the date and approximate time, and the method of notification. This proposed identification requirement should help to protect the interests of the submitter and any person with a proprietary interest. Moreover, this proposed identification requirement should help to resolve motions seeking non-public materials that were submitted years ago—for instance, if there is a successor to the individual designated in the application.

If the motion states that actual notice has been provided to any person, the motion should also state whether the

movant is authorized to represent that the motion (in whole or in part) has been resolved or is contested by such person. This proposed change would expedite the resolution of motions where it is represented that motion is uncontested (in whole or in part).

Proposed § 3007.301(b)(5) requires attachment of a description of protective conditions executed by the movant's attorney or non-attorney representative. Proposed § 3007.301(b)(6) requires attachment of an executed certification to comply with protective conditions from each person (and any individual working on behalf of that person) for whom access is sought. Both of these requirements may be satisfied by using the proposed template Protective Conditions Statement and Certification to Comply with Protective Conditions included in Proposed Appendix A to subpart C of part 3007.

Proposed § 3007.301(c) sets the response period at 3 business days if there has been actual notice. In all other circumstances, the response period remains 7 calendar days. These response timeframes remains consistent with existing §§ 3007.40(b) and 3007.50(b).

Proposed § 3007.301(d) remains consistent with existing §§ 3007.40(c) and 3007.50(c) regarding reply.

Proposed § 3007.301(e) sets forth information related to the Commission's ruling. Consistent with past practice, proposed § 3007.301(e) explains that the Commission may rule on an uncontested access motion at any time after receiving the motion.<sup>15</sup> Consistent with past practice, proposed

§ 3007.301(e) provides that the Commission may rule on an unresolved access motion at any time after the response period has expired. Proposed § 3007.301(e) sets forth the standard for the Commission ruling, which remains consistent with the standard appearing in existing §§ 3007.42 and 3007.52. Proposed § 3007.301(e) states that access shall begin after issuance of the order setting forth all protective conditions.

*Proposed § 3007.302 Non-dissemination, use, and care of non-public materials.* Proposed § 3007.302 sets forth the duties of persons granted access to non-public materials in Commission proceedings. Proposed § 3007.302(a) remains consistent with existing § 3007.62(a) by prohibiting dissemination of non-public materials to any person not granted access by the

Commission under proposed §§ 3007.300 (Commission and reviewing court personnel) or 3007.301 (persons granted access by order of the Commission). Proposed § 3007.302(b) remains consistent with existing § 3007.25(a) by limiting the use of non-public materials to only the purpose for which the non-public materials are supplied. Proposed § 3007.302(c) is based on the prohibition on allowing unauthorized persons to have access to the materials, which appears in existing § 3007.25(b). Proposed § 3007.302(c) also incorporates the standard of care appearing in existing Appendix A to part 3007, which requires a person granted access to non-public materials to use reasonable care to prevent the unauthorized disclosure of non-public materials.

*Proposed § 3007.303 Sanctions for violating protective conditions.* Proposed § 3007.303(a) remains consistent with existing § 3007.62(a) relating to the sanctions for violations of the order granting access subject to protective conditions. Proposed § 3007.303(b) adapts the language of existing § 3007.62(b). Existing § 3007.62(b) refers only to the Postal Service. To reflect that parties other than the Postal Service may be adversely affected by violations of protective conditions, proposed § 3007.303(b) states that the Commission's rules do not impair the ability of any person, including the Postal Service, to pursue other remedies available under the law related to violations of an order granting access subject to protective conditions.

*Proposed § 3007.304 Termination and amendment of access to non-public materials.* Proposed § 3007.304(a) combines the material appearing in existing §§ 3007.41 and 3007.51, which relate to the termination of access to non-public materials. Existing §§ 3007.41 and 3007.51 divide the rules applicable to termination of access depending on whether the non-public materials at issue are relevant to general proceedings or compliance proceedings. Proposed § 3007.304(a) treats termination procedures consistently in both instances.

Proposed § 3007.304(a)(1) remains consistent with the timeframes for the termination of access described in existing §§ 3007.41(a)(1) and 3007.51(a)(1).

Proposed § 3007.304(a)(2) remains consistent with the procedural requirements upon termination described in existing §§ 3007.41(c) and 3007.51(c). Proposed § 3007.304(a)(2) provides that the applicable non-public materials must be destroyed or returned

<sup>15</sup> See, e.g., Docket Nos. ACR2016 and RM2017-1, Order No. 3757, Order Granting Unopposed Motion for Access, January 24, 2017 (granting access one day after filing of the motion, which contained a representation that the motion was unopposed).

to the Commission and notification of compliance must be filed with the Commission. As described below, the Commission proposes revisions to the applicable template form to be filed with the Commission upon termination of access in Appendix A to subpart C of part 3007.

Proposed § 3007.304(b) sets forth the procedure for a person to seek amendment of any protective conditions. This proposed rule aims to facilitate prompt resolution of common issues such as seeking access for additional time (as encompassed under existing §§ 3007.41(b) and 3007.51(b)) or for an additional employee or consultant.

*Proposed § 3007.305 Producing non-public materials in non-Commission proceedings.* Proposed § 3007.305 clarifies existing § 3007.61.

Proposed § 3007.305(a) retains the existing 2-day notification requirement, in § 3007.61(a), imposed upon any person who is the target of a subpoena or order to produce non-public materials that were obtained in a Commission proceeding. Existing § 3007.61(a) requires the target to notify the Postal Service and does not adequately address situations in which the materials were submitted by or claimed to be non-public by a person other than the Postal Service. Therefore, proposed § 3007.305(a) requires the target to notify all persons identified in the underlying application for non-public treatment pursuant to proposed § 3007.201(b)(2). The proposed change better serves the purpose of this rule, which is to give the affected person the opportunity to object to the production or to seek a protective order or other relief.

Proposed § 3007.305(b) clarifies the language of existing § 3007.61(b). Proposed § 3007.305(b) requires a good faith effort to obtain protective conditions at least as effective as those ordered by the Commission regarding the disclosure of non-public materials in non-Commission proceedings.

Proposed § 3007.305(c) clarifies the language of existing § 3007.61(c). Proposed § 3007.305(c) provides that unless overridden in a non-Commission proceeding, the protective conditions ordered by the Commission will remain in effect.

*Proposed Appendix A to subpart C of part 3007—Template Forms.* Existing Appendix A to part 3007 contains three template forms relating to seeking or terminating access to non-public materials. The Commission proposes to move this content to subpart C, which pertains to access to non-public materials. To better reflect its content,

the Commission proposes to update the heading identified in existing Appendix A to part 3007, “Statement of Compliance with Protective Conditions,” to “Template Forms.”

