

**POSTAL REGULATORY COMMISSION****39 CFR 3007**

[Docket No. RM2008-1; Order No. 96]

**Administrative Practice and Procedure, Confidential Business Information, Postal Service****AGENCY:** Postal Regulatory Commission.**ACTION:** Proposed rule.

**SUMMARY:** The Commission is proposing rules on the treatment of non-public material submitted by the Postal Service. Issuance of this proposal will allow interested parties to comment on the Commission's approach to implementing a new statutory requirement.

**DATES:** Initial comments due September 25, 2008; reply comments due October 10, 2008.

**ADDRESSES:** Submit comments electronically via the Commission's Filing Online system at <http://www.prc.gov>.

**FOR FURTHER INFORMATION CONTACT:** Stephen L. Sharfman, General Counsel, 202-789-6820 and [stephen.sharfman@prc.gov](mailto:stephen.sharfman@prc.gov).

**SUPPLEMENTARY INFORMATION:** The Postal Regulatory Commission (Commission) proposes to implement 39 U.S.C. 504(g) by adopting regulations applicable to confidentiality of materials submitted by the Postal Service to the Commission.

**I. Statutory Standards for According Confidentiality to Postal Service Materials**

39 U.S.C. 504(g)(1) holds that the Postal Service may determine "that any document or other matter it provides to the Postal Regulatory Commission" is exempt from public disclosure under 39 U.S.C. 410(c) or 5 U.S.C. 552(b). The Postal Service must give reasons, in writing, for its claim. *See* 39 U.S.C. 504(g)(1). Unless the Commission has established rules for determining the appropriate degree of protection of information or materials claimed to be non-public by the Postal Service, the Commission may not (1) "use such information for purposes other than the purposes for which it is supplied," or (2) "permit anyone who is not an officer or employee of the Commission to have access to any such information." *See* 39 U.S.C. 504(g)(2).

Under 39 U.S.C. 410(c), the Postal Service may claim as exempt from public disclosure the name and address information of postal customers; certain commercial information, for example, trade secrets; certain information related

to the negotiation of collective bargaining agreements; information prepared for proceedings before the Commission or the federal courts concerning postal rates, classes and services; reports and memoranda prepared by outside sources unless their disclosure would have been required if the Postal Service had prepared the reports or memoranda itself; and investigatory files compiled for law enforcement purposes, unless legally available to parties other than the Postal Service.

Under 5 U.S.C. 552(b), records that may be withheld from public disclosure include, but are not limited to, matters concerning only internal personnel matters of an agency; matters specifically exempted from public disclosure by statute; trade secrets and privileged or confidential commercial or financial information; non-public interagency or intra-agency memoranda or letters; privacy protected personnel, medical and other files; and certain law enforcement records or information. Section 552(b) provides that any portions of records subject to disclosure that can be segregated from records otherwise exempt from disclosure must be provided.

Upon adopting appropriate regulations under 5 U.S.C. 553 that "establish a procedure for according appropriate confidentiality," the Commission may publicly disclose information which the Postal Service asserts is exempt from disclosure under 39 U.S.C. 410(c) or 5 U.S.C. 552(b). In determining what degree of protection is appropriate, the Commission is directed to "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." 39 U.S.C. 504(g)(3)(A).<sup>1</sup>

Similarly, section 504(g)(3)(B) provides that in the narrower context of any "discovery procedure" that is part of a Commission "proceeding," the Commission has the authority to require the Postal Service to produce information that the Postal Service has claimed as exempt from production. As under section 504(g)(3)(A) and before requiring such disclosure, the

<sup>1</sup> Compare Postal Rate Commission Order No. 1025 at 14. (The Commission notes that "[t]he standards by which commercial information is accorded confidential treatment under [Fed. R. Civ. P. 26(c)], \* \* \* are essentially those that govern the invocation of Freedom of Information (FOIA) exemption (b)(4), except that the alleged commercial harm of disclosure is balanced against the alleged need for the information. *See, e.g., Covey Oil v. Continental Oil Co.*, 340 F.2d 993 (10th Cir. 1965)."

Commission "shall, by regulations based on rule 26(c) of the Federal Rules of Civil Procedure, establish procedures for ensuring appropriate confidentiality for information furnished to any party."<sup>2</sup>

Section 504(g)(3)(B) appears to be a specific application, in the context of discovery, of the more general authority granted in 39 U.S.C. 504(g)(3)(A) to disclose information obtained from the Postal Service if disclosure is found appropriate and consistent with the kind of balancing of interests that is performed by federal civil courts when asked to establish protective conditions under rule 26(c) of the Federal Rules of Civil Procedure.

