

ORDER NO. 39

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
Baseline Negotiated Service
Agreement With Life Line Screening

Docket No. MC2007-5

ORDER DENYING JOINT MOTION OF UNITED STATES POSTAL SERVICE AND
LIFE LINE SCREENING FOR PROTECTIVE CONDITIONS FOR MATERIAL
RESPONSIVE TO INTERROGATORIES OF THE OFFICE OF THE CONSUMER
ADVOCATE (OCA/USPS-T1-1-2)

(Issued October 9, 2007)

The United States Postal Service and Life Line Screening have filed a joint motion for leave to file material responsive to interrogatories OCA/USPS-T1-1-2 under protective conditions.¹ On September 28, 2007, the Postal Service and Life Line Screening (Life Line) filed supplemental comments in support of their Joint Motion.²

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

¹ Joint Motion of the United States Postal Service and Life Line Screening for Protective Conditions for Materials Requested in OCA/USPS-T1-1-2, September 21, 2007 (Joint Motion). Similar information has been sought by the Commission. Commission Information Request No. 1, September 21, 2007.

² Joint Supplementary Comments to Joint Motion of the United States Postal Service and Life Line Screening for Protective Conditions for Materials Requested in OCA/USPS-T1-1-2, September 28, 2007 (Supplemental Comments).

information could harm Life Line's competitive position and could allow competitors to mimic Life Line's proprietary business practices.

The Joint Motion is denied without prejudice to the Movants' 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 Life Line's competitive position or allow competitors to mimic Life Line'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 a 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 Life Line Screening's mailing practices and business strategy. Publicly revealing this information could damage Life Line Screening'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 Standard Mail users should be protected for Life Line.

To this end, the Commission is appreciative that the Postal Service and Life Line 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. Nonetheless, the Commission continues to have concerns with issues that the Supplemental Comments do not address. Those issues must be

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."

explored before the Joint Motion may be granted. Specifically, the Supplemental Comments state that:

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

Supplemental Comments at 1-2. Accordingly, the harm identified by the Movants is a potential to "mimic Life Line's propriety business practices."

However, even with the identification of Life Line's concerns provided in the Supplemental Comments, the Commission has difficulty determining how the requested information would allow Life Line's competitors to "mimic Life Line's proprietary business practices." *Id.* at 2. It is reasonable to assume that in order to mimic Life Line's proprietary mailing practices, a competitor would need significant insight into Life Line'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 by Movants in the Supplemental Comments is addressed below.

As the Supplemental Comments point out, the information requested appears to seek a breakdown of Life Line'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 many times a year Life Line executes its campaigns. Additionally, it does not contain information on the size of each mailing campaign

¹⁰ To mimic Life Line's mailing practices, a competitor would need information on when mailings occur, the frequency of mailings, 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 Life Line'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 Life Line'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 Life Line's concerns. The total postage costs for Life Line 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 Life Line's mailing campaigns (postage related plus non-postage related) is not at issue in this case and is not requested. Accordingly, the Commission would need additional information to find a sufficient nexus between the information requested and the alleged harm that might result from publicly revealing Life Line'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 Life Line's commingling practices. The information requested does not appear to identify Life Line'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 Life Line itself has insufficient density to meet the Postal Service's requirements for that

¹² USPS-T-1, Appendix A at 3, 5.

dropship level, a competitor could extrapolate the fact that Life Line commingles at that dropship level. However, it is not apparent how the existence of commingling can allow a competitor to mimic or interfere with Life Line'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 Life Line'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 Life Line's commingling practices.

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

It is ordered:

1. Joint Motion of the United States Postal Service and Life Line Screening for Protective Conditions for Materials Requested in OCA/USPS-T1-1-2, filed September 21, 2007, is denied without prejudice to the Movants' right to renew their request.

2. If Life Line Screening seeks protective conditions with respect to the interrogatory responses 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