

(d) Intermediate decisions are subject to review by the Commission and subject to challenge by parties to the proceeding through the filing of exceptions pursuant to §3010.336. After review and consideration of the exceptions filed, intermediate decisions may be adopted by the Commission, in whole or in part, as part of the final decision in the proceeding.

(e)(1) The Commission may, at any time, direct the omission of an intermediate decision and the certification of the record for the Commission's consideration sitting *en banc*. Parties to a proceeding may, by motion, request the omission of an intermediate decision and the certification of the record for the Commission's consideration sitting *en banc*. Motions shall specify:

(i) The concurrence of other parties; and

(ii) Whether opportunity for filing briefs or presenting oral argument to the Commission is desired or waived.

(2) Failure of any party to object to such request shall constitute a waiver of any objections. Motions shall be filed no later than the deadline for the filing of briefs. In either instance, the decision to omit an intermediate decision shall be based upon the consideration of the novelty of the matters before the Commission, and the timely and efficient operation of the docket.

§3010.336 Exceptions to intermediate decisions.

(a) *Briefs on exceptions and opposing exceptions.* Any party in a proceeding may file exceptions to any intermediate decision by first filing a notice of intent to file a brief on exceptions with the Commission within seven days after the date of issuance of the intermediate decision or such other time as may be fixed by the Commission. The brief on exceptions shall be filed with the Commission within 30 days after the date of issuance of the intermediate decision or such other time as may be fixed by the Commission. Any party to a proceeding may file a response to briefs on exceptions within 20 days after the time limited for the filing of briefs on exceptions or such other time as may be fixed by the Commission. No further response will be entertained unless the Commission, upon

motion for good cause shown or on its own initiative, so orders.

(b) *Filing and contents.* Briefs on exceptions and briefs opposing exceptions shall be filed in accordance with §3010.330. In briefs on exceptions, the discussion of evidence, reasons and authorities shall be specifically directed to the findings, conclusions and recommendations in the intermediate decision to which exception is taken. Briefs on exceptions should not include a discussion of evidence and authorities on matters and issues to which no exception to the intermediate decision is taken. Briefs on exceptions and briefs opposing exceptions need not contain a statement of the case to the extent that it was correctly stated in either the intermediate decision or the brief on exceptions of another party to which reference is made.

(c) *Failure to except results in waiver.* Any party who fails to except or object to any part of an intermediate decision in its brief on exceptions may not thereafter raise such exceptions or objections which shall be deemed to have been waived.

PART 3011—NON-PUBLIC MATERIALS PROVIDED TO THE COMMISSION

Subpart A—General Provisions

Sec.

3011.100 Applicability and Scope.

3011.101 Definitions.

3011.102 Treatment of non-public materials.

3011.103 Commission action to determine non-public treatment.

3011.104 Standard for public disclosure of materials claimed to contain non-public information.

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

3011.200 General requirements for submitting non-public materials and seeking non-public treatment.

3011.201 Application for non-public treatment.

3011.202 Redacted version of the non-public materials.

3011.203 Unredacted version of the non-public materials.

3011.204 Protections for any person other than the submitter with a proprietary interest.

§ 3011.100

39 CFR Ch. III (7–1–25 Edition)

3011.205 Non-public materials inadvertently submitted publicly.

Subpart C—Seeking Access to Non-public Materials

3011.300 Eligibility for access to non-public materials.

3011.301 Motion for access to non-public materials.

3011.302 Non-dissemination, use, and care of non-public materials.

3011.303 Sanctions for violating protective conditions.

3011.304 Termination and amendment of access to non-public materials.

3011.305 Producing non-public materials in non-Commission proceedings.

APPENDIX A TO SUBPART C OF PART 3011—
TEMPLATE FORMS PROTECTIVE CONDITIONS
STATEMENT

Subpart D—Seeking Public Disclosure of Non-public Materials

3011.400 Motion for disclosure of non-public materials.

3011.401 Materials for which non-public treatment has expired.

APPENDIX A TO SUBPART D OF PART 3011—
TEMPLATE FORM

AUTHORITY: 39 U.S.C. 407, 503, 504.

SOURCE: 83 FR 31281, July 3, 2018, unless otherwise noted. Redesignated at 85 FR 9615, Feb. 19, 2020.

Subpart A—General Provisions

§ 3011.100 Applicability and Scope.

