

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

COMPLAINT OF TIME WARNER INC. ET AL.
CONCERNING PERIODICALS RATES

Docket No. C2004-1

MOTION OF TIME WARNER INC. ET AL.
TO COMPEL PRODUCTION RESPONSIVE TO
TW ET AL./ABM-5(C) AND TW ET AL./ABM-68(K)
AND FOR DECLARATORY ORDER
(October 5, 2004)

Pursuant to section 27(d) of the rules of practice, Time Warner Inc., Condé Nast Publications, a Division of Advance Magazine Publishers Inc., Newsweek, Inc., The Reader's Digest Association, Inc., and TV Guide Magazine Group, Inc. (collectively, Time Warner Inc. et al.) hereby respectfully move to compel production of documents requested by TW et al./ABM-5(c) (filed July 27, 2004) and TW et al./ABM-68(k) (filed September 14, 2004).

Requests for production subject to this motion

This motion pertains to the portions of the following interrogatories and requests for production of documents that are in boldface type:

TW et al./ABM-5

- a. Did ABM at any time after the filing of Time Warner et al.'s original complaint in January 2004, attempt to estimate the impact of the proposed rates on specific ABM-member publications?
- b. If yes, please identify the publications for which such an analysis was attempted and describe the method used to perform the analysis and the results obtained.
- c. **Please also answer the following for each such publication.**
 - (1) **Was one or more mail.dat files used in the analysis? If yes, please provide an electronic copy of each mail.dat file used.**
 - (2) **Was an Access file generated in the process of analyzing the mail.dat information? If yes, please provide an electronic copy of the Access files used.**
 - (3) **Was an Excel spreadsheet generated in the process of analyzing the mail.dat information? If yes, please provide an electronic copy of the Excel files used.**

TW et al./ABM-68 In its response to TW et al./ABM-5c (filed August 31, 2004), ABM refers to a recent analysis of the potential impact on 141 ABM publications, belonging to five ABM member organizations, of the rates proposed by Time Warner Inc. et al. Additionally, ABM provided to Time Warner Inc. et al. (pursuant to a Nondisclosure Agreement, dated August 27, 2004) an Excel spreadsheet, consisting of four distinct worksheets that together appear to summarize an analysis performed on 144 different publications. No names identifying the publications or their owners appear in the spreadsheet.

- k. **Please provide without further delays copies of the 144 mail.dat files as well as the 144 Excel spreadsheets generated in their analysis. (The identities of particular publishers and publications may be masked; Time Warner Inc. et al. stipulate that these materials are subject to the terms of the existing Nondisclosure Agreement between ABM and Time Warner Inc. et al, dated August 27, 2004.)**

Background

ABM witness Bradfield's Exhibit LB-1 purports to represent "a calculation of the impact of the Time Warner [*sic*, for "Time Warner Inc. et al."] proposed rates" on a "sample of the 1,500 or so Periodicals that are members of American Business Media." ABM-T-2, p. 5, ll. 7-8, 20-21. The sample is comprised of 153 publications published by five ABM member companies. "[A]t the request of [ABM's] counsel for purposes of this litigation" (Response to TW et al./ABM-5(c)), the five companies undertook to analyze the impact of the proposed rates on their publications.

The "method used by the five member companies . . . was for each to perform calculations employing both mail.dat files and an Access file developed and made available by the complainants to determine the postage that would be paid under the rates proposed for an actual, recent issue and comparing the result to the postage paid at today's rates." Response to TW et al./ABM-5b (filed August 31, 2004).¹ This means that an Access file was developed from a mail.dat file for each publication, and that an Excel file containing considerable information was developed from the corresponding Access file.

Since Exhibit LB-1 contains only summaries of alleged results, transposed or transcribed from the Excel files containing the actual results, it is not possible to verify the accuracy or faithfulness even of the exhibit's *transcription* of results without access to those files. More importantly, without access to both the mail.dat files and the Excel files, it is impossible to validate, replicate, or even spot-check the appropriateness of the procedures followed, or the accuracy of the computations performed.

¹ Only four ABM members actually participated in the analysis, because witness McGarvy performed the necessary calculations both for her employer Crain Communications and for ComputerWorld publications. Response to TW et al./ABM-68.j (filed September 29 [but dated September 28], 2004).

