

ORDER NO. 38

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners:

Dan G. Blair, Chairman;
Dawn A. Tisdale, Vice Chairman;
Mark Acton; Ruth Y. Goldway; and
Tony L. Hammond

Rate and Service Changes to Implement
Functionally Equivalent Negotiated Service
Agreement With The Bradford Group

Docket No. MC2007-4

ORDER DENYING JOINT MOTION OF UNITED STATES POSTAL SERVICE AND
THE BRADFORD GROUP FOR PROTECTIVE CONDITIONS FOR MATERIAL
RESPONSIVE TO INTERROGATORIES OF THE OFFICE OF THE CONSUMER
ADVOCATE (OCA/USPS-T1-19(c), 20, 21(c), (f), (i), and 22)

(Issued October 9, 2007)

The United States Postal Service and The Bradford Group have filed a joint motion for leave to file material responsive to interrogatories OCA/USPS-T1-19(c), 20, 21(c), (f), (i), and 22 under protective conditions.¹ On September 28, 2007, the Postal Service and The Bradford Group filed supplemental comments in support of their Joint Motion.²

¹ Joint Motion of the United States Postal Service and Bradford Group for Protective Conditions for Materials Requested in OCA/USPS-T1-19(c), 20, 21(c), 21(f), 21(i), and 22, September 20, 2007 (Joint Motion). Similar information has been sought by the Commission. Commission Information Request No. 1, September 14, 2007. Answers are awaiting action on this Joint Motion. See Response of United States Postal Service Witness Parr to Commission Information Request No. 1, Questions 1 and 3, September 28, 2007, at 1.

² Joint Supplementary Comments to Joint Motion of the United States Postal Service and Bradford Group for Protective Conditions for Materials Requested in OCA/USPS-T1-19(c), 20, 21(c), 21(f), 21(i), and 22, September 28, 2007 (Supplemental Comments).

The interrogatories at issue seek workpapers and related billing determinants used to calculate mail volumes and revenue per piece by dropship level. The Joint Motion asserts that publicly revealing this highly confidential and commercially sensitive information could harm The Bradford Group's competitive position and could allow competitors to mimic Bradford's proprietary business practices.

The Joint Motion is denied without prejudice to Bradford and the Postal Service's right to renew their request with additional supporting explanation of why the information sought is highly confidential and commercially sensitive, and how it could harm The Bradford Group's competitive position or allow competitors to mimic Bradford's proprietary business practices. Below, the Commission outlines the principles for dealing with motions for protective conditions in general and then applies those criteria to the interrogatories at issue in the Joint Motion.

I. INTRODUCTION

The Commission routinely confronts issues relating to protective conditions. In the Bookspan negotiated service agreement case (Docket No. MC2005-3), the Presiding Officer noted that "in accordance with long-established principles governing discovery in civil litigation, evidentiary privileges are exceptions to the general rule that proceedings must be conducted in public view." (Internal quotation omitted.)³ In commenting on the extent of the trade secret privilege, the Presiding Officer reminded the Bookspan participants that the Commission has long held the view that "[i]n regulatory proceedings, the privilege is entitled to still less weight because the public interest, as well as rights of private parties, is at stake." (Footnote omitted.) *Id.* The extent of protection, if any, "is for the agency to determine by balancing the harm of disclosure against the party's need to prove his case and the public interest in just and

³ P.O. Ruling MC2005-3/5 at 2-3; Order No. 1283 (January 28, 2000) at 3, quoting Docket No. R97-1, P.O. Ruling R97-1/62 at 8; *see also* Order No. 1025 (August 17, 1994) at 13 ("disclosure rather than protection is the rule because of the overriding interest requiring that each party be empowered to obtain all evidence needed to prove his case.") (Internal quotation omitted.) (Footnote omitted.)

accurate adjudication of disputes.”⁴ The Commission considers the following factors in determining whether to apply protective conditions: (1) “the overall role (or standing) assumed by the proponent of the data’s use;” (2) “the purpose the data serves;” and (3) “the extent to which protective conditions interfere with or compromise the Commission’s interest in — and ability to provide — open and public proceedings.”⁵

The Commission is concerned about having to rely extensively on non-public information in its opinions. Such circumstances do not allow for a transparent decision-making process. Given these concerns, in a previous case, the Presiding Officer noted that protective conditions should be used only when absolutely necessary:

As the discovery phase of this proceeding gets under way, participants are cautioned only to seek protective conditions for materials that are proprietary, commercially sensitive, or otherwise damaging in a meaningful way to the releasing party. This is not to suggest that such conditions are not useful. Recent proceedings, however, appear to reflect a growing tendency to rely on such conditions as a matter of convenience rather than necessity. This practice, to the extent it is overused, hampers the administrative process and burdens the parties and the Commission. Consequently, participants are urged to seek protective conditions only in circumstances where they are clearly necessary.

