

ORDER NO. 44

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 ON JOINT MOTION OF THE BRADFORD GROUP AND THE UNITED
STATES POSTAL SERVICE FOR PROTECTIVE CONDITIONS IN RESPONSE TO
COMMISSION ORDER NO. 38 (OCA/USPS-T1-19(c), 20, 21(c), 21(f), 21(i), and 22)

(Issued November 9, 2007)

On October 26, 2007, The Bradford Group (Bradford) and the United States Postal Service renewed a previously filed initial joint motion for protective conditions¹ concerning a workpaper containing billing determinants used to calculate mail volumes and revenue per piece by dropship level.² The Commission sought this information in

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 (Initial Joint Motion).

² Joint Motion of The Bradford Group and United States Postal Service for Protective Conditions in Response to Commission Order No. 38 (OCA/USPS-T1-19(c), 20, 21(c), 21(f), 21(i), and 22), October 26, 2007 (Renewed Joint Motion).

Commission Information Request No. 1, Question 2, September 14, 2007.³ In Commission Order No. 38, the Commission denied the Initial Joint Motion, but outlined the level of detail Bradford and the Postal Service would be required to provide in order for the Commission to sustain protective conditions for that data.⁴ The Renewed Joint Motion and supporting Declaration⁵ argue that (1) the Postal Service workpaper provides information that is “far beyond” what Bradford would generally disclose publicly; (2) because Bradford does not have access to such information about its competitors, its competitors should not have access to this information about Bradford’s mailing practices; and (3) the workpaper is similar to a Postal Service mailing statement (Form 3602) which the Postal Service treats as competitively sensitive. For the reasons that follow, the Commission requests that (1) the Postal Service provide the workpaper for *in camera* review by the Commission; and (2) Bradford provide a thorough explanation of how others can use the information to the detriment of Bradford for *in camera* review.

I. COMMISSION ORDER NO. 38

In Order No. 38 (October 9, 2007), the Commission denied the Initial Joint Motion, but explained why it was unable to grant protective conditions on the basis of the limited justification provided. The order then detailed the requirements for the Commission to grant a renewed motion for protective conditions for that data. The

³ The Office of the Consumer Advocate (OCA) seeks similar information in OCA/USPS-T1-19(c), 20, 21(c), 21(f), 21(i), and 22. See 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 (stating that “materials requested by these [OCA] interrogatories contain a breakdown of the Bradford Group’s mail volume by sortation tier and dropship discount.”); see *also* Response of United States Postal Service Witness Parr to Commission Information Request No. 1, Questions 1 and 3, September 28, 2007.

⁴ The Commission also granted Bradford and the Postal Service an opportunity to renew their request for protective conditions in response to Commission concerns raised in Order No. 38.

⁵ Declaration of Steve Gustafson, October 26, 2007 (Declaration).

Commission explained that “to 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.” See Order No. 1390 at 4. The Commission further explained that “[u]nder 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 . . . Commission responsibilities.” *Id.* The proponent of protective conditions must show that public disclosure will cause it serious harm such as competitive disadvantage. See Order No. 1025 at 14.

With respect to the specific proposal to have protective conditions apply to the information at issue in the Initial Joint Motion, the Commission was unable to conclude that the level of detail of the requested information was sufficient to justify Bradford’s claim that competitors could use this information to “mimic Bradford’s proprietary business practices.” Order No. 38 at 6. From the information provided in the Initial Joint Motion, the Commission could not find a sufficient nexus between the information requested and the ability to mimic Bradford’s proprietary business practices with respect to commingling or its other mailing practices. Specifically, the Commission stated that it was reasonable to assume that in order to mimic Bradford’s mailings, a competitor would need the following additional information (which was not requested):

- How frequently Bradford executes its campaigns;
- The size of each mailing campaign that is dropshipped;
- The nature of each mailing campaign; and
- When each mailing occurs.

Id. at 6-8.

The Commission noted that “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.” *Id.* at 6.

Additionally, since billing determinant information is typically provided publicly in NSA proceedings, the Commission requested that Bradford provide:

. . . persuasive rationale as to why these data that typically are not protected for NSA partners should be protected for The Bradford Group.

Id. at 5.

II. RENEWED JOINT MOTION AND SUPPORTING DECLARATION

In the Renewed Joint Motion, Bradford provides additional information for the Commission to consider. It attaches a declaration signed by witness Gustafson stating that “the workpaper in question provides a level of detail about Bradford’s mailing practices that is far beyond what Bradford would generally reveal publicly.” Renewed Joint Motion at 2. It argues that because Bradford does not have access to this sort of information about its competitors, Bradford’s competitors should not have access to such information about Bradford. The Renewed Joint Motion and the Declaration compare the information in this workpaper to a Postal Service mailing statement (Form 3602) which is not provided publicly. *Id.* at 2. However, the Declaration notes that “the information in the Work Paper [is] less detailed and partially aggregated” compared to the information contained in the mailing statement. Declaration at 2. Witness Gustafson believes that the information in the workpaper, “especially when put together with information that is publicly available and the information [Bradford has] made public in this case,” will provide insight into business methods that competitors do not now possess. *Id.* He does not, however, provide details as to how this could occur, or what publicly available information could be combined with this data to allow competitors to mimic its business practices.