The general parameters for disclosure, and conversely protection of confidentiality, of information during the discovery process under section 504(g)(3)(B) must be gleaned from the federal case law pertaining to Federal Rule of Civil Procedure 26, and those parameters are, as stated above, a more specific application of the parameters established by the balancing test laid out in section 504(g)(3)(A).<sup>3</sup> Case law surrounding Federal Rule of Civil Procedure 26 identifies several non-exclusive factors to be applied under the rule 26(c) "good cause balancing test."<sup>4</sup> In the 2007 *Arnold* decision, the Third Circuit reaffirms the balancing test factors it developed in its 1994 *Pansy* decision:

(1) [T]he interest in privacy of the party seeking protection; (2) whether the information is being sought for a legitimate purpose or an improper purpose; (3) the prevention of embarrassment, and whether that embarrassment would be particularly serious; (4) whether the information sought is important to public health and safety; (5) whether sharing of the information among litigants would promote fairness and efficiency; (6) whether the party benefiting from the order of confidentiality is a public entity or official; and (7) whether the case involves issues important to the public.

*Id.* (citing *Pansy*, 23 F.3d at 787-88). Most of the seven specific factors listed by the *Pansy* court appear to be applicable to the general balancing test

<sup>2</sup> Rule 26(c), which is entitled "Protective Conditions," authorizes the court to issue a variety of orders to protect parties or witnesses in the discovery process. *See* Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 2035, *et seq.* (2d ed. 1994).

<sup>3</sup> *See, e.g., Arnold v. Penn. Dep't of Transp.*, 477 F.3d 105 (3d Cir. 2007) at 109-110; *Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3d Cir. 1994) at 788; *Leucadia, Inc. v. Applied Extrusion Technologies*, 998 F.2d 157 (3d Cir. 1993) at 167. *See generally* Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 Harv. L. Rev. 427 (1991).

<sup>4</sup> *See Arnold v. Penn. Dep't of Transp.*, 477 F.3d 105, 108 (3d Cir. 2007).

weighing the competing interests of the Postal Service against the public interest for transparency.<sup>5</sup>

It must be noted, nonetheless, that section 504(g)(3)(B) specifically and particularly instructs the Commission to establish procedures for assuring confidentiality when requiring production of information during the discovery process based on Federal Rule of Civil Procedure 26(c). Under Federal Rule of Civil Procedure 26(c), a party or person may during the discovery process request a protective order. Under the rule, a court may, for good cause, issue a protective order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense \* \* \*." Federal Rule of Civil Procedure 26(c) lists several possible procedures to limit discovery and ensure confidentiality of information, including (1) completely forbidding the disclosure; (2) specifying terms for disclosure, for example, specifying the time and/or place of discovery; (3) ordering a specific method of discovery; (4) limiting the scope of discovery as it relates to certain matters; (5) limiting who may be present during discovery; (6) sealing a deposition; and (7) requiring that a trade secret or other confidential information be revealed only in a specific and limited manner.

Because the Commission interprets the Postal Accountability and Enhancement Act (PAEA) as intending that the Commission engage in essentially the same balancing of interests under the standards in both sections 504(g)(3)(A) and 504(g)(3)(B), and the universe of specific procedures to assure the protection of information, when appropriate, is essentially the same, the Commission is initially of the view that a single rule governing disclosure applying to both sections 504(g)(3)(A) and 504(g)(3)(B) is sufficient.<sup>6</sup>

Section 504 recognizes the need to balance the Postal Service's legitimate expectation to keep commercially

<sup>5</sup> Of the enumerated factors, "embarrassment" and "public health concerns" probably will be the least applicable in the majority of matters before the Commission, but fairness, public interest, efficiency and so forth should all be considered when deciding whether the need for transparency outweighs the need for protecting the commercial or other interests of the Postal Service.

<sup>6</sup> In application of the proposed disclosure rule, the decision-maker will also take into account relevant factors such as the procedural stage a matter is in (for example, discovery versus a formal hearing before the Commission) when deciding whether protection or non-disclosure of information sought by the Postal Service is appropriate. Another factor to be considered is whether the information at issue relates to market dominant or competitive products.

sensitive information confidential with the public's expectation for accountability and transparency of a governmental entity operating in commercial markets. The PAEA relies on public transparency, in addition to regulation, to achieve its goal of Postal Service accountability. Therefore, as directed by the provisions of the PAEA and because the Commission considers it necessary and appropriate, the Commission proposes rules that could lead to public disclosure of information initially claimed by the Postal Service as non-public. In developing proposed rules, the Commission is mindful of, and takes very seriously, its responsibility to achieve a fair balance between the commercial interests of the Postal Service and the public interest in disclosure of information concerning a public entity that operates in commercial markets.