P.O. Ruling R2001-1/2 at 2.

Such a concern is particularly germane to a request for a special discount for a single mailer. Due to this “strong public policy favoring public disclosure,” the burden of establishing the need of protective conditions is on the participant asserting their

⁴ P.O. Ruling MC2005-3/5, *supra*; see also Order No. 1283 (January 28, 2000) at 3; P.O. Ruling R2001-1/17 at 13; P.O. Ruling R97-1/62 at 8.

⁵ Order No. 1390 (February 4, 2004) at 4; see also P.O. Ruling MC2005-3/5, *supra*, at 3. A corollary to these factors is the strong public policy favoring open and transparent Commission decisions as envisioned by the Postal Accountability and Enhancement Act.

necessity.⁶ To assure there is enough evidence on the record to support their proposals “the proponent of a new rate or classification sometimes has a higher burden for disclosure....”⁷ This is due to the fact that “[t]he Commission eventually utilizes interrogatories submitted into record evidence by the parties to determine if a new classification is warranted and if a proposed rate is justified.” *Id.* On the other hand, protective conditions may be utilized where necessary, as in the absence of “clear supporting evidence on which to base a decision, there is the risk of precluding the Commission from making an informed decision, or the Commission drawing an erroneous conclusion.” *Id.*

The Commission has consistently held that nominal support in the form of generalized assertions for the claim that the information sought is highly confidential and commercially sensitive is not sufficient for the granting of protective conditions. In prior cases, the Commission has stated:

[T]o the extent the Service (or other party) seeks to protect data or other information a specific, well-supported claim must be presented. Minimum standards will require that the supporting narrative be relatively detailed and issue-specific.... Under this approach, claims of ‘inherent sensitivity’ based on commercial business practices or broad industry standards generally will not suffice. This is largely because such standards are often quite general; usually lack a clear or direct relationship to case-specific postal issues; and typically do not reflect the type of unique statutory mandates that underlie Postal Service operations and Postal Rate Commission responsibilities.

See, e.g., Order No. 1390, *supra*, at 4. Declarations or affidavits in support of positions of confidentiality and commercial sensitivity may also be helpful in making such a determination. See P.O. Ruling R2000-1/97, *supra*, at 6.

⁶ Order No. 1025, *supra*, at 14 (footnotes omitted); see also P.O. Ruling R2001-1/17 at 11-12 (“As the proponent of the protective conditions, the Postal Service, which had objected to disclosure on various grounds including commercial sensitivity, has the burden of demonstrating that the information to be produced is confidential and that public disclosure will cause it serious harm, e.g. competitive disadvantage.”)

⁷ See P. O. Ruling R2000-1/97 at 8.

II. REQUEST FOR PROTECTIVE CONDITIONS FOR BILLING DETERMINANTS

With those principles in mind, the Commission turns to the interrogatories at issue in the Joint Motion. They seek workpapers and related billing determinants underlying data provided in testimony used to calculate revenue per piece and volumes by dropship level. The Joint Motion contends that:

The calculation and workpapers requested by the Office of Consumer Advocate (OCA) in these interrogatories involve highly confidential, commercially-sensitive data that, if publicly disclosed, would reveal details of Bradford Group's mailing practices and business strategy. Publicly revealing this information could damage Bradford Group's competitive position.

Joint Motion at 1.

Typically, billing determinant data is provided publicly. In the last Standard Mail negotiated service agreement case (Docket No. MC2005-3), for example, the Postal Service provided this information to the Commission in response to Presiding Officer's Information Request No. 1, Question 3.⁸ Ultimately, the Commission relied upon these data, in part, in making a favorable recommendation to the Governors.⁹ Protecting such data here would be contrary to past practice. Before granting the Joint Motion, the Commission requires persuasive rationale as to why these data that typically are not protected for NSA partners should be protected for The Bradford Group.

To this end, the Commission is appreciative that the Postal Service and The Bradford Group have been forthcoming in providing additional detail to help the Commission make a better informed decision as to whether the information at issue should be subject to protective conditions. Supplemental Comments at 1-2. Nonetheless, the Commission continues to have concerns with issues that the

⁸ Response of United States Postal Service to Presiding Officer's Information Request No. 1, August 9, 2005, at 13.

⁹ Docket No. MC2005-3, PRC-LR-1 at Spreadsheets "Letters" and "Nonletters."

Supplemental Comments do not address. Those issues must be explored before the Joint Motion may be granted. Specifically, the Supplemental Comments state that:

Publicly revealing this information would provide Bradford's competitors with insight into Bradford's costs and mailing practices, including commingling and the percentage of mail that Bradford dropships. This information could enable Bradford's competitors to mimic Bradford's propriety business practices....

Id. Accordingly, the harm identified by Bradford and the Postal Service is a potential to "mimic Bradford's propriety business practices."

