

**BEFORE THE POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-001**

Regulations Establishing System Of Ratemaking)
_____) Docket No. RM2007-1
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SUBMISSION OF COMMENTS

Pursuant to the Commission's January 30, 2007 "Advance Notice of Proposed Rulemaking on Regulations Establishing a System of Ratemaking," Akerman Senterfitt Wickwire Gavin hereby submits its comments on how the Commission can best fulfill its responsibilities to achieve the purposes of the Postal Accountability and Enhancement Act (PAEA). We thank the Commission for the opportunity to submit comments and its earnest desire to involve the public in this process. These comments are limited to a single aspect of the Commission's procedures: the submission of information that the Postal Service deems confidential.

Background on Confidential Treatment of USPS Submitted Information

The submission of information that the Postal Service deems confidential has arisen quite frequently in recent PRC proceedings, and can arise under a variety of different scenarios under the PAEA. During the last several rate cases, it appears that the Postal Service has increasingly sought confidential treatment for information that it has submitted to the PRC.

Under new Section 3652(f)(1), the Postal Service initially determines whether to deem confidential the information it submits to the PRC. For all such information, it must notify with

particularity the documents (or portions of documents) for which confidentiality is sought and the reasons therefor.

The test for determining whether confidentiality will be accorded such information is set out in newly revised 39 U.S.C. § 504(g)(2) (as amended by PAEA section 602). The "likely commercial injury" to the Postal Service from release of such information is to be weighed against the public interest in financial transparency:

In determining the appropriate degree of confidentiality to be accorded information identified by the Postal Service under paragraph (1), the Commission shall balance the nature and extent of the likely commercial injury to the Postal Service against the public interest in maintaining the financial transparency of a government establishment competing in commercial markets.

In determining whether information submitted by the Postal Service should be afforded confidentiality, and the degree of such confidentiality, the Commission is to balance the extent of the "likely commercial injury" from release of the information against the public interest in "maintaining the financial transparency of a government establishment competing in commercial markets."

It is important to note that Congress, in setting out this balancing test, did not institute the Postal Service's "good business practice" exemption to the Freedom of Information Act exemption, which appears in 39 U.S.C. § 410(c)(2). The Postal Service has taken the position that the good business practice exemption allows it to withhold from disclosure essentially any information that a corporation would not disclose. Under the PAEA, Congress explicitly rejects that position with respect to information submitted to the PRC by setting out the standard that now appears in 39 U.S.C. § 504(g)(2). To obtain confidential treatment of information under the new PAEA standard, USPS must show: (1) "*likely* competitive injury," not just speculative possible competitive injury; and (2) the nature and extent of such injury, assuming likely

competitive injury would occur. This showing is to be balanced against the public interest in the financial transparency of "a government establishment competing in commercial markets." The counter-balance of a *government establishment* competing in commercial markets is quite different, and of less weight, than a *private establishment* competing in commercial markets.

As the name of the Postal Accountability and Enhancement Act itself suggests, accountability and transparency were paramount considerations of Congress. This is further reflected in new section 3622(b)(6), which states that "increas[ing] the transparency of the ratemaking process" is one of the objectives to be achieved under the PAEA.

Recommendations

In consideration of these factors, the Commission should adopt regulations that apply when USPS seeks to designate information as confidential.

1. Place Burden of Establishing Need for Confidentiality on USPS, and Place Limits on Duration of Confidentiality.

The regulations should make clear that the burden of proving "likely competitive injury" and the "nature and extent" of that injury lies squarely with the Postal Service. The regulations should also make clear that only the confidential portions of documents (whose release would cause "likely competitive injury") be afforded confidential treatment. The regulations should also provide for time limits on how long information will remain confidential. While procedures exist for the submission of confidential information by the Postal Service, those procedures prevent public access to such information. Even for parties who are granted access to confidential information under protective orders, such procedures necessarily make it much more burdensome, costly, and time-consuming for parties to review and use the information in PRC

proceedings. And by its very nature, the designation of USPS information as confidential does not promote the PAEA's goal of financial transparency.

2. Adopt Separate Procedures for Affording Confidential Treatment to Information Related to Market Dominant Products.

The Commission should also adopt separate procedures for determining whether to afford confidential treatment to information that is related to market dominant products versus competitive products. The PAEA provides for separate methods of rate regulation for market dominant and competitive products. Market dominant products (i.e., essentially monopoly products) are not an instance of "a government establishment *competing* in commercial markets." 39 U.S.C. § 504(g)(2). Thus, the balancing test set out in 39 U.S.C. § 504(g)(2) would weigh heavily against granting confidential treatment to information related to such products. Only in the competitive products category would the Postal Service be "competing in commercial markets." For market dominant products, it can be expected that very little, if any, information could be deemed confidential under 39 U.S.C. § 504(g)(2).

3. Require USPS to Break Down Confidential Information that Relates to Both Market Dominant and Competitive Products.

It is conceivable that certain information submitted by the Postal Service would relate to both market dominant and competitive products. The Commission should enact rules to require the Postal Service to, wherever possible, break down such information into finer categories so that information related to market dominant products not be masked by a larger category that applies to both products.

4. Adopt Procedures that Allow for Review, Reconsideration, and Revocation of Confidential Treatment.

For information that is afforded confidential treatment, procedures should be enacted that allow for the revocation, reconsideration, or revised terms of such treatment. For example, non-confidential information submitted by the Postal Service to the PRC or other forums may show there is no need to afford confidential treatment to other information previously submitted. Similarly, the lapse of time, or other circumstances, may remove the need to continue to afford confidential treatment to USPS information, or may make portions of the information submitted non-confidential. In all such cases, the Postal Service should bear the burden of establishing that all of the information submitted as confidential must continue to be treated as confidential.

Respectfully submitted,

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