

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

Postal Rate and Fee Changes

Docket No. R2005-1

PRESIDING OFFICER'S RULING GRANTING MOTION
FOR WAIVER AND FOR PROTECTIVE CONDITIONS

(Issued May 4, 2005)

The Postal Service requests a waiver of relevant portions of rules 31(k) and 54 concerning library reference USPS-LR-K-85, Calculation of FedEx Variability, a category 2 library reference sponsored by witness Nash (USPS-T-17).¹ It also seeks protective conditions to govern the provision of this library reference. *Id.* at 1. The Postal Service deferred filing library reference USPS-LR-K-85 pending a ruling on its motion. Pursuant to Order No. 1436, answers to the motion were due May 2, 2005.

The Postal Service states that the library reference contains commercially sensitive information concerning the FedEx agreement, including, for example, cost data for fuel, non-fuel, and handling charges as well as volume information. Motion at 1. In addition, it contends that the volume information is proprietary to both the Postal Service and FedEx. *Id.* at 2.

¹ Motion of the United States Postal Service for Waiver and for Protective Conditions for Library Reference that Includes Costs and Other Data Associated with the FedEx Transportation Agreement, April 8, 2005 (Motion). The Postal Service's blanket request for waiver does not identify the relevant subsections of the two rules for which it seeks waiver. Rule 31(k) concerns the introduction and reliance on studies and analyses; rule 54 describes the contents of formal requests for changes in rates and fees.

On May 3, 2005, the Office of the Consumer Advocate (OCA) filed an answer in partial opposition.² Although not opposing the protective conditions for library reference USPS-LR-K-85 as described, the OCA opposes the inclusion of proposed paragraph 2, which would require each person desiring access to the protected materials to provide the Commission and the Postal Service with at least one day's advance notice prior to signing the certification required to review the protected materials. Answer at 1-2. On the same day the Answer was filed, the Postal Service responded, stating that it did not object to deleting paragraph 2 from the proposed protective provisions.³

The Postal Service's motion for waiver and for protective conditions is granted, as modified as suggested by the OCA. The Postal Service notes that, as so modified, the protective conditions will mirror those used by the Commission in Docket No. R2001-1 to protect similar materials. *Id.* at 2. Although neither the Commission nor the participants has seen the information contained in library reference USPS-LR-K-85, the information described by the Postal Service appears to warrant imposition of protective conditions.⁴

² Office of the Consumer Advocate Answer in Partial Opposition to United States Postal Service Motion for Waiver and Protective Conditions for Library Reference Regarding FedEx Transportation Agreement, May 3, 2005 (Answer). The OCA's Answer was filed one day out-of-time. Accordingly, the OCA submitted a motion to file its Answer late. Office of the Consumer Advocate Motion to File Late Answer in Partial Opposition to United States Postal Service Motion for Waiver and Protective Conditions for Library Reference Regarding FedEx Transportation Agreement, May 3, 2005. The OCA's motion is granted.

³ United States Postal Service Response to Office of the Consumer Advocate Answer in Partial Opposition to United States Postal Service Motion for Waiver and Protective Conditions for Library Reference Regarding FedEx Transportation Agreement, May 3, 2005. The Postal Service's prompt response is appreciated as it obviates the need to address the OCA's objection to including proposed paragraph 2 in the protective conditions, thus hastening the issuance of this ruling.

⁴ In its response to the OCA's Answer, the Postal Service states that the library reference does not contain the FedEx transportation agreement. It notes that in Docket No. R2001-1 a redacted version of the FedEx agreement was filed as USPS-LR-J-97 and that, coincident with its response, it was filing similarly redacted versions of two addenda to that agreement discussed by witness Nash in USPS-T-17. *Id.* at 2.

RULING

1. The Postal Service's motion for waiver and for protective conditions concerning library reference USPS-LR-K-85 is granted as set forth above.
2. The attached protective conditions govern access to materials provided in response to this Ruling.
3. The Office of the Consumer Advocate's motion to submit its late answer in partial opposition to the Postal Service's request for waiver and for protective conditions is granted.