(a) *Applicability.* The rules in this part apply whenever:

(1) The Postal Service claims that any materials it provides to the Commission in connection with any proceeding or other purpose under title 39 of the U.S. Code, contain non-public information;

(2) Any person other than the Postal Service claims that any materials it provides to the Commission contain non-public information;

(3) The Commission is in the process of determining the appropriate degree of confidentiality to be accorded materials identified by any person to contain non-public information in accordance with these rules; or

(4) The Commission is in the process of determining how to ensure appropriate confidentiality for materials identified to contain non-public infor-

mation that is furnished to any person in accordance with these rules.

(b) *Scope.* Information includes, but is not limited to, explanations, confirmations, factual descriptions, and data. Document refers to a hard copy or electronic conveyance of information and may be stored in any medium from which information can be obtained either directly or, if necessary, after translation into a reasonably usable form. Documents include, but are not limited to, writings, notes, graphs, charts, data files, emails, drawings, photographs, and images. Things include all matter, other than documents, that convey information. Documents and things shall collectively be referred to as materials.

(c) *Exemption.* Except for the circumstances described in paragraphs (c)(1) through (3) of this section, the rules in this part do not apply to any non-public materials (and the non-public information contained therein) provided to the Commission by any person in connection with activities under 39 U.S.C. 407(b)(2)(A).

(1) The following persons shall adhere to the requirements of § 3011.302 regarding the non-dissemination, use, and care of the non-public materials (and the non-public information contained therein) provided to the Commission in connection with activities under 39 U.S.C. 407(b)(2)(A).

(i) Members of the Commission;

(ii) Commission employees; and

(iii) Non-employees who have executed appropriate non-disclosure agreements (such as contractors, attorneys, or subject matter experts) assisting the Commission in carrying out its duties.

(2) Any person that discovers that non-public materials provided to the Commission in connection with activities under 39 U.S.C. 407(b)(2)(A) have been inadvertently included within materials that are accessible to the public shall follow the procedures of § 3011.205.

(3) Non-public materials provided to the Commission in connection with activities under 39 U.S.C. 407(b)(2)(A) are construed to exclude each of the following:

(i) Non-public materials provided by the Postal Service to the Commission pursuant to a subpoena issued in accordance with part 3013 of this chapter;

(ii) Non-public materials filed in response to an information request issued in accordance with § 3010.170 of this chapter;

(iii) Non-public materials filed in compliance with any applicable Postal Service reporting required under part 3050 or part 3055 of this chapter; and

(iv) Non-public materials filed in a Commission docket.

[83 FR 31281, July 3, 2018, as amended at 88 FR 37154, June 7, 2023]

§ 3011.101 Definitions.

(a) *Non-public materials* means any documents or things that are provided to the Commission and identified as containing non-public information. The Postal Service may claim that information that would be exempt from disclosure pursuant to 39 U.S.C. 410(c), 504(g), 3652(f), or 3654(f) is non-public information. Any person other than the Postal Service with a proprietary interest in the materials may claim that information that would be protectable under Federal Rule of Civil Procedure 26(c) is non-public information. Any person may claim that information that is exempt from public disclosure under 5 U.S.C. 552(b) is non-public information. Non-public materials cease to be non-public if the status has expired or has been terminated by the Commission pursuant to this part. Except as provided by § 3011.205, 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). The cessation of non-public status applies to the particular document or thing and the particular information contained therein (in whole or in part, as 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.

[83 FR 31281, July 3, 2018, as amended at 85 FR 9641, Feb. 19, 2020]

§ 3011.102 Treatment of non-public materials.

(a) Except as described in part 3011 or part 3006 of this chapter, the Commission will neither disclose nor grant access to any non-public materials (and the non-public information contained therein).

(b) To accord appropriate confidentiality to non-public information and 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 information and non-public materials;

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

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

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

(5) Restrict who may access the non-public information and 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.

[83 FR 31281, July 3, 2018, as amended at 85 FR 9641, Feb. 19, 2020]

§ 3011.103 Commission action to determine non-public treatment.

(a) The inadvertent failure of a submitter to concomitantly provide all documents required by § 3011.200(a) does not prevent the Commission from according appropriate confidentiality to non-public information contained with any materials provided to the Commission. Information requests as described in § 3010.170 of this chapter, preliminary notices, or interim orders may be issued to help the Commission determine the non-public treatment, if any, to be accorded to the materials claimed by any person to be non-public.