Revisions are proposed to the content of each proposed template form to conform with the changes to the rules appearing in proposed 39 CFR part 3007 and to improve readability. The first proposed template form is a Protective Conditions Statement to aid compliance with proposed § 3007.301(b)(5), which requires attachment of a description of protective conditions to a motion for access to non-public materials. The second proposed template form is a Certification to Comply with Protective Conditions to aid compliance with proposed § 3007.301(b)(6), which requires attachment of a certification to comply with protective conditions executed by each person (and any individual working on behalf of that person) seeking access to non-public materials. The third proposed template form is a Certification of Compliance with Protective Conditions and Termination of Access to aid compliance with proposed § 3007.304(a)(2), which requires the filing of certifications executed by each person (and any individual working on behalf of that person) granted access to non-public materials upon the termination of access.

#### *D. Proposed Subpart D of Part 3007—Seeking Public Disclosure of Non-Public Materials*

*Proposed subpart D of part 3007.* The Commission proposes to add subpart D to 39 CFR part 3007 containing rules applicable to seeking public disclosure of non-public materials.

##### *Proposed § 3007.400 Motion for disclosure of non-public materials.*

Proposed § 3007.400 applies to situations when a person seeks to challenge the non-public treatment claimed for materials—that is, to have the materials disclosed to the public, also known as “unsealed.”

Proposed § 3007.400(a) specifies that this rule applies to materials for which the non-public status remains active—either because the non-public status has not expired or has been extended by order of the Commission.

Proposed § 3007.400(b) explains that a request to have non-public materials unsealed shall be made by motion and sets forth the contents of a motion. Consistent with existing § 3007.31(a), the motion must explain why the materials should be made public and address any pertinent rationale(s) provided in the application for non-public treatment. Also, consistent with

existing § 3007.31(a), the motion may not publicly disclose the information that is designated as non-public pending resolution of the motion.

Proposed § 3007.400(b) requires the movant to indicate whether actual notice has been provided to all persons identified in the application under § 3007.201(b)(2). This proposed change will make it clear whether the expedited deadline for a response under proposed § 3007.400(c) applies.

If the motion states that actual notice has been provided to any person, the motion should identify the individual receiving actual notice, the date and approximate time, and the method of notification. This proposed identification requirement should help to protect the interests of the submitter and any person with a proprietary interest. Moreover, this proposed identification requirement should help to resolve motions seeking non-public materials that were submitted years ago—for instance, if there is a successor to the individual designated in the application.

If the motion states that actual notice has been provided to all identified persons, the motion should also state whether the movant is authorized to represent that the motion (in whole or in part) has been resolved or is contested by such persons. This proposed change would facilitate expedited resolution of motions where it is represented that motion is uncontested (in whole or in part) and particularly when a person other than the submitter has a proprietary interest in the non-public materials. The Commission observes that in accordance with proposed § 3007.101(a), a motion for public disclosure can be avoided if all persons identified pursuant to § 3007.201(b)(2) consent to allowing the submitter to file the materials at issue publicly. The Commission observes that in accordance with proposed § 3007.101(a), a motion for public disclosure can be avoided if all persons identified pursuant to § 3007.201(b)(2) consent to allowing the submitter to file the materials at issue publicly.

Proposed § 3007.400(b) also adds instructions pertaining to the docket in which the motion must be filed. The motion must be filed in the docket in which the non-public materials sought were filed or are intended to be used, if such a docket (open or closed) exists. However, if no docket (open or closed) meeting either of those conditions exists, then the motion shall be filed in the G docket for the applicable fiscal year. Any movant considering filing in a G docket should telephone Dockets

personnel to discuss whether a more appropriate docket exists.

Proposed § 3007.400(c) imposes an expedited response deadline for motions if there has been actual notice. If there has been actual notice, proposed § 3007.400(c) sets the response period at 3 business days. In all other circumstances, the response period remains 7 calendar days, consistent with existing §§ 3007.40(b) and 3007.50(b). This proposed change should encourage movants to provide actual notice and thereby streamline motions practice.

Proposed § 3007.400(d) remains consistent with existing §§ 3007.40(c) and 3007.50(c) regarding reply.

Proposed § 3007.400(e) reflects that the Commission will continue to accord non-public treatment to the material while the motion is pending.

Proposed § 3007.400(f) sets forth information related to the Commission's ruling. Proposed § 3007.400(f) remains consistent with existing § 3007.31(d), which explains the timing for the Commission ruling. Proposed § 3007.400(f) adds that if there has been actual notice and the motion is uncontested, the Commission may rule before the response period expires. Proposed § 3007.400(f) remains consistent with existing § 3007.33, which explains the standards for the Commission ruling.

*Proposed § 3007.401 Materials for which non-public treatment has expired.* Proposed § 3007.401 applies to materials for which non-public treatment has expired. Consistent with existing § 3007.30, proposed § 3007.401(a) provides that non-public status shall expire after the passage of 10 years, unless otherwise provided by the Commission.<sup>16</sup>

The existing rules do not set forth the mechanism for the handling of materials when non-public treatment has expired. Proposed § 3007.401(b) through (f) provide the procedural mechanisms to take effect after 10 years have passed. Proposed § 3007.401(b) through (f) take into account the need for transparency, sound records management practices, and adequate protection of the commercial interests of affected persons, including the Postal Service.

Proposed § 3007.401(b) provides that any person may file a motion requesting the disclosure of materials for which

non-public treatment has expired. Proposed § 3007.401(b) explains the content of such a motion. This motion must identify the materials requested and date(s) that materials were originally submitted under seal. Proposed § 3007.401(b) provides that the motion may not publicly disclose the information that is designated as non-public pending resolution of the motion. Proposed § 3007.401(b) informs the reader that all documents are treated in accordance with the Commission's record retention schedule, which may reduce the availability of some non-public information.

Proposed § 3007.401(b) requires the movant to indicate whether actual notice has been provided to all persons identified in the application under § 3007.201(b)(2). This proposed change will make it clear whether the expedited deadline for a response under proposed § 3007.401(c) applies.

If the motion states that actual notice has been provided to any person, the motion should identify the individual receiving actual notice, the date and approximate time, and the method of notification. This proposed identification requirement should help to protect the interests of the submitter and any person with a proprietary interest. Moreover, this proposed identification requirement should help to resolve motions seeking non-public materials that were submitted over 10 years ago and there is a successor to the individual designated in the application.

If the motion states that actual notice has been provided to any persons, the motion should also state whether the movant is authorized to represent that the motion (in whole or in part) has been resolved or is contested by such persons. This proposed change would facilitate expedited resolution of motions where it is represented that motion is uncontested (in whole or in part) and particularly when a person other than the submitter has a proprietary interest in the non-public materials. The Commission observes that in accordance with proposed § 3007.101(a), a motion for public disclosure can be avoided if all persons identified pursuant to § 3007.201(b)(2) consent to allowing the submitter to file the materials at issue publicly.

Proposed § 3007.401(b) also adds instructions pertaining to the docket in which the motion must be filed. The motion must be filed in the docket in which the non-public materials sought were filed or are intended to be used, if such a docket (open or closed) exists. However, if no docket (open or closed) meeting either of those conditions

exists, then the motion shall be filed in the G docket for the applicable fiscal year. Any movant considering filing in a G docket should telephone Dockets personnel to discuss whether a more appropriate docket exists.