The Commission will obtain information from the Postal Service, and must manage access to that information, in three basic contexts. In the first context, the Postal Service will file information pursuant to a specific statutory requirement or Commission rules. In these instances, with respect to some reports, the PAEA explicitly authorizes the Postal Service to designate portions as non-public annexes or to otherwise avail itself of the protections afforded Postal Service documents or other matters under the procedures of section 504(g). See 39 U.S.C. 3642(d), 3652(f), and 3654(f). Under proposed rule 3007.20, the Postal Service would notify the Commission at the time that it files the information that it considers specifically identified portions of its report or annex to be non-public and to qualify for a degree of protection from public disclosure. The Postal Service in its application for relief from disclosure must also include its reasons for concluding that the information should not be publicly disclosed. See proposed rule 3007.21.

In the second major context, the Commission may request information or materials from the Postal Service by way of a data or information request, or, if necessary, by issuance of a subpoena.<sup>7</sup> When the Commission identifies information that it needs for the preparation of reports, for the conduct of "proceedings," or other functions under the PAEA, the normal procedure contemplated for obtaining that

information will be the issuance of data or information requests under proposed rule 3007.3. Data or information requests in the proposed rules are similar to requests that were issued in the former Postal Rate Commission's international mail dockets as part of its preparation of its reports to Congress on international mail. The proposed rules contemplate that, where it perceives it to be necessary, the Postal Service would file an application for relief under proposed rule 3007.20 with regard to data or information provided in response to a request issued by the Commission. In its application for relief, the Postal Service would ask for a necessary degree of protection from public disclosure, for example, by requesting limiting the scope of the information to be produced, or restricting the dissemination of the information provided, as is commonly done in the application of rule 26(c) of the Federal Rules of Civil Procedure in federal civil courts.

In both instances, the non-public information would initially be protected from disclosure until such time as the Commission decides what actual degree of protection, if any, from public disclosure should be afforded such non-public information. However, before acting on its own initiative to require disclosure of information claimed to be non-public by the Postal Service, the Commission will give the Postal Service an opportunity to respond within seven days of the issuance of the Commission's notice that it considers certain information to be not confidential.

In the third context, a person (as defined by the Commission's rules) may file a motion for access to the materials claimed to be non-public by the Postal Service. Access to such non-public information, if any, will most often be granted under a protective order. Such protective order could, for example, specify that no person involved in competitive decision-making for any entity that might gain competitive advantage from use of the information at issue should be granted access to the materials. In addition, restrictions could be imposed on any person granted access to the materials at issue limiting or prohibiting its dissemination.

Because the Commission frequently operates under tight deadlines, it is important to have procedures in place that prevent unnecessary delay in determining whether granting a person access to non-public materials is appropriate. See, e.g., 39 U.S.C. 3653(a) (annual determination of compliance). Therefore, the Commission proposes a streamlined procedure for persons who

<sup>7</sup> Information and materials required to be provided to the Commission in response to a subpoena that the Postal Service determines to be exempt are subject to the same rules under proposed part 3007 as information or materials provided in response to a data or information request. See 39 U.S.C. 504(f), (g).

agree to abide by the Commission's standard protective conditions. If a person attaches an executed copy of the Commission's standard protective conditions to its motion, answers to that motion are due within three days after such a motion is filed. On the other hand, if an executed copy of the Commission's standard protective conditions is not attached, answers are due within seven days after such a motion is filed.

The Commission will publish its standard protective conditions on its Web site. The Commission is cognizant of the fact that in many instances it will be necessary to tailor protective conditions to the circumstances of a particular case. For example, protective conditions may have to be stricter if a direct competitor of the Postal Service requests access to non-public materials concerning competitive products than when a non-competitor requests access. The Commission will publish several examples of protective orders in this docket that will be representative of the standard protective conditions the Commission intends to publish on its website. The Commission also invites comments regarding the form such standard protective conditions should take.

The proposed rules also include a "sunset provision" stating that protective conditions afforded to any non-public materials filed by the Postal Service shall expire 10 years after such filing, unless the Commission or its authorized representative enters an order providing for an extension of the protective conditions. The Commission or its authorized representative can enter such an order in its own discretion or upon a motion by the Postal Service.

