

**BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001**

**Complaint of Time
Warner Inc. et al.
Concerning Periodicals Rates**

) **Docket No. C2004-1**

**REQUEST FOR RECONSIDERATION OF PRESIDING OFFICER'S RULING
ON HEARING SCHEDULE
BY AMERICAN BUSINESS MEDIA
(June 14, 2004)**

American Business Media hereby requests reconsideration of Ruling No. C2004-1/2, prescribing an initial hearing schedule in this docket. The McGraw-Hill Companies and the National Newspaper Association have authorized the undersigned to state that they support this request.

The Order sets June 24th and 25th for the filing of designated written cross-examination of the four witnesses scheduled to appear on June 29th and 30th, with the proviso that discovery responses filed after June 24th and 25th may be designated "up to seven days following their filing with the Commission."

Since the cutoff for the submission of written discovery requests was previously set as June 14th, and since responses to any requests submitted on that day will be due on June 28th, there is a high probability that responses will in fact be filed after the dates set for designations. By permitting the designation of evidentiary material as late as July 5th, seven days after June 28th, the Order would permit the introduction of written cross-examination after all of the sponsoring witnesses have been excused.

Such a procedure would be unfair to intervenors such as American Business Media, who might be faced with the introduction into evidence of material prepared by witnesses to support the complaint that is not in the record at the time the witnesses appear for cross-examination. A review of the responses to date indicates that the witnesses, like witnesses in previous cases, often submit responses that go well beyond the question in order to provide further support for their positions. Those responses are likely to be designated by sympathetic parties. As a result, a failure to permit cross-examination after that material is designated would seriously compromise due process rights. See, e.g., *United States v. Caudle*, 606 F. 2d 451, 458 (4th Cir. 1979) and *United States v. Riggi*, 951 F. 2d 1368, 1375-76 (3d Cir. 1991).

Moreover, the procedural schedule as established in the Order would appear to require that interrogatory responses, which might be voluminous and require analysis,¹ received from Witness Stralberg (and Witness Gordon) late on June 23rd or even June 24th be designated on June 24th, which would present obvious logistical nightmares. In addition, apart from the designation problem, it will be nearly impossible to cross-examine witness Stralberg on June 29th with respect to interrogatory responses and documents produced the day before.

These procedural problems will result from the commencement of cross-examination the day after the final discovery responses must be filed, assuming that the complainants are able to respond to all requests in a timely manner. These procedural and due process problems would be resolved by a change in the hearing schedule that would permit all parties a reasonable opportunity to both review all discovery responses and tender their designations sufficiently in advance of the witnesses' appearance for oral cross-examination.

American Business Media recognizes that the change suggested could cause a delay measured in weeks rather than days, given the complainants' notice of witness availability and, we would imagine, already planned vacations by Commissioners and their staff. But that delay is likely to be inevitable, even if the first phase of the hearing is held as scheduled.

The Order directs the participants to be prepared to discuss how much time should be allowed for the preparation of evidence in opposition to the complaint. As a preview of that discussion, American Business Media states here its concern, already real rather than theoretical, that its witnesses will face the far more serious issues than those faced by the complainants' witnesses in selecting available days in July, and those four witnesses each had to identify only single free days. Unless the schedule for submitting intervenor and respondent testimony is set for after Labor Day, it will be difficult if not impossible for American Business Media and others to find qualified witnesses who during the traditional vacation months of July and August can free the several weeks, or more, that are required to prepare testimony and respond to what could be voluminous requests for information and data within the fourteen days permitted.² It should be noted in this connection that the complainants appear to have devoted at least a year to the development of their complaint and testimony. See the response of Robert Mitchell to ABM/TW et al. – T1- 26.

There is a great deal at stake in this case for both sides. The multi-million dollar rate reductions hoped for by the complainants, if they are successful,

¹ Although American Business Media submitted nearly all of its discovery requests more than two weeks ago, by our count there were 137 separately numbered requests containing 248 discrete questions filed on June 14th. Many of these requests call for answers that will be complex.

² We expect that in some cases these witnesses may need assistance from others in their company to provide data responses, and the problem of summer unavailability would then be compounded.

would be matched with equivalent increases for many smaller publishers. A requirement that these publishers produce witnesses during the summer months, when there is no statutory time limit on the case and when its results will not be felt, if at all, the until decision in the next general rate case is implemented, would be unfair.

For these reasons, American Business Media respectfully requests that the Presiding Officer reconsider the hearing schedule. Doing so will permit the parties and the Commission to develop a factual record in a fair and orderly fashion. The current schedule, we predict, will not.

Respectfully submitted,

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