Proposed § 3007.401(c) provides for the timing and content requirements pertaining to any response opposing the motion. Proposed § 3007.401(c) imposes the expedited response deadline for motions if there has been actual notice. If there has been actual notice, proposed § 3007.401(c) sets the response period at 3 business days. In all other circumstances, the response period remains 7 calendar days. This proposed change should encourage movants to provide actual notice and thereby streamline motions practice. A response opposing the motion must request an extension of non-public status by including an application for non-public treatment compliant with proposed § 3007.201 and include specific facts supporting any assertion that commercial injury exists 10 years after the original filing under seal.

Proposed § 3007.401(d) permits a reply to be filed within 7 calendar days of the response.

Proposed § 3007.401(e) states that the information designated as non-public will be accorded non-public treatment pending resolution of the motion.

Proposed § 3007.401(f) sets forth the timing and standard of the ruling. If there has been actual notice and the motion is uncontested, the Commission may rule before the response period expires. In all other circumstances, a motion may be granted any time after the response period described in proposed § 3007.401(c) expires. A motion may be denied any time after the reply period described in proposed § 3007.401(d) expires. The standard to balance the interests of the parties shall remain consistent with proposed § 3007.104.

## V. Section-by-Section Analysis of the Proposed Changes to 39 CFR Part 3001

*Proposed subpart E of part 3001.* The Commission proposes to add subpart E to existing 39 CFR part 3001.

Existing §§ 3007.2 and 3007.3, which relate to information requests, are included in existing 39 CFR part 3007, which relates to non-public information. Information requests are not limited to situations involving non-public materials. Therefore, the Commission proposes to move the procedural requirements relating to information requests to the Commission's rules of practice and procedure under existing 39 CFR part 3001. To minimize disruption associated with moving these

<sup>16</sup> In many dockets, the Postal Service asks the Commission to protect certain non-public information from public disclosure indefinitely. See, e.g., Docket Nos. MC2011-1 and CP2011-2, Order No. 563, Order Approving Express Mail Contract 9 Negotiated Service Agreement, October 20, 2010, at 6-7. The Commission has consistently denied requests for indefinite protection. See *id.*

rules to existing 39 CFR part 3001, the Commission proposes to add proposed subpart E to 39 CFR part 3001. Proposed subpart E to 39 CFR part 3001 contains two rules applicable to information requests.

**Proposed § 3001.100 Applicability and scope.** The first sentence of proposed § 3001.100(a) mirrors the first sentence of existing § 3007.2, which informs the reader that the Commission may require that the Postal Service provide certain information that is likely to materially assist the Commission in fulfilling its statutory responsibilities. Consistent with existing § 3007.3(b), the second sentence of proposed § 3001.100(a) informs the reader that the Commission may request that persons other than the Postal Service provide certain information that is likely to materially assist the Commission in fulfilling its statutory responsibilities. Proposed § 3001.100(b) is based on the second sentence of existing § 3007.2 and includes a non-exhaustive list of the types of information that may be sought in an information request. Proposed § 3001.100(b) is intended to encompass information, documents, and things in whatever form that is likely to materially assist the Commission in fulfilling its statutory responsibilities.

**Proposed § 3001.101 Information request.** Proposed § 3001.101(a) combines existing § 3007.3(a) and (b). Proposed § 3001.101(a) provides that an information request may be directed to the Postal Service as well as other persons and describes the contents of an information request. Proposed § 3001.101(a) dispenses with the defined term “authorized representative” and instead specifies that an information request may be issued by the Commission, the Chairman of the Commission, or the presiding officer, consistent with existing practice and 39 U.S.C. 504(f)(2). Consistent with existing practice, proposed § 3001.101(a) provides that the issuance of an information request is discretionary.

Proposed § 3001.101(b) is based on existing § 3007.3(c). Proposed § 3001.101(b) provides that a request to issue an information request shall be via a motion listing the proposed questions and justifying the request. Proposed § 3001.101(b) codifies that the Commission, the Chairman of the Commission, or the presiding officer may issue an information request at any time after the motion. Any or all of the proposed questions may be included or modified in the information request.

## VI. Section-by-Section Analysis of the Proposed Changes to 39 CFR part 3004

**Proposed § 3004.30 Relationship among the Freedom of Information Act, the Privacy Act, and the Commission’s procedures for accord appropriate confidentiality.** The Commission proposes to amend paragraph (d) of the existing rule to reflect that in all instances in which the Postal Service submits materials to the Commission that it reasonably believes to be exempt from public disclosure, the Postal Service shall follow the submission procedures appearing in subpart B of 39 CFR part 3007. The Commission also proposes to amend paragraph (e) of the existing rule to dispense with the use of the term “third party” to refer to a person other than the Postal Service.

**Proposed § 3004.70 Submission of non-public materials by a person other than the Postal Service.** The Commission also proposes to amend the heading identified in the existing rule to dispense with the use of the term “third party” to refer to a person other than the Postal Service. The Commission proposes to amend paragraph (a) of the existing rule to reflect that any other person providing materials to the Commission that it reasonably believes to be exempt from public disclosure shall follow the submission procedures appearing in subpart B of 39 CFR part 3007. The Commission also proposes to amend paragraph (b) of the existing rule to dispense with the use of the term “third party” to refer to a person other than the Postal Service. The Commission also proposes to amend paragraph (c) of the existing rule so as to update the cross-reference to the provision containing the requirements for an application for non-public treatment from existing § 3007.10 to proposed § 3007.201.

## VII. Administrative Actions

The Commission establishes Docket No. RM2018–3 for consideration of matters raised by this Order. Additional information concerning this rulemaking may be accessed via the Commission’s website at <http://www.prc.gov>. Interested persons may submit comments no later than March 23, 2018. Pursuant to 39 U.S.C. 505, James Waclawski is designated as an officer of the Commission (Public Representative) to represent the interests of the general public in this proceeding.

## VIII. Ordering Paragraphs

*It is ordered:*

1. The Commission establishes Docket No. RM2018–3 for consideration of the matters raised by this Order.

2. Interested persons may submit comments no later than March 23, 2018.

3. Pursuant to 39 U.S.C. 505, the Commission appoints James Waclawski to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in this proceeding.

4. The Secretary shall arrange for publication of this Order in the **Federal Register**.

By the Commission.

**Stacy L. Ruble,**  
Secretary.

## List of Subjects

### 39 CFR Part 3001

Administrative practice and procedure, Confidential business information, Freedom of information, Sunshine Act.

### 39 CFR Part 3004

Administrative practice and procedure, Freedom of information, Reporting and recordkeeping requirements.

### 39 CFR Part 3007

Administrative practice and procedure, Confidential business information.

For the reasons stated in the preamble, the Commission proposes to amend chapter III of title 39 of the Code of Federal Regulations as follows:

## PART 3001—RULES OF PRACTICE AND PROCEDURE

■ 1. The authority citation for part 3001 continues to read as follows:

**Authority:** 39 U.S.C. 404(d); 503; 504; 3661.

■ 2. Add subpart E to read as follows:

### Subpart E—Information Requests

Sec.