The Commission in rule 3004.8 already provides that information submitted to the Commission and claimed to be exempt from disclosure under 5 U.S.C. 552(b) (namely, trade secrets or commercially or financially sensitive materials) and then determined to be exempt by the Commission will lose such exemption 10 years after its submission. A longer exemption period from disclosure may be requested by the person submitting the information, but must be specifically justified by the requestor and approved by the Commission. 39 CFR 3004.8.

The Commission believes that administrative convenience and sound records management practices will be served by such a provision. It initially appears to the Commission that the 10-year period for the sunset provision should be adequate to protect the commercial interest of the Postal Service, but invites comments as to

whether the proposed time period is appropriate. In addition, the Commission is interested in comments as to whether any specific category of non-public materials should be exempted from the sunset provision. Initial comments are due within 30 days of the publication of this Notice in the **Federal Register**. Reply comments are due within 45 days of the publication of this Notice in the **Federal Register**.

## II. Analysis of Proposed Rules

Below, the Commission provides a concise description of each rule designed to assist commenters in understanding the scope and nature of the proposed rules.

**Rule 3007.1 Definitions.** This provision simply sets forth definitions used in part 3007. The term "non-public materials" is defined as any information, documents, and things filed by the Postal Service which, pursuant to 39 U.S.C. 504(g), it determines to be exempt from disclosure. As used in the rules, the phrase "materials claimed to be non-public" has the same meaning as non-public materials.

**Rule 3007.2 Scope.** This provision sets forth the scope of information, documents, and things that the Commission (or its authorized representative) may require the Postal Service to provide in connection with the Commission's responsibilities under title 39. It is intended to encompass information, documents, and things in whatever form that are likely to materially assist the Commission in fulfilling its statutory responsibilities.

**Rule 3007.3 Data or Information requests.** This proposed rule provides that the Commission (or its authorized representative) may issue data or information requests to the Postal Service concerning materials covered by proposed rule 3007.2.

**Rule 3007.10 Submission of non-public materials under seal.** This proposed rule sets forth the manner in which non-public materials are to be filed with the Commission. More specifically, it provides that non-public materials are not to be filed electronically pursuant to rule 3001.9, but are to be filed in sealed envelopes clearly marked as confidential. The proposed rule requires non-public materials to be filed in hard copy as well as electronic form (compact discs), with the latter subject to certain conditions to ensure their usefulness. In addition, the proposed rule requires that a redacted copy of the non-public materials be filed electronically pursuant to rule 3001.9.

**Rule 3007.20 Application for non-public treatment.** This provision directs the Postal Service to file an application for relief from public disclosure whenever it files non-public materials.

**Rule 3007.21 Form and content of the application for non-public treatment.** This proposed rule requires the Postal Service to identify the materials it asserts are non-public and to provide a detailed statement in support thereof, addressing, among other things, the rationale for the claim, including the statutory authority, the nature and extent of any commercial harm, a hypothetical example of such harm, the extent of public protection from public disclosure deemed necessary by the Postal Service, and any other factors relevant to the application for relief.

**Rule 3007.22 Treatment of material claimed to be non-public.** This proposed rule provides that the Commission will not disclose non-public materials except as pursuant to the rules in part 3007.

**Rule 3007.23 Access to non-public material.** This proposed rule permits Commissioners and Commission employees access to non-public material subject to the limitations in 39 U.S.C. 504(g)(2)(A) and (B).

As a matter of course, the Commission will review non-public material submitted by the Postal Service for substance, and in the course of such review may have cause to question the claim that part or all of the material should not be disclosed. Thus, the proposed rule also provides that the Commission (or its authorized representative) may issue a notice of preliminary determination concerning the appropriate degree of protection, if any, to be accorded non-public material filed by the Postal Service.<sup>8</sup> If a notice of preliminary determination is issued, the Postal Service and any interested person may submit a responsive pleading within 7 days (or such longer period as specified in the notice). Given the expedited timetables under which the Commission ordinarily operates, the proposed rules do not contemplate any reply to the responsive pleadings. Thus, those submitting responsive pleadings should address all issues relevant to whether the non-public materials should be publicly disclosed. Following the receipt of the responsive pleadings, if any, the Commission will issue an

<sup>8</sup>This aspect of the rule is designed to enable the Commission to address claims of confidentiality by the Postal Service on its own initiative. It is not intended to imply that the Commission will necessarily make a preliminary determination with respect to each filing by the Postal Service of non-public materials.

order concerning access to the non-public material.

The Commission will not provide access to material subject to protective conditions to contractors or experts hired by the Commission, its authorized representative, or the public representative, unless a notice of access is filed giving the Postal Service an opportunity to object to such access. The Postal Service may interpose an objection within 3 days of the filing of such notice.

