

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

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

) **Docket No. C2004-1**

**OBJECTION OF AMERICAN BUSINESS MEDIA
TO REQUESTS FOR PRODUCTION
Time Warner et al./ABM-T2-3
Time Warner et al./ABM-T2-9
(September 23, 2004)**

Pursuant to rule 27(c), American Business Media hereby objects to the following requests for production:¹

Time Warner et al./ABM-T2-3

This request for production (not, as captioned by the complainants, an interrogatory) seeks a representative mail.dat file for each publication produced by VNU, the publisher by which witness Bradfield is employed.

American Business Media does not believe that an objection is necessary, since the mail.dat files of VNU's publications are not within the custody or control of American Business Media, and therefore (as specified in the

¹ American Business Media notes that the complainants' caption on the discovery requests to witness Bradfield describes the contents only as "interrogatories," although some are clearly requests for production. By contrast, the contemporaneous fourth set of requests directed to American Business Media itself are correctly described as both interrogatories and requests for production. American Business Media does not know whether the incomplete description of the discovery directed against this and American Business Media's other witnesses is inadvertent, or whether it represents a subtle attempt to avoid rule 27(a), which limits requests for production of documents to those in the "custody or control of the participant," and here American Business Media is the participant. Rule 5(a) limits the term "participant" to parties. American Business Media's witnesses and the companies for which they work are not parties or participants.

footnote above), those files do not fall within the ambit of rule 27. VNU is not a party to this case, and the fact that it has agreed to permit its employee to testify for American Business Media does not make it a party. American Business Media's truthful answer, to be provided separately, that it has neither custody nor control over VNU's files, should be a sufficient response to this request for production.²

In an excess of caution, however, American Business Media objects to the request on the ground that the mail.dat files sought contain commercially sensitive, proprietary and confidential information for which the complainants have established no need and that is, if relevant at all, only marginally relevant to the issues in this proceeding.

The Commission has long recognized that participation of the public in its proceedings would be seriously impeded if such participation required that the books, contracts and other commercially sensitive information of participating companies thus became fair game for discovery. For example, in Presiding Officer's Ruling No. R2000-1/102 (July 31, 2000), he stated:

The Commission's policy regarding the discovery of intervenors' commercially sensitive information has been reiterated in a series of rulings—absent exceptional circumstances, such data need not be produced.

² We note that the Magazine Publishers of America, the association to which Time Warner and other complainants belong, has used this same defense when other parties sought discovery against its members, even a member that offered a witness. In Objections filed on February 2, 1998 in Docket No. R97-1, MPA argued that the information sought from it and its member, Meredith, "is not within the custody or control of MPA" and that, even if the members had the data, "MPA has no legal right to obtain that information from its members." It appears that the matter was not further pursued.

The Ruling added that “[t]he balance between disclosure and commercial sensitivity rests initially on whether the data are essential for the Commission’s deliberations, including importantly, evaluating the direct case of the party resisting disclosure.”

This ruling and those that it cites protect a *party* from an obligation to disclose commercially sensitive information. Here, the complainants seek commercially sensitive information from a *non-party*, which, even if a permissible request, must be subject to an even higher standard. Moreover, as discussed below, the fact that witness Bradfield is the witness that presented in Exhibit LB-1 the results produced by those American Business Media members that studied the impact of the proposed rates on their publications does not entitle the complainants to access to VNU’s confidential data, especially because there are other mail.dat files (and other data) that have been made or are available that can be used by the complainants for any legitimate purpose for which the VNU mail.dat files would be used.

There should be no disputing the fact that mail.dat files contain commercially sensitive, confidential and proprietary information. In fact, they contain all of the information that is contained on a form 3541 Periodicals mailing statement, and more, and the Postal Service routinely rejects Freedom of Information Act requests for mailing statements, citing the commercial sensitivity and confidentiality of their contents.

American Business Media anticipates that the complainants will contend that, since American Business Media has raised an issue in this case about the

impact of the proposed rates on Periodicals, it is entitled to probe into the details of the Periodicals published by VNU. If they do so, they would be wrong.

We begin with the fact American Business Media has made no claim about the impact of the proposal upon VNU specifically. To be sure, American Business Media has presented an witness Bradfield's exhibit LB-1 data showing the impact of the rates proposed by the complainants upon 156 publications,³ and in doing so witness Bradfield agreed with the complainants (see Bradfield at 6) that the impacts portrayed could in some cases be ameliorated or even reversed if the publishers (and printers) changed the way that the mail is prepared.