3001.100 Applicability and scope.

3001.101 Information request.

### § 3001.100 Applicability and scope.

(a) *Applicability.* The Commission 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. The Commission may request that any other person 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.

(b) *Scope.* Information, documents, and things include, but are not limited to, things such as explanations, confirmations, factual descriptions, data, and documents. Examples include writings; notes; graphs; charts; spreadsheets and underlying formulae; erased, fragmented, or damaged data; data compilations or tables; emails; drawings; photographs; and images—stored in any medium from which information can be obtained either directly or, if necessary, after translation into a reasonably usable form.

#### § 3001.101 Information request.

(a) An information request may be issued at the discretion of the Commission, the Chairman of the Commission, or the presiding officer seeking that the Postal Service or any other person provide information, data, or things covered by § 3001.100. An information request shall describe the documents, information, and things sought, briefly explain the reason for the request, and specify a date on which the response(s) shall be due.

(b) Any person may request the issuance of an information request by filing a motion. The motion shall list the information, data, or things sought; explain the reasons the Commission should make the information request, and justify why the information sought is relevant and material to the Commission's duties under title 39 of the U.S. Code. At any time after the motion is filed, the Commission, the Chairman of the Commission, or the presiding officer may issue an information request that includes all or some of the proposed questions or modifies the proposed questions.

### PART 3004—PUBLIC RECORDS AND FREEDOM OF INFORMATION ACT

■ 3. The authority citation for part 3004 continues to read as follows:

*Authority:* 5 U.S.C. 552; 39 U.S.C. 503.

■ 4. Amend § 3004.30 by revising paragraph (d) introductory text and paragraph (e) to read as follows:

#### § 3004.30 Relationship among the Freedom of Information Act, the Privacy Act, and the Commission's procedures for according appropriate confidentiality.

\* \* \* \* \*

(d) *Requesting a Postal Service record.* The Commission maintains custody of records that are both Commission and Postal Service records. In all instances that the Postal Service submits materials to the Commission that the Postal Service reasonably believes to be exempt from public disclosure, the Postal Service shall follow the procedures described in subpart B of part 3007 of this chapter.

\* \* \* \* \*

(e) *Requesting a record submitted under seal by a person other than the Postal Service.* The Commission maintains records of a confidential nature submitted by persons other than the Postal Service as non-public materials.

(1) A request made pursuant to FOIA for records designated as non-public by a person other than the Postal Service shall be considered in light of all applicable exemptions; and

(2) A request made pursuant to part 3007 of this chapter for records designated as non-public by a person other than the Postal Service shall be considered under the applicable standards set forth in that part.

■ 5. Amend § 3004.70, by revising the section heading and paragraphs (a), (b), and (c) to read as follows:

#### § 3004.70 Submission of non-public materials by a person other than the Postal Service.

(a) *Overlap with treatment of non-public materials.* Any person who submits materials to the Commission (submitter) that the submitter reasonably believes to be exempt from public disclosure shall follow the procedures described in subpart B of part 3007 of this chapter.

(b) *Notice of request.* Except as provided in § 3004.30(d), if a FOIA request seeks materials designated as nonpublic materials, the Commission will provide the submitter with notice of the request. The Commission may also provide notice when it has reason to believe that materials submitted by a person other than the Postal Service are possibly exempt from disclosure and may fall within the scope of any FOIA request.

(c) *Objections to disclosure.* A submitter may file written objections to the request specifying all grounds for withholding the information under FOIA within 7 days of the date of the notice. If the submitter fails to respond to the notice, the submitter will be considered to have no objection, beyond those objections articulated in its application for nonpublic treatment

pursuant to § 3007.201 of this chapter, to the disclosure of the information.

\* \* \* \* \*

■ 7. Revise part 3007 to read as follows:

### PART 3007—NON-PUBLIC MATERIALS PROVIDED TO THE COMMISSION

#### Subpart A—General Provisions

Sec.

3007.100 Applicability.

3007.101 Definitions.

3007.102 Treatment of non-public materials.

3007.103 Commission action to determine non-public treatment.

3007.104 Standard for public disclosure of non-public materials.

#### Subpart B—Submitting Non-public Materials and Seeking Non-public Treatment

3007.200 General requirements for submitting non-public materials and seeking non-public treatment.

3007.201 Application for non-public treatment.

3007.202 Redacted version of the non-public materials.

3007.203 Unredacted version of the non-public materials.

3007.204 Protections for any other person with a proprietary interest.

3007.205 Non-public materials inadvertently filed publicly.

#### Subpart C—Seeking Access to Non-public Materials

3007.300 Eligibility for access to non-public materials.

3007.301 Motion for access to non-public materials.

3007.302 Non-dissemination, use, and care of non-public materials.

3007.303 Sanctions for violating protective conditions.

3007.304 Termination and amendment of access to non-public materials.

3007.305 Producing non-public materials in non-Commission proceedings.

Appendix A to subpart C of part 3007—  
Template Forms

#### Subpart D—Seeking Public Disclosure of Non-public Materials

3007.400 Motion for disclosure of non-public materials.

3007.401 Materials for which non-public treatment has expired.

*Authority:* 39 U.S.C. 503, 504.

#### Subpart A—General Provisions

##### § 3007.100 Applicability.

The rules in this part implement provisions in 39 U.S.C. 504(g). These rules apply whenever:

(a) The Postal Service claims that any document or other matter it provides to the Commission under a subpoena issued under 39 U.S.C. 504(f), or otherwise at the request of the Commission in connection with any proceeding or other purpose under title

39 of the U.S. Code, contains non-public material;

(b) Any other person claims that any document or other matter provided to the Commission contains non-public material;

(c) The Commission is determining the appropriate degree of confidentiality to be accorded information identified by the Postal Service or any other person to contain non-public material in accordance with these rules; or

(d) The Commission is determining how to ensure appropriate confidentiality for non-public materials furnished to the Postal Service or any other person in accordance with these rules.

#### **§ 3007.101 Definitions.**

(a) *Non-public materials* means any information, documents, and things provided to the Commission that are claimed to be exempt from disclosure by the Postal Service pursuant to 39 U.S.C. 504(g), 3652(f) or 3654(f), or claimed to be protectable under Federal Rule of Civil Procedure 26(c) by any person other than the Postal Service with a proprietary interest in the materials. Non-public materials includes any information, documents, and things submitted to the Commission that are claimed to contain information that is described in 39 U.S.C. 410(c) or exempt from public disclosure under 5 U.S.C. 552(b). Non-public materials cease to be non-public if the status has expired or been terminated by the Commission pursuant to this part. Except as provided by § 3007.205, non-public materials cease to be non-public if the submitter publicly discloses the materials with the consent of each affected person with a propriety interest in the materials (if applicable).

(b) *Submitter* means any natural or legal person, including the Postal Service, that provides non-public materials to the Commission and seeks non-public treatment in accordance with the rules of this part.

#### **§ 3007.102 Treatment of non-public materials.**

(a) Except as described in part 3007 or part 3004 of this chapter, the Commission will not disclose or grant access to non-public materials.