**Rule 3007.24 Request for access to non-public material.** This proposed rule provides procedures for any interested person to request access to non-public material. Any person requesting access must file a motion, which must include a detailed statement and rationale in support of granting access and must also address the pertinent provisions included in the Postal Service's application for relief filed under rule 3007.21(b). Again, given the expedited timetables under which the Commission generally operates, the proposed rules contemplate procedures that will expedite the process. Thus, the proposed rule provides that the person submitting the motion may agree in advance to abide by standard Commission protective conditions by executing a copy of the standard conditions to its motion. In that event, answers to the motion are due within 3 days.<sup>9</sup> Recognizing that protective conditions may vary based on the nature of the non-public material at issue, the Commission encourages any person attaching protective conditions to tailor the conditions to fit that situation, e.g., limiting access to competitive information to certain individuals. Persons attaching protective conditions should describe those conditions, particularly alterations to the standard form. If a copy of the standard protective conditions is not attached, answers to the motion are due in 7 days. Following the filing of the answer, the Commission (or its authorized representative) will issue an order concerning access to the non-public material.

**Rule 3007.25 Standard for decision.** This proposed rule memorializes the balancing test prescribed in 39 U.S.C. 504(g)(3)(A) for determining the appropriate degree of confidentiality to be accorded non-public material. In addition, the proposed rule also provides a standard for determining the appropriate degree of confidentiality to

be accorded information claimed to be confidential by the Postal Service but not filed pursuant to 39 U.S.C. 504(g)(1). This may include, for example, information for which a specific evidentiary privilege is claimed.

**Rule 3007.30 Limitations on access to non-public material.** This proposed rule identifies various limitations on access to non-public material that may be ordered by the Commission. These limitations, which are generally similar to relief provided by federal civil courts in discovery disputes under rule 26(c) of the Federal Rules of Civil Procedure include, *inter alia*, not requiring the public disclosure of the material, specifying the terms for public disclosure, ordering a specific method of disclosure, restricting to whom the information may be disclosed, specifying a time when access terminates, and such other relief as the Commission deems appropriate.

**Rule 3007.31 Notice of access to material subject to protective order.** This proposed rule requires that, with certain exceptions, persons seeking access to material subject to a protective order must file a notice of access. Persons not required to file a notice of access include Commissioners, Commission employees, and court personnel. Notice of access, which must be filed under rules 3001.9 through 3001.12, must include the name, title, and company of each individual to have access. The proposed rule provides that access will not be granted for 2 days to afford the Postal Service time to interpose an objection. Any objection must provide written justification for the Postal Service's position. If an objection is filed, the person subject to it may file a response within 2 days. The shortened time periods are consistent with past practice and deemed necessary given the expedited schedule under which the Commission generally operates.

**Rule 3007.32 Motion for removal of protective conditions.** This proposed rule sets forth procedures whereby a person, having reviewed the non-public material subject to a protective order, requests by motion that the protective conditions be removed.

**Rule 3007.33 Expiration of protective conditions.** This proposed rule provides that unless otherwise ordered by the Commission (or its authorized representative), protective conditions afforded to non-public materials expire 10 years after the filing of such material.

In the context of FOIA requests, the Commission in rule 3004.8 already provides that information submitted to the Commission and claimed to be exempt from disclosure under 5 U.S.C.

552(b) (namely, trade secrets or commercially or financially sensitive material) and then determined to be exempt by the Commission will lose such exemption 10 years after its submission. The Commission believes that a 10-year sunset provision in this instance will also serve administrative convenience and sound records management practices while adequately protecting the commercial interest of the Postal Service.

**Rule 3007.40 Continued effectiveness of protective conditions.** This proposed rule specifies procedures to be followed if a court or other administrative agency subpoenas (or otherwise orders production of) non-public materials which a person has obtained pursuant to a protective order issued by the Commission under protection. This proposed rule also requires that any person seeking to disclose non-public materials to a reviewing court make a good faith effort to obtain protective conditions in accord with those prescribed by the Commission. The proposed rule also provides that unless overridden by the reviewing court, the protective conditions of the Commission (or its authorized representative) remain in effect. The procedures require notice to the Postal Service.

**Rule 3007.50 Sanctions for violations of protective order.** This proposed rule reiterates the protective conditions, barring the dissemination of non-public materials by every person granted access to such materials to any person not authorized to access such materials. The sanctions include dismissing the proceeding in whole or part, issuing a default judgment against the violator of the protective conditions, and such other relief as the Commission (or its authorized representative) deems appropriate. In addition, the rule provides that the Postal Service may pursue whatever remedies may be available to it under law against the violator as well as the entity on whose behalf that person was acting.

