

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

Rate and Service Changes to
Implement Baseline Negotiated
Service Agreement with Bookspan

Docket No. MC2005-3

PRESIDING OFFICER'S RULING GRANTING
MOTION OF BOOKSPAN FOR RECONSIDERATION
OF PORTIONS OF P.O. RULING MC2005-3/5 AND
GRANTING MOTIONS FOR LATE ACCEPTANCE

(Issued September 26, 2005)

On September 16, 2005, co-proponent Bookspan filed a motion¹ requesting reconsideration of P.O. Ruling MC2005-3/5 and renews its request for a protective order, as provided for in § 31a of the rules of practice (39 C.F.R. § 3001.31a.) applying to information responsive to Office of the Consumer Advocate interrogatory OCA/Bookspan-T2-8(b). This query asks for information related to the monthly Standard Mail volumes for the years referenced in P. O. Information Request No. 1, Question 4(c).²

In P.O. Ruling MC2005-3/5, Bookspan's request for protective conditions with respect to certain interrogatories, including OCA/Bookspan-T2-8(b) was denied "without prejudice to Bookspan's renewal of its request with additional supporting detail on how the information sought is highly confidential."³ Specifically, P.O. Ruling MC2005-3/5 denied Bookspan's request for protective conditions with respect to OCA/Bookspan-T2-8(b) because Bookspan publicly answered P.O. Information Request No. 1, Question 4(c) and did not articulate a basis for distinguishing the two interrogatories on the basis

¹ Motion of Bookspan for Reconsideration of Portions of POR-5 (OCA/Bookspan-T2-8(b)), September 16, 2005 (Motion for Reconsideration).

² The years referenced in this information request are years 2001, 2002, and 2003.

³ P.O. Ruling MC2005-3/5 at 11.

of their commercial sensitivity. In its Motion for Reconsideration, Bookspan set forth additional detail in support of its claim that OCA/Bookspan-T2-8(b) meets the test for protective conditions.

Bookspan now asserts that OCA/Bookspan-T2-8(b) is different from P.O. Information Request No. 1, Question 4(c) because it seeks Standard Mail volumes on a monthly basis, as opposed to an annual basis, which could allow competitors to determine the timing of Bookspan's mailings. It contends that this could harm Bookspan's business since competitors armed with this information would be able to time their mailings to arrive before Bookspan's mailings reducing Bookspan's response rate.

Bookspan's motion for application of protective conditions to its response to OCA/USPS-T2-8(b) shall be granted. As noted in P.O. Ruling MC2005-3/5, "the most commercially sensitive information would likely be related to marketing campaigns and corresponding response rates."⁴ Because Bookspan has shown a link between making this interrogatory response public and harm to Bookspan's solicitation response rates, it has met the burden of proof for the imposition of protective conditions.

Accordingly, the response to OCA's question may be filed under the attached protective conditions, which are identical in all material respects to those employed earlier in this proceeding and recently in proceedings such as Docket Nos. MC2002-2, R2001-1 and C2001-3.⁵

⁴ *Id.* at 7.

⁵ *Id.*; P.O. Ruling MC2005-3/2, August 16, 2005; P.O. Ruling R2001-1/24, December 19, 2001; P.O. Ruling C2001-3/32, September 26, 2002.

On another matter, several Bookspan Motions for Late Acceptance were recently filed.⁶ These pleadings were filed late due to administrative delay and error. Since there does not appear to be any prejudice to the participants from granting these requests and no objections to these motions were filed, the Motions for Late Acceptance will be granted.

RULING

1. The Motion of Bookspan for Reconsideration of Portions of POR-5 (OCA/Bookspan-T2-8(b), filed September 16, 2005, is granted.
2. The response to interrogatory OCA/Bookspan-T2-8(b) may be filed under the attached set of protective conditions, which shall govern access to the information therein.
3. The Motion of Bookspan for Acceptance of Late-Filed Response to Interrogatory of the Office of the Consumer Advocate OCA/Bookspan-T2-8(a), filed September 12, 2005, is granted.
4. The Motion of Bookspan for Acceptance of Late-Filed Response to Interrogatories of the Office of the Consumer Advocate (OCA/Bookspan-T2-11(a) and (c) and OCA/Bookspan-T2-12), filed September 21, 2005, is granted.

⁶ Motion of Bookspan for Acceptance of Late-Filed Response to Interrogatory of the Office of the Consumer Advocate OCA/Bookspan-T2-8(a), September 12, 2005; Motion of Bookspan for Acceptance of Late-Filed Response to Interrogatories of the Office of the Consumer Advocate (OCA/Bookspan-T2-11(a) and (c) and OCA/Bookspan-T2-12), September 21, 2005; Motion of Bookspan for Acceptance of Late-Filed Response to Interrogatories of the Office of the Consumer Advocate (OCA/Bookspan-T1-5-6), September 21, 2005; Motion of Bookspan for Late Acceptance of Response to Redirected Interrogatory of the Office of the Consumer Advocate (OCA/USPS-T2-20), September 22, 2005; Motion of Bookspan for Late Acceptance of Response to Interrogatory of the Office of the Consumer Advocate (OCA/Bookspan-T2-13), September 22, 2005 (collectively, Motions for Late Acceptance).

5. The Motion of Bookspan for Acceptance of Late-Filed Response to Interrogatories of the Office of the Consumer Advocate (OCA/Bookspan-T1-5-6), filed September 21, 2005, is granted.

6. The Motion of Bookspan for Late Acceptance of Response to Redirected Interrogatory of the Office of the Consumer Advocate (OCA/USPS-T2-20), filed September 22, 2005, is granted.

7. The Motion of Bookspan for Late Acceptance of Response to Interrogatory of the Office of the Consumer Advocate (OCA/Bookspan-T2-13), filed September 22, 2005, is granted.

George Omas
Presiding Officer

STATEMENT OF COMPLIANCE WITH PROTECTIVE CONDITIONS

The following protective conditions limit access to materials provided in Docket No. MC2005-3 by Bookspan in response to Presiding Officer's Ruling No. MC2005-3/7 (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. MC2005-3, 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. MC2005-3, 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. MC2005-3;

- (b) the date on which that participant formally withdraws from Docket No. MC2005-3; or
 - (c) the last date on which the person who obtains access is under contract or retained or otherwise affiliated with the Docket No. MC2005-3 participant on whose behalf that person obtains access. 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 or 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. MC2005-3, 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. MC2005-3.

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. MC2005-3 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. Bookspan shall clearly mark the following legend on each page, or portion thereof, that it seeks to protect under this agreement: "Confidential-Subject To Protective Conditions In Docket No. MC2005-3 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 Bookspan, 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 Bookspan 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. Bookspan 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 Bookspan (or any other participant 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.
16. Each person desiring to obtain access to these materials must file a notice with the Postal Rate Commission listing name, title and position at least one day in advance of the day that the person signs a certification at the Commission's docket section in order to receive a copy of the materials. A copy of the notice must also be served in advance on Bookspan.

CERTIFICATION

The undersigned represents that:

Access to materials provided in Docket No. MC2005-3 by Bookspan in response to Presiding Officer's Ruling No. MC2005-3/7 (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. MC2005-3. 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. MC2005-3 by Bookspan in response to Presiding Officer's Ruling No. MC2005-3/7 (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 these 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. MC2005-3.
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 _____