(b) To accord appropriate confidentiality to non-public materials during any stage of a proceeding before the Commission, or in connection with any other purpose under title 39 of the U.S. Code, the Commission may, based on Federal Rule of Civil Procedure 26(c):

(1) Prohibit the public disclosure of the non-public materials;

(2) Specify terms for public disclosure of the non-public materials;

(3) Order a specific method for disclosing the non-public materials;

(4) Restrict the scope of the disclosure of the non-public materials as they relate to certain matters;

(5) Restrict who may access the non-public materials;

(6) Require that a trade secret be revealed only in a specific and limited manner or to limited or specified persons; and

(7) Order other relief as appropriate including sealing a deposition or part of a proceeding.

#### **§ 3007.103 Commission action to determine non-public treatment.**

Information requests as described in subpart E of part 3001 of this chapter, preliminary notices, or interim orders may be issued to help the Commission determine the non-public treatment, if any, to be given to the materials. Upon motion by any person, or on its own motion, the Commission may issue an order containing a description of and timeframe for the non-public treatment, if any, to be given to materials claimed by any person to be non-public. The Commission may amend the non-public treatment, if any, to be given to the materials at any time by order.

#### **§ 3007.104 Standard for public disclosure of non-public materials.**

(a) In determining whether to publicly disclose materials claimed by the Postal Service to be non-public, the Commission shall balance the nature and extent of the likely commercial injury identified by the Postal Service against the public interest in maintaining the financial transparency of a government entity competing in commercial markets.

(b) In determining whether to publicly disclose materials in which the Commission determines any person other than the Postal Service has a proprietary interest, the Commission shall balance the interests of the parties based on Federal Rule of Civil Procedure 26(c).

#### **Subpart B—Submitting Non-public Materials and Seeking Non-public Treatment**

##### **§ 3007.200 General requirements for submitting non-public materials and seeking non-public treatment.**

(a) Whenever providing non-public materials to the Commission, the submitter shall provide the following on the same business day: An application for non-public treatment that clearly identifies all non-public materials and describes the circumstances causing

them to be submitted to the Commission in accordance with § 3007.201, a redacted (public) version of the non-public materials in accordance with § 3007.202, and an unredacted (sealed) version of the non-public materials in accordance with § 3007.203.

(b) Before submitting non-public materials to the Commission, if the submitter has reason to believe that any other person has a proprietary interest in the non-public materials, the submitter shall inform each affected person of the nature and scope of the submission to the Commission, including the pertinent docket designation(s) (if applicable) and that the affected person may address any confidentiality concerns directly with the Commission.

##### **§ 3007.201 Application for non-public treatment.**

(a) *Burden of persuasion.* An application for non-public treatment shall fulfill the burden of persuasion that the material designated as non-public should be withheld from the public.

(b) *Contents of application.* An application for non-public treatment shall include a specific and detailed statement setting forth the information specified in paragraphs (b)(1) through (8) of this section:

(1) The rationale for claiming that the materials are non-public, including the specific statutory provision(s) supporting the claim, and an explanation justifying application of the provision(s) to the materials.

(2) A statement of whether the submitter, any other person, or both have a proprietary interest in the non-public materials, and the identification(s) specified in paragraphs (b)(2)(i) through (iii) of this section (whichever is applicable). For purposes of this paragraph, identification means the name, phone number, and email address of an individual.

(i) If the submitter has a proprietary interest in the materials, identification of an individual designated by the submitter to accept actual notice of a motion related to the non-public materials or notice of the pendency of a subpoena or order requiring production of the materials.

(ii) If any person other than the submitter has a proprietary interest in the materials, identification of each person who is known to have a proprietary interest in the materials. If such an identification is sensitive or impracticable, an explanation shall be provided along with the identification of an individual designated by the

submitter to provide notice to each affected person.

(iii) If both the submitter and any other person have a proprietary interest in the non-public materials, identification in accordance with both paragraphs (b)(2)(i) and (ii) of this section shall be provided. The submitter may designate the same individual to fulfill the requirements of paragraphs (b)(2)(i) and (ii) of this section.

(3) A description of the materials claimed to be non-public in a manner that, without revealing the materials at issue, would allow the Commission to thoroughly evaluate the basis for the claim that the materials are non-public.

(4) Particular identification of the nature and extent of the harm alleged and the likelihood of each harm alleged to result from disclosure.

(5) At least one specific hypothetical, illustrative example of each alleged harm.

(6) The extent of the protection from public disclosure alleged to be necessary.

(7) The length of time for which non-public treatment is alleged to be necessary with justification thereof.

(8) Any other relevant factors or reasons to support the application.

(c) *Incorporation by reference.* If the material designated as non-public has been previously claimed to be non-public material by a prior application for non-public treatment, the submitter may incorporate by reference the prior application. Any application that incorporates by reference a prior application that is accessible through the Commission's website (<http://www.prc.gov>) shall state the date, docket number, and the name of the filer of the prior application. In all other circumstances, the application that incorporates by reference a prior application shall attach the prior application.

**§ 3007.202 Redacted version of the non-public materials.**

(a) Except as allowed under paragraph (b) of this section, the submitter shall use the graphical redaction (blackout) method for all redacted materials. The submitter shall blackout only the material that is claimed to be non-public.

(b) The submitter shall justify using any other redaction method. The application for non-public treatment shall state with particularity the competitive harm or practical difficulty alleged to result from using the blackout method. The submitter shall specifically identify any alterations made to the unredacted version, including the

location and number of lines or pages removed.

(c) If electronic, the redacted version shall be filed in a searchable format, unless the submitter certifies that doing so would be impracticable.

**§ 3007.203 Unredacted version of the non-public materials.**

(a) Each page, item, and thing, or portion thereof, of the unredacted version of the materials for which non-public treatment is sought shall be marked in a manner reasonably calculated to alert custodians to the confidential nature of the materials. The Filing Online method accessible through the Commission's website (<http://www.prc.gov>) described under §§ 3001.9 and 3001.10 of this chapter may not be used to submit the unredacted version of non-public materials.

(b) In lieu of §§ 3001.9 and 3001.10 of this chapter, the filing of the unredacted version of the non-public materials shall be made in accordance with the following requirements concerning the filing process, form, and number of copies.

(1) Except if using an alternative system approved by the Commission under paragraph (b)(2) of this section, the unredacted version of the non-public materials shall be filed in a sealed envelope clearly marked "Confidential. Do Not Post on Web" to the Office of Secretary and Administration, Postal Regulatory Commission, 901 New York Avenue NW, Suite 200, Washington, DC 20268-0001. Two copies of the unredacted version of the non-public materials shall be filed using an electronic format such as compact discs (CDs) or digital video discs (DVDs) that shall be clearly marked "Confidential. Do Not Post on Web." The non-public materials may not be password protected. Spreadsheets shall display the formulas used and their links to related spreadsheets. All workpapers or data shall be filed in a form, and be accompanied by sufficient explanation and documentation, to allow them to be replicated using a publicly available PC application. If making an electronic unredacted version of the non-public materials is impracticable, two hard copies (paper) versions of the non-public materials may be filed.