George Omas
Presiding Officer

STATEMENT OF COMPLIANCE WITH PROTECTIVE CONDITIONS

The following protective conditions limit access to materials provided in Docket No. R2005-1 by the Postal Service in response to Presiding Officer's Ruling No. R2005-1/3 (hereinafter, "these materials"). Individuals seeking to obtain access to these materials must agree to comply with these conditions, complete the attached certifications, provide the completed certifications to the Commission, and serve them upon counsel for the party submitting the confidential material.

1. Only a person who is either:

(a) an employee of the Postal Rate Commission (including the Office of the Consumer Advocate) with a need-to-know; or

(b) a participant in Postal Rate Commission Docket No. R2005-1, or a person employed by such participant, or acting as agent, consultant, contractor, affiliated person, or other representative of such participant for purposes related to the litigation of Docket No. R2005-1, shall be granted access to these materials. However, no person involved in competitive decision-making for any entity that might gain competitive advantage from use of this information shall be granted access to these materials. "Involved in competitive decision-making" includes consulting on marketing or advertising strategies, pricing, product research and development, product design, or the competitive structuring and composition of bids, offers or proposals. It does not include rendering legal advice or performing other services that are not directly in furtherance of activities in competition with a person or entity having a proprietary interest in the protected material.

2. No person granted access to these materials is permitted to disseminate them in whole or in part to any person not authorized to obtain access under these conditions.

3. The final date of any participant's access shall be the earlier of:

(a) the date on which the Postal Rate Commission issues its recommended decision or otherwise closes Docket No. R2005-1;

(b) the date on which that participant formally withdraws from Docket No. R2005-1; or

- (c) the last date on which the person who obtains access is under contract or retained or otherwise affiliated with the Docket No. R2005-1 participant on whose behalf that person obtains access, whichever comes first. The participant immediately shall notify the Postal Rate Commission and counsel for the party who provided the protected material of the termination of any such business and consulting arrangement or retainer or affiliation that occurs before the closing of the evidentiary record.
- 4. Immediately after the Commission issues its last recommended decision in Docket No. R2005-1, a participant (and any person working on behalf of that participant) who has obtained a copy of these materials shall certify to the Commission:
 - (a) that the copy was maintained in accordance with these conditions (or others established by the Commission); and
 - (b) that the copy (and any duplicates) either have been destroyed or returned to the Commission.
- 5. The duties of any persons obtaining access to these materials shall apply to material disclosed or duplicated in writing, orally, electronically, or otherwise, by any means, format, or medium. These duties shall apply to the disclosure of excerpts from or parts of the document, as well as to the entire document.
- 6. All persons who obtain access to these materials are required to protect the document by using the same degree of care, but no less than a reasonable degree of care, to prevent the unauthorized disclosure of the document as those persons, in the ordinary course of business, would be expected to use to protect their own proprietary material or trade secrets and other internal, confidential, commercially-sensitive, and privileged information.
- 7. These conditions shall apply to any revised, amended, or supplemental versions of materials provided in Docket No. R2005-1.
- 8. The duty of nondisclosure of anyone obtaining access to these materials is continuing, terminable only by specific order of the Commission, or as specified in paragraphs 10 through 15, below.