But the impact issue in this case is not the impact of rates (that are not even directly at issue) on those 156 publications, or even all American Business Media-member publications, but on the twenty thousand or more publications entered into the mail. The complainants cannot make even a colorable case that there are "exceptional circumstances" warranting an order directing disclosure *by a non-party* of commercially sensitive information related to the publications produced by VNU.

Nor is such disclosure essential for the Commission to be able to evaluate the direct case presented by American Business Media or for the complainants to be able to prepare rebuttal testimony. As stated above, American Business Media has contended that that the rates proposed would have a wide range of impacts and has recognized that changes in mail preparation will affect that

³ While there are 144 lines, the exhibit fails to note that lines 77 and 78 combine co-palletized publications—5 in line 77 and 9 in line 78.

impact. Complainants would no doubt like to show with greater detail how such changes would affect the impact. They certainly had but did not take advantage of the opportunity to do so in their direct testimony, where such a demonstration belonged, either through use of data on their own publications or by constructing realistic but hypothetical publications.

More importantly, they now have every opportunity to do so in their rebuttal testimony, and to do so without the need to obtain and review a “representative” mail.dat file from VNU or any other American Business Media member. First, the complainants can use their own data, which include publications in a wide range of sizes, or hypothetical publications. Note that the complainants in fact produce a number of publications that are similar in size to American Business Media-member publications, and they routinely make supplemental mailings of their larger publications that mirror the mailing characteristics of much smaller publications. See Tr. 73-75, which show 25 individual mailings of less than 70,000 pieces.

Second, they can use the 155 mail.dat files already provided to them by American Business Media to calculate “before and after” rate impacts with as many combinations and permutations as they desire. Although those mail.dat files are a few years old, and thus may not be representative in all cases of the current mailing characteristics of those 155 specific publications, the data are certainly representative of small and medium size publications in general. Third, the complainants can pursue additional data related to the publications used in the testimony of Postal Service witness Tang.

Again, the issue in this case is not the impact of the proposal on VNU or on the 156 publications in Exhibit LB-1. If the complainants seek to show that in some, many, most or all cases, the adverse impact of the rates they propose on smaller circulation publications can be ameliorated by shifting from sacks to pallets or by building bigger bundles or sacks, they can use other data available to them.⁴ For its part, American Business Media will not contend that the general results of such an inquiry by complainants are not relevant or material based on the age of the files, which are sufficiently dated to offer mailer protection but not so dated as to be unrepresentative of certain types of Periodicals.

For these reasons, even if the request for production directed against a non-party is proper, a proposition with which American Business Media does not agree, the mail.dat files sought need not be provided. An order directing the disclosure of this non-essential, confidential information by a non-party merely because an employee of that non-party offered his testimony would send a chilling notice that parties to these proceedings that cannot afford or locate independent “consultants” but must rely on employees or employees of members do so at great peril.

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In this request for production of data, the complainants seek much of the same information for every VNU periodical that would be found on the mail.dat

⁴ One reason that certain American Business Media members were willing to provide the 155 mail.dat files is that such files would provide the complainants with data they could use for this purpose, but without the need to provide more recent files or files attributed to any particular member.

files above (and on a form 3541 mailing statement). Again, the complainants have asked for information that is not in the custody or control of American Business Media, which is a participant in this proceeding, but within the custody and control of VNU, which is not. Therefore, a response that this information is not available to American Business Media ought to be sufficient.

But if it is not, then American Business Media objects on the same grounds and for the same reasons that it objects to the provision of VNU's mail.dat files. Much of the information is confidential, not directly related to the testimony of this or any other witness and—most importantly—is less complete and less useful to complainants than the information in the 155 mail.dat files already provided.

Moreover, the production of this information would be burdensome. VNU has estimated that, for its 46 publications, it would take approximately 40 man hours to produce the information from available records, a task that would add nothing useful to the record in this case. Unlike the complainants, VNU has a small, four-person department dealing with distribution, and the task of locating reviewing and extracting data from more than 150 form 3541s (the VNU titles average at least three to four 3541's per title) would likely fall on witness Bradfield, who is now in the middle of his company's budget process. He has estimated that, if required to do so, he could probably produce the requested information by the second or third week of October.

Finally, as with the mail.dat files, an order directing a non-party to produce this information would send a message that only associations that can find and

afford witnesses who are unaffiliated with the association's members can participate in the Commission's proceedings without running the risk of being directed to offer confidential information and information of marginal (at best) relevance that is burdensome to produce.⁵

Respectfully submitted,

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⁵ American Business Media understands that complainants were asked to produce some of the information requested in this interrogatory, and did so. But as parties—and as the parties with the burden of proof—they stand in a very different posture than does VNU, a non-party.