(2) On behalf of the Commission, the Secretary has authority to approve the use of a secure alternative system to file non-public materials. The Secretary may set forth any minimum requirements associated with using an alternative system. If a filer using the alternative system fails to comply with any of the

Secretary's requirements, the Secretary has discretion to revoke the filer's eligibility to use the alternative system or impose requirements specific to the filer as necessary to ensure secure transmission of non-public materials.

**§ 3007.204 Protections for any other person with a proprietary interest.**

Any other person with a proprietary interest in materials that have been or will be submitted to the Commission may address any confidentiality concerns directly with the Commission by seeking non-public treatment in accordance with the requirements of this subpart, responding to a motion for access to non-public materials in accordance with the requirements of subpart C of this part, or responding to a motion for disclosure of non-public materials in accordance with the requirements of subpart D of this part.

**§ 3007.205 Non-public materials inadvertently filed publicly.**

Any filer or person with a proprietary interest that discovers the inclusion of materials that could have been filed non-publicly within a public filing made in accordance with §§ 3001.9 and 3001.10 of this chapter shall telephone Dockets personnel immediately to request that the non-public material be removed from the publicly available material. Upon receipt of that telephone request, Dockets personnel will remove from the publicly available material that material for which non-public treatment is being requested until the end of the next business day in order to provide the filer or person with a proprietary interest an opportunity to file an application for non-public treatment and the non-public materials in accordance with the requirements of this subpart. If any filer makes repeated use of this rule, the Secretary has discretion to impose additional requirements on this filer as necessary to ensure secure filing of non-public materials.

**Subpart C—Seeking Access to Non-public Materials**

**§ 3007.300 Eligibility for access to non-public materials.**

(a) The following persons may access non-public materials without an order issued pursuant to § 3007.301(e):

- (1) Members of the Commission;
- (2) Commission employees, including Public Representatives, carrying out their official responsibilities;
- (3) Contractors, attorneys, or other non-employee subject matter experts assisting the Commission in carrying out its duties;
- (4) Reviewing courts and their staffs;

(5) Court reporters, stenographers, or persons operating audio or video recording equipment for such court reporters or stenographers at hearings or depositions.

(b) No person involved in competitive decision-making for any individual or entity that might gain competitive advantage from using non-public materials shall be granted access to non-public materials. Involved in competitive decision-making includes consulting on marketing or advertising strategies, pricing, product research and development, product design, or the competitive structuring and composition of bids, offers or proposals. It does not include rendering legal advice or performing other services that are not directly in furtherance of activities in competition with an individual or entity having a proprietary interest in the protected material.

(c) Any person not described in paragraph (a) or (b) of this section may request access to non-public materials as described in § 3007.301, for the purpose of aiding participation in a pending Commission proceeding (including compliance proceedings) or aiding the initiation of a proceeding before the Commission.

**§ 3007.301 Motion for access to non-public materials.**

(a) *Filing requirements.* A request for access to non-public materials shall be made by filing a motion with the Commission. Any part of the motion revealing non-public materials shall be filed in accordance with subpart B of this part. The motion shall be filed in the docket in which the materials were filed or in the docket in which the materials will be used; in all other circumstances, the motion shall be filed in the G docket for the applicable fiscal year.

(b) *Content requirements.* The motion shall:

(1) Identify the particular non-public documents to which the movant seeks access;

(2) Include a detailed statement justifying the request for access:

(i) if access is sought to aid participation in any pending Commission proceeding, the motion shall identify all proceedings (including compliance proceedings) in which the movant proposes to use the materials and how those materials are relevant to those proceedings, or

(ii) if access is sought to aid initiation of a proceeding before the Commission, the motion shall describe the subject of the proposed proceeding, how the materials sought are relevant to that proposed proceeding, and when the

movant anticipates initiating the proposed proceeding;

(3) List all relevant affiliations, including employment or other relationship (including agent, consultant or contractor) with the movant, and whether the movant is affiliated with the delivery services, communications or mailing industries;

(4) Specify if actual notice of the motion has been provided to each person identified in the application pursuant to § 3007.201(b)(2). If the motion states that actual notice has been provided, the motion shall identify the individual(s) to whom actual notice was provided, the date(s) and approximate time(s) of actual notice, the method(s) of actual notice (by telephone conversation, face-to-face conversation, or an exchange of telephone or email messages), and whether the movant is authorized to represent that the motion (in whole or in part) has been resolved or is contested by the submitter or any other affected person;

(5) Attach a description of protective conditions completed and signed by the movant's attorney or non-attorney representative, who may use and modify the template Protective Conditions Statement in Appendix A to this subpart; and

(6) Attach a certification to comply with protective conditions executed by each person (and any individual working on behalf of that person) seeking access, who may use and modify the template Certification to Comply with Protective Conditions in Appendix A to this subpart.

(c) *Response.* If actual notice of the motion was provided in advance of the filing to each person identified pursuant to § 3007.201(b)(2) by telephone conversation, face-to-face conversation, or an exchange of telephone or email messages, a response to the motion is due within 3 business days of the filing of the motion, unless the Commission otherwise provides. In all other circumstances, a response to the motion is due within 7 calendar days of filing the motion, unless the Commission otherwise provides.

(d) *Reply.* No reply to a response shall be filed, unless the Commission otherwise provides.

(e) *Commission ruling.* The Commission may enter an order at any time after receiving a motion if the movant states that: Actual notice has been given to each persons identified pursuant to § 3007.201(b)(2) and that the movant is authorized to represent that the motion is uncontested. In all other circumstances, the Commission will enter an order determining if access will be granted after the response period

described in paragraph (c) of this section has expired. If no opposition to the motion has been filed by the submitter or any other person with a proprietary interest before the expiration of the response period described in paragraph (c) of this section, the Commission may issue an order granting access, subject to the agreed protective conditions. In determining whether to grant access to non-public materials, the Commission shall balance the balance the interests of the parties based on Federal Rule of Civil Procedure 26(c). If access is granted, access shall commence following the issuance of the appropriate order setting forth all protective conditions.

**§ 3007.302 Non-dissemination, use, and care of non-public materials.**

(a) No person who has been granted access to non-public materials in accordance with § 3007.300 or § 3007.301 may disseminate the materials in whole or in part to any person not allowed access pursuant to § 3007.300 or § 3007.301.

(b) Persons with access to non-public materials under § 3007.300 or § 3007.301 shall use non-public materials only for the purposes for which the non-public materials are supplied.

(c) Persons with access to non-public materials under § 3007.300 or § 3007.301 shall protect the non-public materials from any person not granted access under § 3007.300 or § 3007.301 by using the same degree of care, but no less than a reasonable degree of care, to prevent the unauthorized disclosure of these materials as those persons, in the ordinary course of business, would be expected to use to protect their own proprietary material or trade secrets and other internal, confidential, commercially sensitive, and privileged information.