(b) Upon motion by any person, the Commission may issue an order containing a description of and timeframe for the non-public treatment, if any, to be accorded to materials claimed by any person to be non-public.

(c) Upon its own motion, the Commission may issue notice of its preliminary determination concerning the appropriate degree of protection, if any, to be accorded to materials claimed by any person to be non-public. A response is due within seven calendar days of issuance of the preliminary determination, unless the Commission otherwise provides. No reply to a response shall be filed, unless the Commission otherwise provides. Pending the Commission's resolution of the preliminary determination, information designated as non-public will be accorded non-public treatment. The Commission will enter an order determining what non-public treatment, if any, will be accorded to the materials after the response period described in this paragraph has expired. The determination of the Commission shall follow the applicable standard described in § 3011.104.

[83 FR 31281, July 3, 2018, as amended at 85 FR 9641, Feb. 19, 2020; 88 FR 37154, June 7, 2023]

§ 3011.104 Standard for public disclosure of materials claimed to contain non-public information.

(a) In determining whether to publicly disclose materials claimed by the Postal Service to contain non-public information, 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 consistent with the analysis undertaken by a federal court when applying the protective conditions appearing in Federal Rule of Civil Procedure 26(c).

Subpart B—Submitting Non-Public Materials and Seeking Non-Public Treatment

§ 3011.200 General requirements for submitting non-public materials and seeking non-public treatment.

(a) Whenever providing non-public materials to the Commission, the submitter shall concomitantly provide the following: 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 § 3011.201, a redacted (public) version of the non-public materials in accordance with § 3011.202, and an unredacted (sealed) version of the non-public materials in accordance with § 3011.203.

(b) Before submitting non-public materials to the Commission, if the submitter has reason to believe that any person other than the submitter has a proprietary interest in the information contained within 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) (to the extent practicable) and that the affected person may address any confidentiality concerns directly with the Commission.

[83 FR 31281, July 3, 2018, as amended at 85 FR 9641, Feb. 19, 2020]

§ 3011.201 Application for non-public treatment.

(a) *Burden of persuasion.* An application for non-public treatment shall fulfill the burden of persuasion that the materials 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 person other than the submitter, or both have a proprietary interest in the information contained within 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 information contained within 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 information contained within the materials, identification of each person who is known to have a proprietary interest in the information. 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 person other than the submitter have a proprietary interest in the information contained within 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 information contained within the materials claimed to be non-public in a manner that, without revealing the information at issue, would allow the Commission to thoroughly evaluate the basis for the claim that the information contained within 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.

§ 3011.202 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 to redact non-public information from the materials. The submitter shall blackout only the information 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.

§ 3011.203 Unredacted version of the non-public materials.

(a) Each page or portion 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

§ 3011.204

the confidential nature of the materials.

(b) The Filing Online method that results in posting a document that is available to the public, which is accessible through the Commission's website (<http://www.prc.gov>) described under part 3010, subpart B of this chapter may not be used to submit the unredacted version of non-public materials.

(c) The filing of the unredacted version of the non-public materials shall be made in accordance with the following requirements.

(1) Except if using an alternative system approved by the Commission under paragraph (c)(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. The unredacted version of the non-public materials may not be password protected. Two copies of the unredacted version of a non-public document shall be filed using an electronic format such as compact discs (CDs), or digital video discs or digital versatile discs (DVDs) that shall be clearly marked "Confidential. Do Not Post on Web." If making an electronic unredacted version of a non-public document is impracticable, two hard copies (paper) versions of the non-public document may be filed.

(2) The Secretary of the Commission 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.

(d) The unredacted version of a spreadsheet shall display the formulas used and their links to related spreadsheets. The unredacted version of workpapers or data shall be submitted

39 CFR Ch. III (7-1-25 Edition)

in a form, and be accompanied by sufficient explanation and documentation, to allow them to be replicated using a publicly available PC application.

[83 FR 31281, July 3, 2018, as amended at 85 FR 9641, Feb. 19, 2020]

§ 3011.204 Protections for any person other than the submitter with a proprietary interest.

Any person other than the submitter 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.

§ 3011.205 Non-public materials inadvertently submitted publicly.

(a) Any filer or person with a proprietary interest that discovers the inclusion of materials that could have been subject to a claim for non-public treatment are contained within a public filing made in accordance with subpart B to part 3010 of this chapter shall telephone Dockets personnel immediately to request that the non-public materials be removed from the publicly available materials. Upon receipt of that telephone request, Dockets personnel will remove from the publicly available materials those materials for which non-public treatment are 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.

