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POSTAL RATE COMMISSION  
OFFICE OF THE SECRETARY  
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August 18, 1999

VIA HAND DELIVERY

Honorable Margaret P. Crenshaw  
Secretary, Postal Rate Commission  
1333 H Street, N.W.  
Washington, D.C. 20268

Re: Appeal on Partial Denial of Freedom of Information Act  
Request for Report Under 39 U.S.C. § 3663

Dear Ms. Crenshaw:

Pursuant to 39 C.F.R. § 3001.42(c)(2), Piper & Marbury L.L.P. ("P&M") hereby appeals to the Commission from that portion of the decision dated July 29, 1999, which denies P&M's Freedom of Information Act ("FOIA") request dated July 15, 1999, seeking a copy of the comprehensive report on the costs, revenues, and volumes accrued by the United States Postal Service ("the Postal Service") in connection with mail matter conveyed between the United States and other countries for the past fiscal year, as required by 39 U.S.C. § 3663. P&M requests that you forward this appeal to the Commission for disposition.

BACKGROUND

In October of 1998, Congress amended the Postal Reorganization Act ("the Act") to require the Commission to "transmit to each House of Congress a comprehensive report of the costs, revenues, and volumes accrued by the Postal Service in connection with mail matter conveyed between the United States and other countries for the previous fiscal year." 39 U.S.C. § 3663(a). This requirement was adopted because of concerns expressed by Postal Service competitors that competitive international mail services are being subsidized by other postal services. Those concerns were given legitimacy by a General Accounting Office report which indicated that at least some of the Postal Service's competitive international products and services were being provided at a loss. See Report on New Postal Products, GAO/GGD-99-15 (November 24, 1998), at 19, 44-47.

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In Order No. 1226 (January 15, 1999), the Commission noted that it “may be appropriate to establish permanent rules concerning data that the Postal Service should provide to enable the Commission to carry out this responsibility,” but it declined to initiate a rulemaking proceeding due to “the short period [of time] that remains for obtaining the data on which the study will be based.” Order No. 1226 at 2. However, the Commission indicated that it “expects to initiate such an inquiry shortly after the July 1, 1999 report is completed.” *Id.* The Commission specifically found that “input from interested parties would be helpful” in complying with § 3663. *Id.* at 3.

The Commission has since issued its report. The report confirms (at page 35) that a number of rates for competitive international services are below cost.

On July 15, 1999, P&M requested a copy of the report under FOIA, 5 U.S.C. § 552. By letter dated July 29, 1999 (“the Denial Letter”), the Secretary provided P&M with a copy of the report, from which the following information was redacted:

1. Product-specific costs and cost coverages for outbound international services;
2. Product-specific volumes, revenues, and costs for outbound international “initiatives”;
3. Attributable costs for inbound services for which the Postal Service negotiates individual country inward charges, or for which the Postal Service unilaterally sets inbound delivery charges;
4. Attributable costs and cost coverages for inbound parcel post;
5. Service-specific cost data disaggregated by cost component or element; and
6. Costs by country or country group.<sup>1</sup>

These redactions are based on 39 U.S.C. § 410(c)(2). This provision states that 39 U.S.C. § 410(b)(1) -- which, among other things, makes FOIA applicable to the Postal Service -- “shall not require the disclosure of . . . information of a commercial nature . . . which under good business practice would not be publicly disclosed.” *See also* 5 U.S.C. § 552(b)(4). The Denial Letter indicates that “The ‘good business practice’ standard of § 410(c)(2) . . . appears to intend that the Postal Service be placed on an equal footing with private competitors with respect to its disclosure obligations, at least when the public hearing provisions of Chapter 36 of the Postal Reorganization Act do not apply.” Denial Letter at 3-4.

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1. Other information not listed here was also redacted.

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ARGUMENT

A. The Denial Letter Is Based on the Erroneous View that 39 U.S.C. § 410(c)(2) Is Intended to Treat the Postal Service As If It Were Just Another Private Company.

The Denial Letter bases its redactions on the premise that “The ‘good business practice’ standard of § 410(c)(2) . . . appears to intend that the Postal Service be placed on an equal footing with private competitors with respect to its disclosure obligations” under FOIA. Denial Letter at 3-4. But that is not so.

United States governmental agencies have a “firm obligation” to “make disclosure to ‘any person’ of identifiable information and facts in their possession, limited only by certain specific exceptions.” *Ethyl Corp. v. EPA*, 478 F.2d 47, 48 (4th Cir. 1973) (footnote omitted). *See also id.* at 49 (stating that with the adoption of FOIA, disclosure of information is now the rule and secrecy is the exception). It is generally accepted that this disclosure obligation is to be construed broadly, and exemptions from it should be construed narrowly. By making FOIA applicable to the Postal Service, Congress made these principles applicable to it as well.