**§ 3007.303 Sanctions for violating protective conditions.**

(a) If a person who has been granted access to non-public materials under § 3007.301 violates the terms of the order granting access, the Commission shall impose sanctions on the person who violated the order, the persons or entities on whose behalf the person was acting, or both. The sanctions may include:

(1) Dismissing the proceeding in whole or in part;

(2) Ruling by default against the person who violated the order or the persons or entities on whose behalf the person was acting; and

(3) Such other sanctions, as deemed appropriate by the Commission.

(b) This rule does not prevent any person, including the Postal Service, whose interests are damaged by the violation of an order granting access subject to protective conditions, from pursuing any remedies available under the law against the person who violated the order, the persons or entities on whose behalf the person was acting, or both.

**§ 3007.304 Termination and amendment of access to non-public materials.**

(a) *Termination of access.* (1) Except as provided in paragraph (b) of this section, access to non-public materials granted under § 3007.301 terminates either when the Commission issues the final order or report concluding the proceeding(s) in which the participant who filed the motion seeking access represented that the non-public materials would be used, or when the person granted access withdraws or is otherwise no longer involved in the proceeding(s), whichever occurs first. For purposes of this paragraph, an order or report is not considered final until after the possibility of judicial review expires.

(2) Upon termination of access, all non-public materials, and any duplicates, in the possession of each person (and any individual working on behalf of that person) granted access shall be destroyed or returned to the Commission. The participant who filed the motion seeking access shall file with the Commission a notice of termination of access and attach a certification of compliance with protective conditions executed by each person (and any individual working on behalf of that person) granted access to the non-public materials. The template Certification of Compliance with Protective Conditions and Termination of Access in Appendix A to this subpart may be used and modified to comply with this requirement.

(b) *Amendment of Access.* Any person may file a motion seeking to amend any protective conditions related to access of non-public materials, including extending the timeframe for which access is granted or expanding the persons to whom access is to be granted, in accordance with § 3007.301.

**§ 3007.305 Producing non-public materials in non-Commission proceedings.**

(a) If a court or other administrative agency issues a subpoena or orders production of non-public materials that a person obtained under protective conditions ordered by the Commission, the target of the subpoena or order shall,

within 2 days of receipt of the subpoena or order, notify each person identified pursuant to § 3007.201(b)(2) of the pendency of the subpoena or order to allow time to object to that production or to seek a protective order or other relief.

(b) Any person that has obtained non-public materials under protective conditions ordered by the Commission and seeks to disclose the non-public materials in a court or other administrative proceeding shall make a good faith effort to obtain protective conditions at least as effective as those set forth in the Commission order establishing the protective conditions.

(c) Unless overridden by the reviewing court or other administrative agency, protective conditions ordered by the Commission will remain in effect.

**Appendix A to Subpart C of Part 3007—  
Template Forms**

**Protective Conditions Statement**

\_\_\_\_ (name of submitter of non-public materials) requests confidential treatment of non-public materials identified as \_\_\_\_ (non-confidential description of non-public materials) (hereinafter “these materials”) in Commission Docket No(s). \_\_\_\_ (designation of docket(s) in which these materials were filed).

\_\_\_\_ (name of participant filing motion) (hereinafter “the movant”) requests access to these materials related to \_\_\_\_ (designation of docket(s) or description of proposed proceeding(s) in which these materials are to be used) (hereinafter “this matter”).

The movant has provided to each person seeking access to these materials:

- this Protective Conditions Statement,
- the Certification to Comply with Protective Conditions,
- the Certification of Compliance with Protective Conditions and Termination of Access; and
- the Commission’s rules applicable to access to non-public materials filed in Commission proceedings (subpart C of part 3007 of the U.S. Code of Federal Regulations).

Each person (and any individual working on behalf of that person) seeking access to these materials has executed a Certification to Comply with Protective Conditions by signing in ink or by typing/s/before his or her name in the signature block. The movant attaches the Protective Conditions Statement and the executed Certification(s) to Comply with Protective Conditions to the motion for access filed with the Commission.

The movant and each person seeking access to these materials agree to comply with the following protective conditions:

1. In accordance with 39 CFR 3007.303, the Commission may impose sanctions on any person who violates these protective conditions, the persons or entities on whose behalf the person was acting, or both.

2. In accordance with 39 CFR 3007.300(b), no person involved in competitive decision-

making for any individual or entity that might gain competitive advantage from using these materials shall be granted access to these materials. Involved in competitive decision-making includes consulting on marketing or advertising strategies, pricing, product research and development, product design, or the competitive structuring and composition of bids, offers or proposals. It does not include rendering legal advice or performing other services that are not directly in furtherance of activities in competition with an individual or entity having a proprietary interest in the protected material.

3. In accordance with 39 CFR 3007.302(a), a person granted access to these materials may not disseminate these materials in whole or in part to any person not allowed access pursuant to 39 CFR 3007.300(a) (Commission and court personnel) or 3007.301 (other persons granted access by Commission order) except in compliance with:

- a. Specific Commission order,
- b. Subpart B of 39 CFR 3007 (procedure for filing these materials in Commission proceedings), or
- c. 39 CFR 3007.305 (production of these materials in a court or other administrative proceeding).

4. In accordance with 39 CFR 3007.302(b) and (c), all persons granted access to these materials:

- a. must use these materials only related to this matter; and
- b. must protect these materials from any person not authorized to obtain access under 39 CFR 3007.300 or 3007.301 by using the same degree of care, but no less than a reasonable degree of care, to prevent the unauthorized disclosure of these materials as those persons, in the ordinary course of business, would be expected to use to protect their own proprietary material or trade secrets and other internal, confidential, commercially sensitive, and privileged information.

5. The duties of each person granted access to these materials apply to all:

- a. Disclosures or duplications of these materials in writing, orally, electronically, or otherwise, by any means, format, or medium;
- b. Excerpts from, parts of, or the entirety of these materials;
- c. Written materials that quote or contain these materials; and
- d. Revised, amended, or supplemental versions of these materials.

6. All copies of these materials will be clearly marked as “Confidential” and bear the name of the person granted access.

7. Immediately after access has terminated pursuant to 39 CFR 3007.304(a)(1), each person (and any individual working on behalf of that person) who has obtained a copy of these materials must execute the Certification of Compliance with Protective Conditions and Termination of Access. In compliance with 39 CFR 3007.304(a)(2), the movant will attach the executed Certification(s) of Compliance with Protective Conditions and Termination of Access to the notice of termination of access filed with the Commission.

8. Each person granted access to these materials consents to these or such other conditions as the Commission may approve.

Respectfully submitted,  
(signature of representative)  
/s/ \_\_\_\_\_

(print name of representative)  
(address line 1 of representative)  
(address line 2 of representative)  
(telephone number of representative)  
(email address of representative)  
(choose the appropriate response)  
Attorney/Non-Attorney Representative  
for \_\_\_\_\_  
(name of the movant)

You may delete the instructional text to complete this form. This form may be filed as an attachment to the motion for access to non-public materials under 39 CFR 3007.301(b)(5).