Beginning early in this proceeding, well before the filing of ABM's testimony, Time Warner Inc. et al. sought production of the mail.dat files analyzed (the input) and the Excel files generated (the output) for the 153 publications represented in the study that would become the basis for Exhibit LB-1. Those files constitute the essential foundation for Exhibit LB-1 and the testimony that relies on it. As ABM's responses dribbled in, it gradually became clear that ABM does not have and never did have any intention of producing those files or being in a position to produce them.

Time Warner Inc. et al. initially requested the "mail.dat files used in the analysis" and "Excel spreadsheet generated" from any "attempt to estimate the impact of the proposed rates on specific ABM-member publications" on July 27, 2004. TW et al./ABM-5. ABM's response, when it was eventually filed on August 31, 2004, was in two parts.

The first part- of ABM's response was remarkably audacious in view of the fact that Exhibit LB-1 and witnesses McGarvy's and Bradfield's testimony relying on it would be filed only nine days later--was as follows: "American Business Media objects to this question on the grounds that the studies performed were conducted at the request of counsel for purposes of litigation and therefore represent attorney work product that is not subject to discovery." That objection might apply if ABM, having conducted these studies and considered their results, had decided to bury them; but where *the studies themselves are to be put into evidence*, and the data on which they are based are unavailable from any other source, it is patently frivolous.

The second part of ABM's response appears to be less brazen: Notwithstanding this objection, American Business Media, in accordance with an understanding and nondisclosure agreement reached with complainants, is willing to state that American Business Media does have and is willing to provide to complainants electronic versions of spreadsheets (covering all 141 publications) in

the custody or control of American Business Media (modified when necessary only to delete the names of individual publications) that show certain billing determinants along with postage at present and proposed rates.

Appearance proved deceptive, however. What complainants had requested--and what both counsel for Time Warner Inc. et al. and their consultant (having participated in the discussions that produced the referenced agreement) were under the impression ABM had indicated it would provide--were the 144 Excel spreadsheets "for each such publication" studied. What was received instead was one Excel file with four worksheets, each worksheet being a summary of the analysis done by one of the four ABM members and containing one line per publication. Response to TW et al./ABM-T2-8(d.)

Subsequently, Time Warner Inc. et al. filed interrogatory TW et al./ABM-68 (September 14, 2004), which included the following subparts:

- c. Please confirm that, while TW et al./ABM-5C requested the Excel files generated in the analysis of each publication, none of the spreadsheets generated for each publication as part of the analysis using Access queries to analyze mail.dat files were provided. Please confirm also that removing publication names from those spreadsheets would have been a trivial matter.
- k. Please provide without further delays copies of the 144 mail.dat files as well as the 144 Excel spreadsheets generated in their analysis. (The identities of particular publishers and publications may be masked; Time Warner, Inc. et al. stipulated that these materials are subject to the terms of the existing Nondisclosure Agreement between ABM and Time Warner Inc. et al, dated August 27, 2004).

On September 29, 2004, ABM responded to those two requests as follows:

- c. Confirmed that complainants requested the Excel files generated in the analysis and that they were not provided. In accordance with the understanding between counsel, American Business Media provided the summary spreadsheets in its custody or control (with names of titles removed) that showed the impact of the proposed rates on American Business Media member publications. American Business Media never had custody of or control over any Excel files generated in the analysis of each publication. American

Business Media does not know for certain but assumes that each of the publishers could have removed publication names from any spreadsheets they generated.

- k. American Business Media does not, and never did, have either custody or control of the mail.dat files and Excel spreadsheets referenced. Moreover, it is our understanding, upon inquiry following the receipt of this interrogatory, that neither the mail.dat files nor the individual spreadsheets have been retained the five member companies whose publications were analyzed. The Excel spreadsheets but not the mail.dat files have been retained by one participant, and both have been retained by another. Crain Communications [witness McGarvy's employer, for whom she performed the analysis] and VNU [witness Bradfield's employer, for whom he performed the analysis] are among the three participants that preserved neither.

Thus, only on September 29 were the complainants informed that the files containing the data that were studied and the results that were generated to produce Exhibit LB-1, and which they have been seeking since July 27, no longer exist (the same responses also revealed that the witness offered by ABM to sponsor the exhibit had no involvement with its preparation of the underlying "study" other than performing the calculations for one of the five sets of publications). Obviously, that fact, rather than ABM's specious objection and elaborate obfuscation, would have been the most useful answer in the first place.