Section 410(c)(2) does not change these principles. That § 410(c)(2) is not intended to “place[] [the Postal Service] on an equal footing with private competitors with respect to its disclosure obligations” (Denial Letter at 3-4) is clear from *National Western Life Insurance Co. v. United States*, 512 F. Supp. 454 (N.D. Tex. 1980). In that case, plaintiff sought the names and duty stations of Postal Service employees. In denying access to that information, the Postal Service relied on § 410(c)(2). It argued that a commercial business, in exercising “good business practice,” would not disclose the requested information, and that, as a result, the Postal Service was not required to provide the same type of information. 512 F. Supp. at 459. The court specifically rejected this argument. Instead, the court concluded:

It is quite true that in creating the United States Postal Service, the Congress intended that it should operate more like a private business than a governmental agency. Nevertheless, the Postal Reorganization Act of 1970 did not remove all semblance of a public agency from the Postal Service; it is still a public agency and its employees are public employees. *Although it may not be good business practice for a private company to disclose names and addresses of its employees, that is not the only concern to be considered. The Postal Service is still subject to public responsibility, as evidenced by the applicability to the Postal Service of the Freedom of Information Act.*

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*Id.* at 462 (emphasis added). In so doing, the court treated § 410(c)(2) and FOIA's "commercial information" exemption of 5 U.S.C. § 552(b)(4) together. *Id.* at 461-62. Thus, § 410(c)(2) does not "place[] [the Postal Service] on an equal footing with private competitors" when it comes to public access to information.<sup>2</sup>

The Postal Service remains a government agency. As the Denial Letter itself states (at page 6), "It is not enough to simply speculate that in the 'typical business environment' no private firm would disclose product-specific commercial information . . ." Yet, the Denial Letter redacts information based solely on a "plausible . . . contention" that the information is not generally disclosed by private companies. Denial Letter at 4. Those redactions are contrary to FOIA, and the full report should be released.

B. The Redactions Frustrate a Number of Basic Purposes of the Postal Reorganization Act.

Section 410(c)(2) should not be interpreted in a way that frustrates any of the basic goals of the Postal Reorganization Act. One of those goals is to ensure the American public that the Postal Service operates efficiently. Another is to ensure that the rates the American public pays for mail service are fair and equitable.

For example, § 101(a) adopts the public policy that the Postal must provide "prompt, reliable, and *efficient* services." 39 U.S.C. § 101(a) (emphasis added). The public cannot judge the efficiency of the Postal Service's international services without knowing the amount of costs (and the associated cost coverages) the Postal Service incurs to provide those services.

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2. Section 410(c)(2) specifically refers to trade secrets. That (and similar information whose value would be destroyed if made public) is the type of information -- not routinely collected cost data -- which the section is intended to embrace. The "profitability" of specific products (Denial Letter at 4) cannot be considered a trade secret, nor can the disclosure of such information lead to any competitive harm to the Postal Service. Costs and cost coverages by product do not furnish any more of a "pricing road map" (*see* United States Postal Service Memorandum Concerning Categories of Information That Should Be Deleted From Commission Report to Congress on International Mail Costs, Volumes, and Revenues at 5) than do the actual prices the Postal Service charges, which are a matter of public knowledge. *See* Denial Letter at 5-6 ("The Postal Service . . . offers no plausible ground for concluding that remailers would base their remail strategies on the cost *to the Postal Service* of" delivering mail).

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Similarly, in § 101(a) of the Act, Congress established the basic postal policy that “The costs of . . . the Postal Service shall not be apportioned to impair the overall value of such service to the people.” *See also* 39 U.S.C. § 403(a). Congress could not have intended to deprive the public of the information (including product-specific costs and cost coverages) needed to insure the public that these policies of overall value and fairness in rates are being met.

In short, § 410(c)(2) is not meant to shield from public disclosure information that is key to assuring the public that the Postal Service is complying with the basic purposes of the Act.

C. The Requirements of Chapter 36 of the Act Override § 410(c)(2).

Even if the redacted information would otherwise be shielded from disclosure by § 410(c)(2), that section must give way to more specific provisions of the Act, including the provisions in Chapter 36 of the Act. That chapter is intended to make sure that postal rates are fair and equitable.

No one could seriously argue that product-specific costs for domestic postal services are shielded from disclosure under § 410(c)(2). *See* Denial Letter at 3-4. That is because Chapter 36 of the Act overrides § 410(b)(2).

It is no accident that Congress included the requirement that the Commission issue a report on product-specific international costs and revenues in Chapter 36. Perhaps it could have been argued before § 3663 was added to Chapter 36 that product-specific costs were no business of the public. But Chapter 36 is concerned solely with making sure that the fairness of rates is transparent. While Congress has established a separate, more truncated procedure for achieving this purpose for international rates than for domestic rates, the purpose is the same: to assure the public that postal rates are fair.

Section 3663 was adopted because of concerns expressed by Postal Service competitors that competitive international services were being subsidized. The evidence to date establishes that to be the case, at least for some services. The Commission has already indicated that input from interested parties would be helpful in complying with § 3663. Order No. 1226 at 3. Yet, without the redacted information, interested parties can be of little help, and no one can know the extent of the cross-subsidy that exists.

The mere fact that Congress saw fit to require an annual report by the Commission on the costs and revenues of international services demonstrates the importance of public interest in such information. While Congress did not require the Commission to hold hearings, the interest to the public in ensuring fair rates is no less important in the case of international rates than it is for domestic rates.

Moreover, Congress did not require the report to be transmitted to each House because it did not want the public to know the results. Quite the contrary: it did so to provide for public disclosure. That holds true for costs as well as for volumes and revenues. P&M submits that

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there is a presumption that reports to Congress should be made publicly available. Section 3663 does not contain any indication that this presumption does not apply here.

Accordingly, the Commission's full report under § 3663 should be disclosed, without any redactions.

Respectfully,

A handwritten signature in black ink, appearing to read "John E. McKeever". The signature is fluid and cursive, with a large initial "J" and "M".

John E. McKeever