(b) Any submitter or person with a proprietary interest that discovers the inclusion of materials that could have been subject to a claim for non-public

treatment are contained within a publicly available submission made to the Commission in circumstances other than through a public filing made in accordance with subpart B to part 3010 of this chapter shall telephone the Commission personnel to whom the submission was directed immediately to request that the non-public materials be removed from the publicly available materials. Upon receipt of that telephone request, the Commission personnel will remove from the publicly available materials those materials for which non-public treatment are being requested until the end of the next business day in order to provide the submitter or person with a proprietary interest an opportunity to submit an application for non-public treatment and the non-public materials in accordance with the requirements of this subpart. If any submitter makes repeated use of this rule, the Secretary has discretion to impose additional requirements on this submitter as necessary to ensure secure submission of non-public materials.

(c) An application for non-public treatment made under paragraph (a) or (b) of this section shall also clearly indicate if any special relief is sought. Examples of special relief include a request that any person not granted access to the materials under § 3011.300 or § 3011.301 perform any or all of the following actions:

(1) Immediately destroy or return all versions of the materials that are claimed to have been inadvertently submitted publicly;

(2) Refrain from disclosing or using the materials, and the information contained therein, that are claimed to be non-public; and

(3) Take reasonable steps to retrieve any materials, and the information contained therein, that are claimed to be non-public and were disclosed to any person not granted access to the materials under § 3011.300 or § 3011.301 prior to the submission of application for non-public treatment.

[83 FR 31281, July 3, 2018, as amended at 85 FR 9641, Feb. 19, 2020]

Subpart C—Seeking Access to Non-Public Materials

§ 3011.300 Eligibility for access to non-public materials.

(a) The following persons may access non-public materials without an order issued pursuant to § 3011.301(e):

(1) Members of the Commission;

(2) Commission employees, including Public Representatives, carrying out their official responsibilities;

(3) Non-employees who have executed appropriate non-disclosure agreements (such as contractors, attorneys, or subject matter experts), assisting the Commission in carrying out its duties;

(4) Reviewing courts and their staffs; and

(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 § 3011.301, for the purpose of aiding participation in a pending Commission proceeding (including compliance proceedings) or aiding the initiation of a proceeding before the Commission.

[83 FR 31281, July 3, 2018, as amended at 85 FR 9642, Feb. 19, 2020; 86 FR 48503, Aug. 31, 2021]

§ 3011.301 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 information 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 materials 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 § 3011.201(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 § 3011.201(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 three 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 seven 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 person identified pursuant to § 3011.201(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 person other than the submitter 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 interests of the parties consistent with the analysis undertaken by a Federal court when applying the

Postal Regulatory Commission

§ 3011.304

protective conditions appearing in 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.

[83 FR 31281, July 3, 2018, as amended at 85 FR 9642, Feb. 19, 2020]

§ 3011.302 Non-dissemination, use, and care of non-public materials.

(a) No person who has been granted access to non-public materials in accordance with § 3011.300 or § 3011.301 may disseminate the materials or the information contained therein, in whole or in part, to any person not allowed access pursuant to § 3011.300 or § 3011.301.

(b) Persons with access to non-public materials under § 3011.300 or § 3011.301 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 § 3011.300 or § 3011.301 shall protect the non-public materials from any person not granted access under § 3011.300 or § 3011.301 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.

[85 FR 9642, Feb. 19, 2020]

§ 3011.303 Sanctions for violating protective conditions.

(a) If a person who has been granted access to non-public materials under § 3011.301 violates the terms of the order granting access, the Commission may 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 any or all of the following:

(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;

(3) Revoking access to non-public materials;

(4) Restricting access to non-public materials in the future; or

(5) 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.

[83 FR 31281, July 3, 2018, as amended at 85 FR 9642, Feb. 19, 2020]

§ 3011.304 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 § 3011.301 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 (including the completion of any Commission response to judicial review, if applicable).

(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

§ 3011.305

39 CFR Ch. III (7–1–25 Edition)

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 § 3011.301.

[83 FR 31281, July 3, 2018, as amended at 85 FR 9643, Feb. 19, 2020]

§ 3011.305 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 two days of receipt of the subpoena or order, notify each person identified pursuant to § 3011.201(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.

