

Before the
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Regulations to Establish Procedure
For According Appropriate Confidentiality

Docket No. RM2008-1

PUBLIC REPRESENTATIVE COMMENTS
ON SECOND NOTICE OF PROPOSED RULEMAKING TO ESTABLISH A
PROCEDURE FOR ACCORDING APPROPRIATE CONFIDENTIALITY
(April 27, 2009)

The Public Representative hereby comments on the Commission's Second Notice of proposed rulemaking to implement section 504(g) of the Postal Accountability and Enhancement Act, 39 U.S.C. 504(g). The proposed rules would accord appropriate confidentiality to documents and materials submitted to the Commission that are claimed to be exempt from disclosure either by the Postal Service or a third party with a proprietary interest.¹

A. REVISED PROPOSED RULES

The revisions to the proposed confidentiality rules significantly improve the initial proposal.² The second notice of proposed rulemaking properly accepts and includes within the rules several of the comments received during the first round of comments. The revisions in the second notice provide workable solutions to the difficult procedural

¹ Second Notice of Proposed Rulemaking to Establish a Procedure for According Appropriate Confidentiality, March 20, 2009. (Second Notice). Reply comments are due May 11, 2009.

² Notice of Proposed Rulemaking to Establish a Procedure for According Appropriate Confidentiality, August 13, 2008.

problems surrounding claims by the Postal Service (and third parties with a proprietary interest) for confidential treatment of filings. The proposed procedures would provide a fair and equitable balancing of the interests of all parties when issues of public disclosure and nonpublic access are presented to the Commission. Most significantly, the revised proposed rules more properly apply two different standards for deciding whether to require disclosure of materials: one is a balancing test applied to Postal Service claims of confidentiality. § 3007.33(a). The other test balances the interests of the parties based on Rule 26(c) of the Federal Rules of Civil Procedure. The latter test protects documents filed on behalf of third parties (§ 3007.33(b)), requests for access to nonpublic documents during any stage of a Commission proceeding (§ 3007.40), including a request relevant to compliance (§ 3007.50), or for any other purpose (§ 3007.60).

Significantly, the rules would now provide that, upon motion, any person may request the Commission to issue a data or information request by, *inter alia*, stating the relevance and materiality of the materials sought. § 3007.3(b). Further, under the proposed rules, non-public materials obtained from the Postal Service or third parties may be accessed during a proceeding (§ 3007.40), or materials relevant to compliance may be accessed (§ 3007.50), when the Commission determines a balancing of the interests based on Federal Rule of Civil Procedure 26(c) favors disclosure. § 3007.42 and § 3007.52. Although the maintenance of confidential treatment may be an inconvenience to those who need ready access to documents for litigation purposes, non-public materials would be available to litigants in many cases if litigators wishing to view non-public materials are willing to accede to the requirements of protective

conditions. Thus, overall, the rules strike a fair balance, on the one hand initially establishing confidentiality where necessary and yet allowing access on a limited basis to nonpublic materials when needed for litigation purposes. In addition, reasonable and workable procedures are available for those seeking the public disclosure of nonpublic documents.

B. ACCEPTED INITIAL SUGGESTIONS OF PUBLIC REPRESENTATIVE

Modifications in the Second Notice to the rules initially proposed satisfactorily dispose of certain issues that were raised in the Public Representative's initial comments.³ Most importantly, the new language eliminates the unnecessary requirement, previously proposed for section 3007.32, that non-public materials must be "reviewed" by the person requesting the materials before that person could request public disclosure of nonpublic material. *Id.* at 7-8. This is remedied by new language that, "Any persons may make a request to the Commission that non-public material be publicly disclosed." §3007.31(a). This language eliminates the requirement that would have injected an unnecessary procedural step for persons wishing to object to confidentiality on more general grounds by having to first move to obtain nonpublic documents for review.