Thus, as became apparent only when ABM filed its responses to TW et al./ABM-T2-8 and TW et al./ABM-68 on September 28 and 29, no possibility now exists of producing most of the requested files. Whether through inadvertence or calculation, and in spite of the fact that "the studies performed were conducted at the request of counsel for purposes of this litigation" (Response to TW et al./ABM-5.b), four of the five participating ABM members appear to have destroyed the unique copies of the mail.dat files that were studied and three to have destroyed the

unique copies of the Excel files that were generated by the study. Responses to TW et al./ABM-68(f) and (k) (filed September 29 [but dated September 28], 2004).²

Under these circumstances, it does not require much discussion or analysis to establish that anyone wishing to understand, authenticate, validate, evaluate, or criticize ABM's alleged "study" is in an impossible position. ABM's inability to answer even the most elementary questions concerning the exhibit should suffice to make the situation apparent. In response to an interrogatory requesting confirmation that the files represented in the exhibit "were at the time of their analysis recent mail.dat files that reflected then current mail preparation," the best that ABM can muster is:

We believe this to be the case, although American Business Media did not ask those members that performed the analysis what date(s) were studied.

Response to TW et al./ABM-68(e)³.

Importance of the discovery requests subject to this motion

The issue of the likely impact of complainants' proposals is the central theme of ABM's testimony in this proceeding, and Exhibit LB-1 and McGarvy's and Bradfield's testimony relying on that exhibit constitute the heart of ABM's evidence regarding impact. Aside from that testimony, ABM's witnesses offer only generalized opinions about the impact of the proposed rates on unspecified

² With respect to the Excel files, witness Bradfield says, "I viewed the information on my computer and never actually printed (or saved) it." Response to TW et al./ABM-T2-8.h (filed September 28, 2004). Complainants will not quibble about whether Bradfield's action constitutes "destroy[ing] the unique copies" of those files. What matters is that they were not preserved and cannot now be examined.

³ A comparison of this response, filed September 29th, with ABM's response a month earlier (August 31) to TW et al./ABM-5(b) is suggestive. The earlier response describes the "method used by the five member companies . . . to determine the postage that would be paid under the rates proposed for an actual, recent issue," The ambivalence of the later answer creates, if nothing more, a suspicion that the earlier one states an assumption or a hope rather than a fact.

publications that are not members of ABM and that ABM does not represent, although it purports to do so. Both McGarvy and Bradfield describe the "results" of the "study" represented in Exhibit LB-1 and proceed to draw inferences from those "results" about the impact of the proposed rates on Periodicals more generally. For example, McGarvy opines:

[I]t would be a huge mistake to push forward with rate structure and level changes on the assumption that all publishers have the ability to adapt to that rate structure. I know from the study we and a few other American Business Media members did of the impact of the proposed rates, the results of which were provided to Time Warner in discovery and provided as an exhibit to Lou Bradfield's testimony, that rate increases of 50% and more under the proposed rates would not be rare.

ABM-T-3, p. 6., ll. 13-17.

Bradfield attributes a similar certainty to his own opinion on the matter:

there is also no doubt that of the 25,000 or so outside-county Periodicals in the mail (Tr. 1041), a good number would be staring at increases of the type portrayed at the upper end of the range on my exhibit with no reasonable opportunity to change their mailing practices.

ABM-T-2, p. 6, ll. 15-18.

Anticipating what ABM may say in reply to this motion, we take note that in its objections to requests from Time Warner Inc. et al. for production of representative mailing data of Crain Communications and VNU, ABM advances several extraordinary propositions about the issue of impact and its witnesses' testimony.⁴ According to ABM, for example, "while Ms. McGarvy's prepared testimony makes a one-sentence reference to the general impact of the complainants' rate proposal

⁴ See "Objection of American Business Media to Request for Production: Time Warner et al./ABM-T1-3" (hereafter "ABM-T-1 Objection"); "Objection of American Business Media to Requests for Production: Time Warner et al./ABM-T2-3, Time Warner et al./ABM-T2-9" (hereafter "ABM-T2-Objection"); and "Objection of American Business Media to Requests for Production: Time Warner et al./ABM-T3-2, Time Warner et al./ABM-T3-3" (hereafter "ABM T-3 Objection") (all filed September 23, 2004).