[83 FR 31281, July 3, 2018, as amended at 85 FR 9643, Feb. 19, 2020]

APPENDIX A TO SUBPART C OF PART 3011—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 ac-

cess 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 3011 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:

In accordance with 39 CFR 3011.303, 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 3011.300(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 3011.302(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 3011.300(a) (Commission and court personnel) or 3011.301 (other persons granted access by Commission order) except in compliance with:

- a. Specific Commission order,
- b. Subpart B of 39 CFR 3011 (procedure for filing these materials in Commission proceedings), or
- c. 39 CFR 3011.305 (production of these materials in a court or other administrative proceeding).

Postal Regulatory Commission

Pt. 3011, Subpt. C, App. A

4. In accordance with 39 CFR 3011.302(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 3011.300 or 3011.301 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 3011.304(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 3011.304(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)

(e-mail 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 3011.301(b)(5).

CERTIFICATION TO COMPLY WITH PROTECTIVE CONDITIONS

____ (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).

____ (name of participant filing motion) requests that the Commission 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 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 3011.301(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;

§ 3011.400

- 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 3011.304(a)(2).

[85 FR 9643, Feb. 19, 2020]

Subpart D—Seeking Public Disclosure of Non-Public Materials

§ 3011.400 Motion for disclosure of non-public materials.

(a) *Application of this section.* This section applies to non-public materials during the initial duration of non-public status, up to ten years, and any non-public materials for which the Commission enters an order extending the duration of that status under § 3011.401(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 information 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 § 3011.201(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

39 CFR Ch. III (7–1–25 Edition)

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 § 3011.201(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 three 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 seven 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 § 3011.201(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 accorded to the materials after the response period described in paragraph (c) of this section has expired. The determination of the Commission shall follow the applicable standard described in § 3011.104.

[83 FR 31281, July 3, 2018, as amended at 85 FR 9644, Feb. 19, 2020]

§ 3011.401 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) *Request for Disclosure of Materials for Which Non-Public Treatment has Expired.* Any person may request that materials for which non-public treatment has expired under paragraph (a) of this section be publicly disclosed. Any part of the request revealing non-public information shall be filed in accordance with subpart B of this part. The request shall identify the materials requested and date(s) that materials were originally submitted under seal. The template Request for Materials for Which Non-Public Treatment Has Expired in appendix A to this subpart may be used and modified to comply with this requirement. The request 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 request 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.* A response to the request is due within seven calendar days of the filing of the request, unless the Commission otherwise provides. Any response opposing the request shall seek an extension of non-public status by including an application for non-public treatment compliant with §3011.201. This extension application shall also include specific facts in support of any assertion that commercial injury is likely to occur if the information contained in the materials is publicly disclosed despite the passage of ten years or the timeframe established by Commission order.

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

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

(f) *Ruling.* The Commission may grant the request at any time after the response period described in paragraph (c) of this section has expired. The Commission may deny the request 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 termination of the Commission shall follow the applicable standard described in §3011.104.

[83 FR 31281, July 3, 2018, as amended at 85 FR 9644, Feb. 19, 2020; 88 FR 37474, June 8, 2023]

APPENDIX A TO SUBPART D OF PART 3011—TEMPLATE FORMS

Before the POSTAL REGULATORY COMMISSION WASHINGTON, DC 20268-0001

(Caption) _____

Docket No. _____

REQUEST FOR MATERIALS FOR WHICH NON-PUBLIC TREATMENT HAS EXPIRED

_____, 20____ (date)

On _____ (date non-public materials were initially submitted), non-public treatment was requested for the materials identified as _____ (non-confidential description of non-public materials) (hereinafter "these materials"). Because the non-public treatment of these materials has expired, I request that these materials be disclosed to the public.

Respectfully submitted,
(signature of representative)

/s/ _____

(print name of representative)

(address line 1 of representative)

(address line 2 of representative)

(telephone number of representative)

(e-mail address of representative)

(choose the appropriate response)

Attorney/Non-Attorney Representative for
(name of the requestor)

You may delete the instructional text to complete this form and file a request under 39 CFR 3011.401(b).

[85 FR 9644, Feb. 19, 2020]

PART 3012—EX PARTE COMMUNICATIONS

Sec.

3012.1 Applicability.

3012.2 Definition of ex parte communications.

3012.3 Definition of a matter before the Commission.

3012.4 Definitions of persons subject to ex parte communication rules.

3012.5 Prohibitions.

3012.6 Required action upon ex parte communication.