The revised rules also include the suggestion of the Public Representative to add a blank certification form to the Statement of Compliance with Protective Conditions for

³ Public Representative Comments on Proposed Regulations to Establish Procedure for According Appropriate Confidentiality [Errata], September 25, 2008. (Public Representative Comments).

use upon the return or disposal of protected materials. That form has been added. See Appendix A to Part 3007, Page 4 of 4.⁴

C. INITIAL COMMENTS OF PUBLIC REPRESENTATIVE NOT
ACCEPTED BUT REMAINING RELEVANT

The Public Representative's initial comments discussed proposed section 3007.1(b).⁵ The definition of "Non-public materials" in section 3007.1(b) is filings "claimed to be exempt from disclosure by the Postal Service pursuant to 39 U.S.C. 504(g)." As proposed, the definition assumes that once a claim of exemption is made by the Postal Service, the information is thereafter styled as "Non-public materials" even if the Commission subsequently determines the materials must be publicly disclosed and are thereafter public material. It is suggested that the following clause should be added at the end of the definition: "unless public disclosure has been ordered pursuant to this Part."

The Commission essentially rejected, without discussion, another comment of the Public Representative relating to the relationship of the proposed rules to Freedom of Information Act requests. That comment is still relevant, but it is not reiterated here.⁶

⁴ Other suggestions of the Public Representative in initial comments related to the timing and manner of access to nonpublic materials when no objections to release were filed under section 3007.31. Those points were superseded by revision to that section and proposed sections 3007.40 and 3007.50. Other initial comments of the Public Representative were not specifically accepted due to revisions in the text of proposed rules, *i.e.*, a proposed correction to the previous section 3007.25(b) is moot due to revisions in the language and section numbers. *Id.* at 8.

⁵ *Id.* at 4.

⁶ The comment suggested that a cross-reference be placed in Part 3004 of the Rules pertaining to FOIA requests noting the potential availability of the 5 U.S.C. § 552(b) materials pursuant to protective conditions under Part 3007. (Public Representative Comments at 8-9).

D. POTENTIAL UNCERTAINTY AS TO COMMISSION PROCEDURE FOR DOCUMENT ACCESS UNDER SUBSECTION (d) OF SECTIONS 3007.40 AND 3007.50.

Proposed subsection (d) of sections 3007.40 and 3007.50 may lead to some uncertainty as to when access is available to nonpublic documents. According to subpart (c) of sections 3007.40 and 3007.50, unless otherwise ordered, no answers to motions for access may be filed. According to the subsequent section, subpart (d)(1) of subsections 3007.40 and 3007.50, following the filing of answers, *if any*, the Commission will issue an order. Also, if an answer is filed, even in the absence of the Commission providing for an answer, the Commission will issue an order. Thus, under (d)(1), upon a motion for access the Commission will issue an order. However, subsection (d)(1) is subject to subsection (d)(2).

Under subsections 3007.40(d)(2) and 3007.50(d)(2), if the Postal Service or third party does not contest access, the Commission *may* issue an order.⁷ If neither the Postal Service nor a third party with a proprietary interest objects, and the Commission *may* issue an order, there will be uncertainty as to *when* access to the nonpublic materials is available. If there is no objection, is access immediate? If the Commission *may* issue an order, must the parties wait to determine whether the Commission will issue an order? If the Commission determines not to issue an order, the rules do not indicate when, or the means by which, authorization will be granted. Presumably,

⁷ Presumably, subsection (d)(2) is intended to apply if “*neither* the Postal Service *nor* a third party....”

access could not be granted until the motion is granted. Unless the Commission issues an order or other authorization, access would not be authorized.⁸

F. STYLISTIC SUGGESTIONS

In section 3007.24, add Court to the title so as to read, "Commission and Court access to non-public materials." The section applies not only to Commission access but also to access by "Reviewing courts and their staffs."

In the same section, change (a)(2) to read, "Commission employees including public representatives carrying out their appropriate responsibilities;"

E. CONCLUSION

The Public Representative respectfully submits the foregoing Comments for the Commission's consideration.

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⁸ The discussion in the Second Notice indicates the Commission will grant access subject to agreed protective conditions. Second Notice at 27.