### III. Public Representative

Pursuant to 39 U.S.C. 505, Kenneth E. Richardson is appointed to serve as officer of the Commission (Public Representative) to represent the interests of the general public in the captioned docket.

### IV. Ordering Paragraphs

*It is Ordered:*

- Docket No. RM2008-1 is established for the purpose of receiving comments on the Commission's proposed rules under the Postal Accountability and Enhancement Act

<sup>9</sup> Consistent with the Commission's rules, any prescribed time period of 5 days or less excludes Saturdays, Sundays, and legal holidays. See § 3001.15 of this chapter.

establishing procedures for the treatment of information which the Postal Service requests should not be publicly disclosed.

2. Interested persons may submit initial comments no later than 30 days from the date of publication of this Notice in the **Federal Register**.

3. Reply comments may be filed no later than 45 days from the date of publication of this Notice in the **Federal Register**.

4. Kenneth E. Richardson is designated as the Public Representative representing the interests of the general public in this proceeding.

5. The Secretary shall arrange for publication of this Notice in the **Federal Register**.

## List of Subjects

### 39 CFR Part 3007

Administrative practice and procedure, Confidential business, Postal Service.

Issued August 13, 2008.

Signed August 20, 2008.

By the Commission.

**Judith M. Grady,**

*Acting Secretary.*

For the reasons stated in the preamble, under the authority at 39 U.S.C. 504, the Postal Regulatory Commission proposes to amend 39 CFR chapter III by adding part 3007 to read as follows:

## PART 3007—TREATMENT OF NON-PUBLIC INFORMATION PROVIDED BY THE POSTAL SERVICE

Sec.

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3007.50 Sanctions for violations of protective order.

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

### § 3007.1 Definitions.

For purposes of this part:

(a) *Authorized representative* means any Commissioner designated by the Chairman, any administrative law judge appointed by the Commission under 5 U.S.C. 3105, and any employee of the Commission designated by the Commission. The authorized representative may administer oaths, examine witnesses, take depositions, and receive evidence with respect to any proceeding before the Commission under title 39 or obtain information to assist the Commission in the preparation of a report or performance of a function under title 39.

(b) *Non-public materials* means any information, documents, and things filed with the Commission which are claimed to be exempt from disclosure by the Postal Service pursuant to 39 U.S.C. 504(g).

### § 3007.2 Scope.

The Commission or its authorized representative 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. Information, documents, and things the Postal Service may be required to provide, include, but are not limited to, paper hard copy and electronically stored data and materials—including writings, notes, e-mails, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation into a reasonably usable form; or any tangible things.

### § 3007.3 Data or information requests.

The Commission or its authorized representative may issue data or information requests to the Postal Service seeking documents, information, and things covered by § 3007.2. A data or information request shall describe the documents, information, and things sought, briefly explain the reason for the request, and specify a timeframe for receiving the requested information and materials.

### § 3007.10 Submission of non-public materials under seal.

(a) Non-public materials shall not be filed electronically pursuant to § 3001.9 of this chapter, but shall be filed in sealed envelopes clearly marked “Confidential. Do Not Post on Web.”

The person filing the non-public materials shall submit two copies consisting, where practicable, of two paper hard copies as well as two copies in easily usable electronic form such as compact discs (CDs) or digital video discs (DVDs) of the non-public materials which shall also be clearly marked “Confidential. Do Not Post on Web.” Spreadsheets submitted in electronic form shall display the formulas used, their links to related spreadsheets, and shall not be password protected. Each page of any paper hard copy non-public materials submitted shall be clearly marked as non-public.

(b) The person submitting the non-public materials shall also file an electronic public (redacted) copy of the non-public materials pursuant to Commission rule 3001.9. As part of its publicly available electronic filing, the Postal Service must appropriately redact materials that contain both public and non-public information. For example, the Postal Service may not identify a whole page or a whole table as non-public material if the page or table contains both public and non-public information, but must redact only the information it claims to be non-public. If necessary and appropriate for efficient document management, the Postal Service shall sequentially number each page of the materials identified as non-public.

(c) The Postal Service shall mark each page, item, and thing, or portion thereof that it seeks to protect from disclosure in a manner reasonably calculated to alert custodians of the confidential nature of the information or material.

### § 3007.20 Application for relief.

Whenever the Postal Service files non-public information or materials with the Commission, it shall, at the same time, file an application for relief from public disclosure.

### § 3007.21 Form and content of the application for non-public treatment.

(a) The application for relief from public disclosure must clearly identify all non-public information or materials and describe the circumstances causing them to be submitted to the Commission.

