

does not apply to them. See GCA Comments at 5, n. 6. Therefore, the rule does not infringe on the Postal Service's right under § 410(c)(4) not to disclose attorney work product intended for Chapter 36 litigation, even if that provision were to apply outside of the context of Freedom of Information Act requests.

There Is No Statutory Ban on Evaluating Rate-Related Matters Between § 3622 Proceedings

Section 3624(c)(1) of the Act requires the Commission to transmit a recommended decision on the Postal Service's request for new rates within 10 months after receiving the request. The Postal Service argues that this provision entitles it to a respite from litigating rate-related matters outside of this 10-month period.²⁰ But the Postal Service goes further, and argues that this respite includes a right not to have to think about rate-related matters, and a respite from having others think about rate-related matters. The Postal Service argues that the Periodic Reporting Rule robs it of the respite to which it is entitled, because it provides others with information that would enable them, in the period between rate cases, to study how postal costs and revenues behave. Substantive Comments at 17.

Apparently, in the Postal Service's view, a "rate case" happens whenever, and wherever a person's thoughts turn to postal cost or revenue behavior, and if the Postal Service didn't ask them to do it, § 3624(c)(1) is violated. It is hard to take this proposition seriously. One obvious flaw in this logic is the fact that the Act contains a complaint procedure whereby the public may ask the Commission, at any time, to hold a hearing on whether current rates violate the policies of the act. See 39 U.S.C. § 3662. This cannot be reconciled with the Postal Service's "respite" theory. It should also be noted that there is nothing in the legislative history of § 3624(c) to suggest that it was motivated by a desire to give the Postal Service a respite from other Chapter 36 hearings, let alone give it a respite from others' rate-related thoughts.²¹

²⁰ This argument, of course, ignores the various kinds of hearings that the Act authorizes the Commission to initiate between rate cases.

²¹ Section 3624(c)(1) was adopted as part of the 1976 amendments to the Act. The legislative history of this provision indicates only two motives for adopting the 10-month time limit for completing rate cases. The overriding motive was the desire to shorten rate cases so that revenues could be increased more quickly, and the financial crisis that prompted the 1976 amendments would not reoccur. See Report of Committee on Post Office and Civil Service, House of Representatives, on H.R. 8603, Postal Reorganization Amendments of 1976, Pub. L.

B. Disclosure Policy Under the Periodic Reporting Rule

The Postal Service expresses a deep-seated insecurity about the Commission's willingness and ability to afford confidential treatment to materials that it might provide under the Periodic Reporting Rule. The cause of this insecurity, it asserts, is its experience with Freedom of Information Act (FOIA) requests for information that it has provided to help the Commission prepare its report to Congress on international mail under 39 U.S.C. § 3663. Substantive Comments at 29–30.

The Postal Service emphasizes that it is exempt from a duty to disclose commercial information that "under good business practice would not be publicly disclosed" by § 410(c)(2) of the Postal Reorganization Act. It argues as though this section of the Act is a general-purpose exemption from the duty to disclose commercial information. Section 410(c)(2), however, is expressly limited to the Postal Service's duty to respond to FOIA requests. The Commission's authority to require the Postal Service to provide information on a periodic basis is not derived from FOIA, but from its authority under § 3603 of the Act to adopt procedures that are "necessary and proper" to carry out its ratemaking and classification functions.

More to the point, the stated concern about the potential need to afford confidential treatment to data provided to comply with the proposed rule changes appears to be largely a red herring. As discussed at some length above, all of the information called for by the proposed rules have been provided and made public in recent years, either as part of a rate case filing or as a courtesy to the Commission. Except for facility-specific data, the Postal Service has never seen fit to request confidential treatment for any of this information, and it does not now identify any competitive disadvantage it is likely to suffer as a result of public access to these historical operating results. Except for facility-specific data,

94–421, 94th Cong., 2d Sess., October 1976, at page 334 (Remarks of Senator McGee). A secondary motive was to reduce the Postal Service's control over the ratesetting process by lengthening the period that the Postal Service must wait before it puts temporary rates into effect, from 90 days to 10 months after it files a rate request. *Id.* at 51. The OCA asserts that under the original statute, temporary rates, as a practical matter, became permanent rates, shortening the hearing time before de facto permanent rates were implemented to 90 days. It contends that the effect of the 1976 amendments was to greatly expand the opportunity of intervenors in rate cases to influence the selection of permanent rates. OCA Reply Comments at 4, n.9.

it seems highly unlikely that the Postal Service will have justification to seek confidential treatment of the materials it will provide to comply with revised rule 102.

Furthermore, the Commission always has conscientiously dealt with requests for confidential treatment of data both during and outside of docketed cases. Existing procedures assure that both the Postal Service, and all others providing information to the Commission, have ample safeguards to assure that their concerns will be fully heard and evaluated in timely fashion, and their rights fully protected.

Protecting Commercially Sensitive Information Required by the Rule

In a rate case, a litigant occasionally will seek to discover information that another litigant considers to be commercially sensitive. The Commission resolves such issues by balancing one litigant's need for the information to support its case against the potential commercial harm that disclosure might cause to the other litigant. In such cases there is a general presumption that discovery should be granted in order to afford the discovering party its due process right to prove its case. The tension between the discovering party's need to prove its case and the opponents need to protect commercially valuable information is sometimes resolved by granting discovery subject to various protective conditions. For example, only temporary access may be granted, and only to specified persons or groups.

The CRA documentation that the rule requires is among the documentation that the Postal Service has consistently disclosed in rate cases without asserting that the documentation has commercial value and without seeking protective conditions. The minor exception to this Postal Service policy has been its consistent request that facility-specific data, and mailer-specific data, be coded so as to mask the identity of the facility or the mailer. The Postal Service has not explained why the same approach could not be satisfactorily applied to disclosure under this rule.

In its comments, the Postal Service strenuously objects to following the same disclosure policy with respect to the same documentation in the context of the Periodic Reporting Rule. It asserts that "the majority of the information designated by the Commission's proposed rules consists of commercial information that would not be disclosed under good business practices." As part of its justification for this position, it notes that the material covered by the rule includes information specific to