9. Any Docket No. R2005-1 participant or other person seeking access to these materials by requesting access, consents to these or such other conditions as the Commission may approve.
10. The Postal Service shall clearly mark the following legend on each page, or portion thereof, that the Service seeks to protect under this agreement: “Confidential—Subject To Protective Conditions In Docket No. R2005-1 Before The Postal Rate Commission” or other markings that are reasonably calculated to alert custodians of the material to its confidential or proprietary nature. Except with the prior written consent of the Postal Service, or as hereinafter provided, no protected information may be disclosed to any person.
11. Any written materials — including but not limited to discovery requests and responses, requests for admission and responses, deposition transcripts and exhibits, pleadings, motions, affidavits, written testimony and briefs — that quote, summarize, or contain materials protected under these protective conditions are also covered by the same protective conditions and certification requirements, and shall be filed with the Commission only under seal. Documents submitted to the Commission as confidential shall remain sealed while in the Secretary’s office or such other place as the Commission may designate so long as they retain their status as stamped confidential documents.
12. Any oral testimony, argument or other statements that quote, summarize or otherwise disclose materials protected under these protective conditions shall be received only in hearing sessions limited to Postal Service representatives and other persons who have complied with the terms of the protective order and have signed the attached certifications. The transcript pages containing such protected testimony shall be filed under seal and treated as protected materials under paragraph 11.
13. Notwithstanding the foregoing, protected material covered by paragraphs 11 or 12 may be disclosed to the following persons without their execution of a compliance certificate. Such disclosure shall not exceed the extent necessary to assist in prosecuting this proceeding or any appeals or reconsideration thereof.
 - (a) Members of the Commission.

- (b) Court reporters, stenographers, or persons operating audio or video recording equipment for such court reporters or stenographers at hearings or depositions.
 - (c) Any other person designated by the Commission in the interest of justice, upon such terms as the Commission may deem proper.
 - (d) Reviewing courts and their staffs. Any person seeking to disclose protected information to a reviewing court shall make a good faith effort to obtain protective conditions at least as effective as those set forth in this document. Moreover, the protective conditions set forth herein shall remain in effect throughout any subsequent review unless overridden by the action of a reviewing court.
14. A participant may apply to the Commission for a ruling that documents, categories of documents, or deposition transcripts, stamped or designated as confidential, are not entitled to such status and protection. The Postal Service or other person that designated the document or testimony as confidential shall be given notice of the application and an opportunity to respond. To revoke confidential status, the proponent of declassification must show by a preponderance of the evidence that public disclosure of the materials is consistent with the standards of the Freedom of Information Act, 5 U.S.C. 552(b)(1)-(9), and Commission precedent.
15. Subpoena by Courts or Other Agencies. If a court or other administrative agency subpoenas or orders production of confidential information which a participant has obtained under the terms of this protective order, the target of the subpoena or order shall promptly (within two business days) notify the Postal Service (or other person who designated the document as confidential) of the pendency of the subpoena or order to allow the designating party time to object to that production or seek a protective order.

CERTIFICATION

The undersigned represents that:

Access to materials provided in Docket No. R2005-1 by the Postal Service in response to Presiding Officer's Ruling No. R2005-1/3 (hereinafter, "these materials" or "the information") has been authorized by the Commission.

The cover or label of the copy obtained is marked with my name.

I agree to use the information only for purposes of analyzing matters at issue in Docket No. R2005-1.

I certify that I have read and understand the above protective conditions and am eligible to receive access to materials under paragraph 1 of the protective conditions. I further agree to comply with all protective conditions and will maintain in strict confidence these materials in accordance with all of the protective conditions set out above.

Name _____
Firm _____
Title _____
Representing _____
Signature _____
Date _____

CERTIFICATION UPON RETURN OF
PROTECTED MATERIALS

Pursuant to the Certification which I previously filed with the Commission regarding information provided in Docket No. R2005-1 by the Postal Service in response to Presiding Officer's Ruling No. R2005-1/3 (hereinafter, "these materials" or "the information"), received on behalf of myself and/or the party which I represent (as indicated below), I now affirm as follows:

1. I have remained eligible to receive access to materials under paragraph 1 of the protective conditions throughout the period those materials have been in my possession. Further, I have complied with all conditions, and have maintained these materials in strict confidence in accordance with all of the protective conditions set out above.
2. I have used the information only for purposes of analyzing matters at issue in Docket No. R2005-1.
3. I have returned the information to the Postal Rate Commission.
4. I have either surrendered to the Postal Rate Commission or destroyed all copies of the information that I obtained or that have been made from that information.

Name _____

Firm _____

Title _____

Representing _____

Signature _____

Date _____