However, even with the identification of Bradford's concerns in the Supplemental Comments, the Commission has difficulty determining how the requested information would allow Bradford's competitors to "mimic Bradford's proprietary business practices." *Id.* at 2. It is reasonable to assume that in order to mimic Bradford's proprietary mailing practices, a competitor would need significant insight into Bradford's mailings.¹⁰ Thus, if the data requested sought information on individual mailings, this would be cause for substantial concern. However, here, where the data requested is aggregated by dropship level, it is unclear how the information subject to the interrogatories at issue can result in the identified harm.¹¹ Each potential link to the identified harm that is outlined in the Supplemental Comments is addressed below.

As the Supplemental Comments point out, the information requested appears to seek a breakdown of Bradford's mail volume by sortation tier and dropship level. *Id.* at 1. Yet a breakdown at this level does not provide information as to how frequently Bradford executes its campaigns. Additionally, it does not contain information on the size of each mailing campaign that is

¹⁰ To mimic Bradford's mailing practices, a competitor would need information on when mailings occur, the frequency of mailings, the nature of mailing campaigns, and perhaps the size of mailings.

¹¹ Although the Joint Motion does not state that the information requested is broken down by individual mailing campaign, if the underlying electronic workpapers do reveal information at that level of granularity, protective conditions might be justified for that portion of the data.

dropshipped. Without information to identify when each mailing occurs, the frequency of each mailing, the nature of each mailing campaign, and the size of each mailing (which does not appear to be obtainable from the information requested), it is not apparent how the information requested could allow competitors to mimic Bradford's mailing practices using the requested information. Accordingly, the Commission would need additional information to find a sufficient nexus between the information requested and the ability to mimic Bradford's proprietary business practices in order to grant the Joint Motion on this ground.

With respect to costs, the Commission has difficulty determining the relationship between the requested information and Bradford's concerns. The total postage costs for Bradford can be found using data already publicly provided in this case using the total revenue information found in witness Parr's publicly filed testimony.¹² Non-postage related costs, such as the price of paper and ink, can not be determined from the information requested. The total cost for Bradford's mailing campaigns (postage related plus non-postage related) is not at issue in this case and is not requested. Accordingly, the Commission would additional information to find a sufficient nexus between the information requested and the alleged harm that might result from publicly revealing Bradford's costs in order to grant the Joint Motion on this ground.

With respect to commingling, the Commission finds it difficult to determine how the requested mailing information, volumes broken down by dropship level, could provide competitors information about Bradford's commingling practices. The information requested does not appear to identify Bradford's co-mailing partners, where such co-mailing activities take place, or how much co-mailing activity occurs at each facility. Potentially, for those dropship levels that Bradford does not have enough density on its own to meet the Postal Service's

¹² USPS-T-1, Appendix A at 3, 5.

requirements for that dropship level, a competitor could extrapolate the fact that Bradford commingles at that dropship level. However, it is not apparent how the existence of commingling can allow a competitor to mimic or interfere with Bradford's co-mailing activities. Since competitors would not be able to determine at exactly which facilities any commingling occurs, how many mailpieces are being commingled, and with whose mailpieces they are being combined, using the requested information to cause competitive harm to Bradford's commingling activities appears to be extremely unlikely. Accordingly, the Commission would need additional information to find a sufficient nexus between the information requested and the methods by which a competitor can use the information requested to harm Bradford's commingling practices.

There is simply not enough information here for the Commission to make a finding that, based on the criteria and balancing test discussed above, protective conditions should apply to these data. Accordingly, Bradford and the Postal Service have not met their burden here given the public policy concerns discussed above.

III. OTHER OUTSTANDING ISSUES

The Postal Service also filed a motion for late acceptance of responses to OCA/USPS-T1-11-14.¹³ In support of this Motion, the Postal Service notes that it had technical difficulties and that it believes that no participant will be prejudiced by the delay. In light of the fact that this Motion was not objected to by any participant and there does not appear to be any prejudice from granting the request, the late filing of this Motion will be accepted.

¹³ Motion for Late Acceptance of Responses of United States Postal Service Witness Parr to Interrogatories of the Office of the Consumer Advocate (OCA/USPS-T1-11-14), September 11, 2007 (Motion).

It is ordered:

1. Joint Motion of the United States Postal Service and Bradford Group for Protective Conditions for Materials Requested in OCA/USPS-T1-19(c), 20, 21(c), 21(f), 21(i), and 22, filed September 20, 2007, is denied without prejudice to Bradford and the Postal Service's right to renew their request.
2. Motion for Late Acceptance of Responses of United States Postal Service Witness Parr to Interrogatories of the Office of the Consumer Advocate (OCA/USPS-T1-11-14), filed September 11, 2007, is granted.
3. If The Bradford Group seeks protective conditions with respect to the interrogatories addressed in this Order, it shall make a further request to the Commission no later than October 16, 2007.

By the Commission.

Steven Williams
Secretary