○ I have read and understand the Protective Conditions Statement and this Certification to Comply with Protective Conditions;

○ I am eligible to receive access to these materials because I am not involved in competitive decision-making for any individual or entity that might gain competitive advantage from using these materials; and

○ I will comply with all protective conditions established by the Commission.  
(signature of individual receiving access)

/s/ \_\_\_\_\_  
(print name of individual receiving access)  
(title of individual receiving access)  
(employer of individual receiving access)  
(name of the participant filing the motion)  
(date)

You may delete the instructional text to complete this form. This form may be filed as an attachment to the motion for access to non-public materials under 39 CFR 3007.301(b)(6).

#### Certification of Compliance with Protective Conditions and Termination of Access

\_\_\_\_\_ (name of submitter of non-public materials) requests confidential treatment of non-public materials identified as \_\_\_\_\_ (non-confidential description of non-public materials) (hereinafter "these materials") filed in Commission Docket No.(s) \_\_\_\_\_ (designation of docket(s) in which these materials were filed).

The Commission granted the request by \_\_\_\_\_ (name of participant filing notice) to grant me access to these materials to use related to \_\_\_\_\_ (designation of docket(s) or description of proposed proceeding(s) in which these materials are to be used) (hereinafter "this matter").

I certify that:

○ I accessed, maintained, and used these materials in accordance with the protective conditions established by the Commission;  
○ Effective \_\_\_\_\_ (date), my access to these materials was terminated; and

○ Effective \_\_\_\_\_ (date), I no longer have any of these materials or any duplicates.  
(signature of individual granted access)

/s/ \_\_\_\_\_  
(print name of individual granted access)  
(title of individual granted access)  
(employer of individual granted access)  
(name of participant filing notice)  
(date)

You may delete the instructional text to complete this form. This form should be filed as an attachment to the notice of termination of access to non-public materials under 39 CFR 3007.304(a)(2).

#### Subpart D—Seeking Public Disclosure of Non-public Materials

##### § 3007.400 Motion for disclosure of non-public materials.

(a) *Application of this rule.* This rule applies to non-public material during the initial duration of non-public status, up to 10 years, and any non-public material for which the Commission enters an order extending the duration of that status under § 3007.401(a).

(b) *Motion for disclosure of non-public materials.* Any person may file a motion with the Commission requesting that non-public materials be publicly disclosed. Any part of the motion revealing non-public materials shall be filed in accordance with subpart B of this part. The motion shall justify why the non-public materials should be made public and specifically address any pertinent rationale(s) provided in the application for non-public treatment. The motion shall specify whether actual notice of the motion has been provided to each person identified in the application pursuant to § 3007.201(b)(2). If the motion states that actual notice has been provided, the motion shall identify the individual(s) to whom actual notice was provided, the date(s) and approximate time(s) of actual notice, the method(s) of actual notice (by telephone conversation, face-to-face conversation, or an exchange of telephone or email messages), and whether the movant is authorized to represent that the motion (in whole or in part) has been resolved or is contested by the submitter or any other affected person. The motion shall be filed in the docket in which the materials were filed or in the docket in which the materials will be used; in all other circumstances, the motion shall be filed in the G docket for the applicable fiscal year.

(c) *Response.* If actual notice of the motion was provided in advance of the filing to each person identified pursuant to § 3007.201(b)(2) by telephone conversation, face-to-face conversation, or an exchange of telephone or email messages, a response to the motion is due within 3 business days of the filing of the motion, unless the Commission otherwise provides. In all other circumstances, a response to the motion is due within 7 calendar days of filing the motion, unless the Commission otherwise provides.

(d) *Reply.* No reply to a response shall be filed, unless the Commission otherwise provides.

(e) *Non-public treatment pending resolution.* Pending the Commission's resolution of the motion, information designated as non-public will be accorded non-public treatment.

(f) *Commission ruling.* The Commission may enter an order at any time after receiving a motion if the movant states that: Actual notice has been given to each person identified pursuant to § 3007.201(b)(2) and that the movant is authorized to represent that the motion is uncontested. In all other circumstances, the Commission will enter an order determining what non-public treatment, if any, will be given to the materials after the response period described in paragraph (c) of this section has expired. The determination of the Commission shall balance the interests of the parties as described in § 3007.104.

##### § 3007.401 Materials for which non-public treatment has expired.

(a) *Expiration of non-public treatment.* Ten years after the date of submission to the Commission, non-public materials shall lose non-public status unless otherwise provided by the Commission.

(b) *Motion for Disclosure of Materials for Which Non-Public Treatment has Expired.* Any person may file a motion requesting that materials for which non-public treatment has expired under paragraph (a) of this section be publicly disclosed. Any part of the motion revealing non-public materials shall be filed in accordance with subpart B of this part. The motion shall identify the materials requested and date(s) that materials were originally submitted under seal. The motion shall specify whether actual notice of the motion has been provided to each person identified in the application pursuant to § 3007.201(b)(2). If the motion states that actual notice has been provided, the motion shall identify the individual(s) to whom actual notice was provided, the date(s) and approximate time(s) of actual notice, the method(s) of actual notice (by telephone conversation, face-to-face conversation, or an exchange of telephone or email messages), and whether the movant is authorized to represent that the motion (in whole or in part) has been resolved or is contested by the submitter or any other affected person. The motion shall be filed in the docket in which the materials were filed or in the docket in which the materials will be used; in all other circumstances, the motion shall be filed in the G docket for the applicable

fiscal year. All documents are treated in accordance with the Commission's record retention schedule, which may reduce the availability of some non-public information.

(c) *Response.* If actual notice of the motion was provided in advance of the filing to each person identified pursuant to § 3007.201(b)(2) by telephone conversation, face-to-face conversation, or an exchange of telephone or email messages, a response to the motion is due within 3 business days of the filing of the motion, unless the Commission otherwise provides. In all other circumstances, a response to the motion is due within 7 calendar days of the filing of the motion, unless the Commission otherwise provides. Any response opposing the motion shall request an extension of non-public

status by including an application for non-public treatment compliant with § 3007.201. This extension application shall also include specific facts in support of any assertion that commercial injury exists despite the passage of 10 years pursuant to paragraph (a) of this section or the timeframe established by Commission order under § 3007.104.

(d) *Reply.* Within 7 calendar days of the filing of a response, any person (including the movant) may file a reply, unless the Commission otherwise provides.

(e) *Non-public treatment pending resolution.* Pending the resolution of the motion by the Commission, information designated as non-public will be accorded non-public treatment.

(f) *Ruling.* The Commission may grant the motion at any time after receiving a

motion if the movant states that: actual notice has been given to each person identified pursuant to § 3007.201(b)(2) and that the movant is authorized to represent that the motion is uncontested. In all other circumstances, the Commission may grant the motion at any time after the response period described in paragraph (c) of this section has expired. The Commission may deny the motion and enter an order extending the duration of non-public status at any time after the reply period described in paragraph (d) of this section has expired. The determination of the Commission shall balance the interests of the parties as described in § 3007.104.

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