(page 6, lines 13-17), the testimony does not deal with impact [of the proposed rates] on Crain Communications or anyone else." ABM-T-3 Objection at 3. That is a gross distortion of fact. McGarvy's testimony deals with impact and little else. For example, on page one of her testimony (lines 10-13) she sets out her general theme:

If implemented, they [the proposed rates] would sacrifice many small publications in order to assure guaranteed rate reductions for Time Warner and would result in speculative, modest benefits, at best, for the Postal Service and most other Periodical mailers.

ABM-T-3, p. 1, ll. 10-13.

ABM 's objections follows the same line of argument with respect to each of its witnesses: (1) that the witness makes no claims about the impact of the proposed rates on the publications of his or her employer; (2) that, "[t]o be sure," Bradfield's exhibit "shows the impact of the rates proposed" on 153 ABM-member publications; (3) but that Bradfield's exhibit really does not put anything of significance in dispute, because "Bradfield agreed with the complainants . . . 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," and because "the impact issue in this case is not the impact of rates . . . on" the publications in Bradfield's exhibit or "even [on] all American Business Media-member publications, but on the twenty thousand or more publications entered into the mail"; and (4) that complainants therefore have no need of specific information about the publications represented in Bradfield's exhibit in order to prepare rebuttal of ABM's case, since data on pretty much any old sample of publications will suffice to show "that the rates proposed would have a wide range of impacts and . . . changes in mail preparation will affect that impact."

The Commission should not accept this stew of misdirection, gamesmanship, irrelevance, bluster, and disingenuousness in place of a good faith effort to comply with the rules of evidence and standards of fair process. It could not be more clear

that the issues in contest are not whether the proposed rates would have "a wide range of impacts" that would be "affected by changes in mail preparation" but rather the specific contours of that range, where in that range various types of publications would fall, and precisely how and to what degree various types of publications could affect that impact through changes in mail preparation. Moreover, it is entirely plain that ABM's witnesses do testify regarding "the impact of rates" (and little else), that the only specific impacts they point to or specific analysis they rely on is that represented by Bradfield's exhibit, that based on the untestable numbers contained in that exhibit they reach adverse conclusions about the impact of the proposed rates on Periodicals generally.

ABM needs to make up its mind. If it really means it when it says that the impact of the proposed rates "on those [153] publications [represented in Bradfield's exhibit], or even all American Business Media publications," is not at issue, then it has no business putting into evidence an exhibit purporting to demonstrate impact on those publications, or testimony that the 153 publications "appear . . . reasonably representative in many respects" of "the 1,500 or so Periodicals that are members" of ABM (TW-T-2 at 5, ll. 20-22 [Bradfield]), or that "I know from the study [of the 153 publications] that rate increases of 50% and more under the proposed rates would not be rare" (ABM-T-3 at 6, ll. 13, 16-17 [McGarvy]). If, on the other hand, ABM does not mean what it says, if its actual position is that the exhibit and the associated testimony do constitute "relevant and material evidence" concerning disputed issues of fact within the meaning of rule 31(a), they have no business asserting that disclosure of the data on which the testimony is based and the procedures by which the exhibit was produced are not needed "for the Commission to be able to evaluate the direct case presented by [ABM] or the complainants to be able to prepare rebuttal testimony." Objection at 7.

Lest there be any doubt that the disputed issues of fact implicated by Bradfield's exhibit and the associated testimony are not merely theoretical but quite concrete, Time Warner et al. offer the following list of assertions by witnesses Bradfield and McGarvy that they desire to rebut and on which they are attempting to prepare rebuttal testimony, an effort that will be handicapped by the unavailability of most of the files underlying Exhibit LB-1:

- that Exhibit LB-1 represents "'RATE INCREASES AT PROPOSED RATES" for any publication(s) (ABM-T-2, Ex. LB-1);
- that Exhibit LB-1 represents an "attempt [to perform] a calculation of the impact of the Time Warner [sic] proposed rates" (ABM-T-2 at 5, ll. 7-8);
- that "[t]he range of impacts [of the proposed rates on the sampled publications] is quite large, from five publications with modest reductions to ten with increases greater than 50%" (ABM-T-2 at 6, ll. 3-4);
- that "[t]he non-weighted average of the increases [in the rates of the sampled publications, resulting from the proposed rates], that is, the average of the percentage increases and decreases, is about 13%" (ABM-T-2 at 6, ll. 4-5);
- that "for [only] *some* of these publications, the increase in postage cost can be ameliorated, or in certain cases perhaps even reversed, if mailers take such steps as increasing sack size, co-mailing, or co-palletizing" (ABM-T-2 at 6, ll. 13-15 [emphasis added]);
- that there is "no doubt that of the 25,000 or so outside-county Periodicals in the mail (Tr. 1041), a good number would be staring at increases of the type portrayed at the upper end of the range on my exhibit with no reasonable opportunity to change their mailing practices" (ABM-T-2 at 6, ll. 15-18);
- that "I [witness McGarvy] know from the study we and a few other American Business Media members did of the impact of the proposed rates, the results of which were . . . provided as an exhibit to Lou Bradfield's testimony, that rate increases of 50% and more under the proposed rates would not be rare" (ABM-T-3 at 6, ll. 13-17);