Witness Gustafson also states that “the level of detail about our mailing volumes that would be revealed by the Work Paper . . . goes beyond aggregate annual volume forecasts.” *Id.* He believes that “[i]f made public, our competitors would be given considerable insight into how we use the mail, how we manage our operational costs and how we are able to achieve economies of scale.” *Id.* He does not, however, provide details as to how this could occur or on the level of detail about Bradford’s individual mailings or mail campaigns that could be gleaned from the workpaper.

III. COMMISSION ANALYSIS

The Commission is appreciative that the Postal Service and Bradford have been forthcoming in providing additional detail through the Declaration to help the Commission make a better informed decision as to whether the information at issue should be subject to protective conditions. The Renewed Joint Motion and supporting Declaration allude to the potential for keeping this data confidential.⁶ Nonetheless, the arguments and factual support in the Renewed Joint Motion and supporting Declaration do not provide a sufficient level of detail to allow the Commission to readily conclude that the information at issue warrants protective conditions.

In line with the parties’ desires, the Commission is striving to act promptly on the Postal Service’s request in this case. As discussed at length in Order No. 38, the Commission also has a strong public policy obligation to ensure the transparency and openness of its proceedings and decisions. The Commission must appropriately balance these interests.

Bradford has made an argument that it should not have to provide this information publicly because Bradford does not have access to this sort of information

⁶ The Declaration could be read to imply that Bradford does not feel comfortable publicly revealing the requisite level of detail required under Commission precedent to support its claim for protective conditions due to the fact that it believes that identifying such information itself could cause competitive interference.

about its competitors. This argument misses the point. Bradford is seeking a special arrangement with the Postal Service with respect to a monopoly product. If a competitor of Bradford sought a special arrangement with the Postal Service, it would also be asked to provide information in support of its claims. The test for granting protective conditions is not whether the information is readily available in the public domain, but rather whether the proponent of protective conditions has made an adequate showing that the public release of this information will cause competitive harm.

The Renewed Motion and Declaration also compare the workpaper at issue in this case to a Form 3602 Postal Service mailing statement. Bradford and the Postal Service acknowledge that the workpaper is partially aggregated and less detailed than the information provided on Form 3602. They do not, however, explain how aggregated or less detailed the information in the workpaper is compared to the Form 3602 information. This lack of detail does not put the Commission in a position to evaluate the differences between the information provided on Form 3602 and that in the workpaper to determine if publicly revealing that information will cause Bradford competitive harm.

To balance the competing interests in this matter, the Commission concludes that the following procedures under Commission rule 31a (39 CFR 3001.31(a)) should apply to the workpaper at issue in the Renewed Joint Motion:

1. The Postal Service is to provide the workpaper *in camera* for the Commission to inspect; and
2. Bradford is to provide a thorough explanation of how others can use the information to the detriment of Bradford for *in camera* review.

Bradford and the Postal Service are requested to provide the workpaper and accompanying explanation within 7 days. Upon receipt, the Commission will review

both the workpaper and accompanying explanation *in camera*.⁷ If, upon review of this information, the Commission finds the workpaper to be commercially sensitive enough to cause Bradford competitive harm, the workpaper will be placed under protective conditions. If, upon review of this information, the Commission finds the workpaper not to be sufficiently commercially sensitive to cause Bradford competitive harm, the Commission will return the workpaper to Bradford and the Postal Service with a request that it be provided publicly. Under no circumstances will Bradford's explanation of how the information could be used by others to the detriment of Bradford be publicly disseminated.

It is ordered:

1. Joint Motion of The Bradford Group and United States Postal Service for Protective Conditions in Response to Commission Order No. 38 (OCA/USPS-T1-19(c), 20, 21(c), 21(f), 21(i), and 22), filed October 26, 2007, is resolved as discussed in the body of this Order.
2. The Postal Service is to provide the workpaper referenced in this Order for *in camera* review no later than November 16, 2007.

⁷ During this review period, absent a motion by a participant demonstrating good cause, only the Commission will have access to this information.

3. The Bradford Group is to provide no later than November 16, 2007, for *in camera* review, a thorough explanation of how the information contained in the workpaper referenced in this Order can be used to the detriment of Bradford.

By the Commission.

Garry J. Sikora
Acting Secretary