(b) When identifying materials it claims to be non-public pursuant to 39 U.S.C. 504(g)(1), the Postal Service must file a specific and detailed statement which shall include:

(1) The rationale for claiming that the materials are non-public, including, but not limited to, a specific statement as to whether the Postal Service considers the materials claimed to be non-public commercially sensitive, or otherwise

protectable within the meaning of 39 U.S.C. 410(c); to be exempt from disclosure under 5 U.S.C. 552(b); and to qualify for a particular evidentiary privilege recognized by federal civil courts, in particular Federal Rule of Civil Procedure 26(c);

(2) A specific and detailed description of the materials claimed to be non-public in a manner that, without revealing the materials at issue, would allow a person to thoroughly evaluate the basis for the claim that they are non-public;

(3) In cases of allegations of commercial harm, particular identification of the nature and extent of commercial harm alleged and the likelihood of such harm;

(4) At least one specific hypothetical, illustrative example of each alleged harm;

(5) The extent of protection from public disclosure deemed to be necessary by the Postal Service;

(6) The length of time the Postal Service deems necessary for the information or material to be protected from public disclosure with justification thereof; and

(7) Any other factors or reasons relevant to support the application for relief.

#### **§ 3007.22 Treatment of material claimed to be non-public.**

The Commission will not publicly disclose non-public materials except as provided in the rules of this part.

#### **§ 3007.23 Access to non-public material.**

(a) Access to non-public material is permitted for Commissioners and Commission employees with a need to know for purposes of carrying out their appropriate responsibilities. Except as pursuant to the rules in this part, no officer or employee of the Commission may, with respect to any materials claimed to be non-public by the Postal Service:

(1) Use such materials for purposes other than the purposes for which it is supplied; or

(2) Permit anyone who is not an employee of the Commission to have access to any such materials.

(3) Before granting access to material subject to protective conditions to contractors or experts hired by the Commission, its authorized representative, or the public representative to assist in the conduct of their official duties, the Commission, its authorized representative, or the public representative shall file a notice of access pursuant to § 3007.31(b) for such a contractor or expert, and the Postal Service shall have 2 days to object.

(b) The Commission or its authorized representative may issue a notice of preliminary determination concerning the appropriate degree of protection, if any, to be accorded to the materials claimed to be non-public by the Postal Service.

(1) Responsive pleadings (by any interested person, including the Postal Service) are due within 7 days after such a notice is filed, unless a longer period as specified in the notice of preliminary determination;

(2) Following the filing of responsive pleadings, if any, the Commission, or its authorized representative, will issue an order determining the appropriate degree of access, if any, to be accorded to the materials claimed to be non-public by the Postal Service; and

(3) Unless the Commission or its authorized representative otherwise provides, no reply to a responsive pleading or any other further responsive document shall be filed.

#### **§ 3007.24 Request for access to non-public material.**

(a) Any person may file a motion requesting access to the materials claimed to be non-public by the Postal Service. The person filing the motion shall file a detailed statement and rationale for why access should be granted, making specific reference to the pertinent rationale provided on the application for relief submitted pursuant to § 3007.21(b).

(b) Any person seeking access to non-public materials may agree to abide by standard Commission protective conditions as published on the Commission's Web site. Such person shall attach an executed copy of the standard protective conditions to its motion; and

(1) If the person agrees to abide by standard Commission protective conditions, answers are due within 2 days after such a motion is filed.

(2) If the person does not agree to standard protective conditions, answers are due within 7 days after such a motion is filed.

(c) Following the filing of responsive pleadings, if any, the Commission or its authorized representative will issue an order determining the appropriate degree of access, if any, and the appropriate degree of protection, if any, to be accorded to the materials claimed to be non-public by the Postal Service.

(d) Unless the Commission or its authorized representative otherwise provides, no reply to an answer or any other further responsive document shall be filed.

(e) Once the reason for obtaining access to non-public information is no

longer applicable, or the person with access to the information withdraws or otherwise no longer is involved in the matter, that person's access to the information shall terminate.

#### **§ 3007.25 Standard for decision.**

(a) The Commission or its authorized representative shall balance the nature and extent of the likely commercial or other injury identified by the Postal Service against the public interest in maintaining the financial transparency of a government entity operating in commercial markets in determining whether to issue an order requiring disclosure of the information or materials filed under 39 U.S.C. 504(g)(1).