- that "in [only] *some* of those cases [represented in Ex. LB-1] it would be possible, *in theory*, to reduce the increase to a significant extent" (ABM-T-3 at 6, ll. 17-18 [emphasis added]).

Complainants are confident that, given the necessary data, they can demonstrate for any representative sample of publications that the methodology underlying ABM's exhibit does not produce realistic estimations of impact, and invariably errs on the high side. The fact that ABM has steadfastly refused to produce such data for the only publications about which it makes *specific* claims regarding impact can only reinforce such confidence. -

Procedural grounds for this motion to compel

Section 31(k) of the rules of practice requires that all "studies or analyses offered in evidence . . . or relied upon as support for other evidence" be supported by a proper foundation, including, upon request, "the actual input data," "[a] hard copy of all data bases," and such information as is "reasonably necessary to enable independent replication of the program output." These items are essential to validating the procedures used and verifying the results achieved.

Similarly, the Federal Rules of Evidence require that parties be able to review the underlying data in order to verify the reliability of reports or summaries derived from large amounts of data. Fed. R. Evid. 1006 provides:

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place.

Rule 1006 is intended to enable the parties to "insure [that the] summaries accurately reflect the contents of underlying documents." *Vasey v. Martin Marietta Corp.*, 29 F.3d 1460, 1468 (10th Cir. 1994). In the same vein, Fed. R. Evid. 705, which governs the disclosure of facts or data underlying expert opinions, provides:

"The expert may in any event be required to disclose the underlying facts or data in cross-examination."

Exhibit LB-1 plainly lacks even the most minimal foundation, documentation, or similar indicia of reliability required by the Commission's rules. The consequence is to "effectively foreclose[] any possibility of evaluating the material."

Conclusion

As acknowledged earlier, it is not possible to compel any participant to produce documents that are genuinely beyond its custody or control. That fact places the complainants in something of a quandary. There is a natural temptation to say that if ABM's members threw out the data for the study whose "results" Ex. LB-1 purports to show, Ex. LB-1 should be thrown out as well. The problem with that solution is that it would leave the record barren of ABM's assertions about the impact of the proposed rates on its members--assertions that Time Warner et al. intend to rebut--while it would not have the effect of banishing those assertions from the consciousness of everyone who has heard or read them. Consequently, although grounds undoubtedly exist for a motion to strike the exhibit and the associated testimony, the granting of such a motion might do as much damage to the case of the complainants as of ABM, a result that would be manifestly unjust in the circumstances.

WHEREFORE, Time Warner et al. respectfully move as follows:

- (1) for an order compelling ABM to produce the requested mail.dat and Excel files to the extent that it is capable of doing so, and specifically instructing ABM to inquire of its relevant members (a) whether they are in possession of, are able to come into possession of, or are able to reconstruct said mail.dat and/or Excel

files, and (b) whether, if so, they are willing to produce such files, subject to appropriate measures to assure confidentiality of proprietary information, for the examination of the complainants and the Commission in this proceeding;

- (2) for a declaratory order to the effect that the Commission will, in weighing the evidence regarding impact presented in this docket, take into consideration whether failure by ABM to provide any or all of the foundational data underlying Ex. LB-1 warrants drawing an adverse inference regarding the weight that should be given to the exhibit and the associated testimony.

Respectfully submitted,

s/ _____
John M. Burzio
Timothy L. Keegan

COUNSEL FOR
TIME WARNER INC.

Burzio & McLaughlin
Canal Square, Suite 540
1054 31st Street, N. W.
Washington, D. C. 20007-4403
Telephone: (202) 965-4555
Fax: (202) 965-4432
E-mail: burziomclaughlin@covad.net