(b) The Commission or its authorized representative shall balance the nature and extent of the likelihood that non-public materials would invade a specific evidentiary privilege that is recognized in federal civil courts, or would constitute an undue burden that the Postal Service has quantified to the best of its ability against the public interest that would be served by providing access to the non-public materials in determining whether to issue an order requiring disclosure of non-public materials.

#### **§ 3007.30 Limitations on access to non-public material.**

Limitations on access to non-public materials at any stage of a proceeding before the Commission, or in connection with any other purpose under title 39, include:

(a) Not requiring the public disclosure of the materials claimed to be non-public by the Postal Service under 39 U.S.C. 504(g)(1);

(b) Specifying terms for public disclosure of the materials;

(c) Ordering a specific method for disclosing the information or materials;

(d) Restricting the scope of the disclosure of information or materials as they relate to certain matters;

(e) Restricting to whom the information or materials may be disclosed;

(f) Sealing a deposition or part of a proceeding;

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

(h) Such other relief as the Commission or its authorized representative determines to be appropriate.

#### **§ 3007.31 Notice of access to material subject to protective order.**

(a) Non-public materials, unless specifically ordered otherwise, may be

disclosed to the following persons, and without their filing a notice of access to the extent necessary to assist in the Commission's performance of any function that is authorized by title 39, or any appeals or reconsiderations thereof:

- (1) Members of the Commission;
- (2) Commission employees on a need-to-know basis;
- (3) Court reporters, stenographers, or persons operating audio or video recording equipment for such court reporters or stenographers at hearings or depositions; and
- (4) Reviewing courts and their staffs.

(b) Except as provided in paragraph (a) or a Commission order, each person seeking access to non-public materials subject to protective conditions must file a notice, under § 3001.9–12 of this chapter, identifying each individual to have access by name, company, and title.

(c) Access will not be granted for 2 days after a notice seeking access is filed to allow the Postal Service or other interested person to interpose an objection. If the Postal Service or another interested person does object, it must provide written justification for its position.

(d) The person subject to the objection may submit a written response to the objection no later than 2 days after such an objection is filed.

#### **§ 3007.32 Motion for removal of protective conditions.**

(a) After reviewing non-public materials subject to protective conditions, a person may file a motion requesting an order that such non-public materials should not be subject to protective conditions, but should be publicly disclosed. Each such request must provide the Commission with a specific and detailed statement and rationale why the material should be made public. The motion, however, shall not publicly disclose any of the information or materials subject to

protective conditions. If it is necessary to use the protected information or materials to formulate the argument in favor of public disclosure, the argument utilizing the non-public materials shall be filed under seal.

(b) Answers are due within 7 days after such a motion is filed.

(c) Following responsive pleadings, if any, the Commission or its authorized representative will issue an order determining whether the non-public materials, or any part thereof, shall be made public.

(d) Unless the Commission or its authorized representative otherwise provides, no reply to an answer or any other further responsive document shall be filed.

#### **§ 3007.33 Expiration of protective conditions.**

(a) Protective conditions afforded to any non-public materials filed by the Postal Service shall expire 10 years after such filing unless the Commission or its authorized representative enters an order extending or shortening the protective conditions.

(b) The Commission or its authorized representative may initiate such action in its own discretion or upon a motion by the Postal Service.

(c) Interested persons shall be provided with the opportunity to submit written comments and reply comments before the applicable period is altered.

#### **§ 3007.40 Continued effectiveness of protective conditions.**

(a) If a court or other administrative agency subpoenas or orders production of non-public materials which a person has obtained under protective conditions ordered by the Commission, the target of the subpoena or order shall promptly, within 2 days of receipt of the subpoena or order for production, notify the Postal Service of the pendency of the subpoena or order to allow the Postal Service time to object to the production or to seek a protective order

or seek such other relief as it deems appropriate.

(b) Any person seeking to disclose protected information to a reviewing court 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) The protective conditions ordered by the Commission or its authorized representative under § 3007.24 shall remain in effect throughout any subsequent review unless overridden by the action of the reviewing court.

#### **§ 3007.50 Sanctions for violations of protective order.**

(a) No individual who has been granted access to materials subject to protective conditions shall disseminate the materials in whole or in part to any individual not authorized to obtain access under the protective conditions imposed by the Commission. If an individual who has been granted access to such non-public materials under a protective order violates the terms of such order, the Commission or its authorized representative shall impose sanctions on the persons or entities on whose behalf the individual 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 protective order; and

(3) Such other sanctions as the Commission or its authorized representative deems appropriate.

(b) The Postal Service, in its discretion, may pursue any remedies available to it under the law against the individual who violated the protective order, or the persons or entities on whose behalf the individual was acting, or both.

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