

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

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

Docket No. C2004-1

ANSWER OF AMERICAN BUSINESS MEDIA TO
MOTION OF TIME WARNER INC., ET AL. TO COMPEL
PRODUCTION AND RESPONSES TO TW ET AL./ABM-T2-3 & 9
(October 12, 2004)

On October 6th, Time Warner et al. (hereafter "Time Warner") filed a motion to compel responses to TW et al./ABM-T2-3 and 9, directed to witness Bradfield, but that motion relies entirely on a motion to compel a response to interrogatory TW et al./ABM-T1-3, directed at American Business Media witness Cavnar. The specific motion here seeks mail.dat files for each publication produced by VNU, witness Bradfield's employer (and wishes to reserve its right to pursue later data of the type contained in those files).

By choosing to rely entirely upon a separate motion, Time Warner has mixed together contentions related to three witnesses with no clear line of demarcation showing which of its assertions support which of its motions to compel. In other words, it is not clear whether, for example, the combined motion's discussion of witness McGarvy's testimony is presented in partial support of the specific motion to compel a response from witness Bradfield—the subject of the instant motion—or whether it is offered only to support the separate motion to compel a response from witness McGarvy.

Facing a choice of whether to file a single substantive response with two incorporations by reference or three separate responses, as the Commission's procedures appear to contemplate, American Business Media has selected the latter option, in part because it is inappropriate to lump together the testimony of the three witnesses for purposes of this discovery dispute. Our choice will lead to repetition that we submit is preferable to confusion.

Although American Business Media and Time Warner appear to disagree to some extent on the meaning of the precedent from Docket No. MC95-1, addressed at pages 9-10 of the combined motion, we do agree that discovery of a witness is limited by the scope of that witness's testimony. Time Warner concludes from *Presiding Officer's Ruling No. MC95-1/11* (June 1, 1995) that "requesting facts or documents underlying that witness's testimony is entirely proper" (motion at 10). In fact, in that order (at 2) the Presiding Officer gave as an example of improper discovery to a university professor giving economic testimony for the Postal Service questions concerning his employer's mailing practices. More generally, the ruling (*id.*) was that, where the Postal Service uses a witness that is employed by another entity (as is analogous to the situation here), the scope of discovery does not extend to the business practices of the witness's employer when that information is not known to the Postal Service and is outside the scope of the witness's testimony.

Time Warner (motion at 9-10) ascribes great weight to the arguments presented Docket No. MC95-1 by American Business Media's predecessor seeking to obtain information on Meredith Corporation's alternate delivery experiences from its employee who was testifying for the Postal Service in a case in which the availability of alternate

delivery was a significant issue (*Presiding Officer's Ruling No. MC95-1/11* at 8) and the witness had access to the information. Although Time Warner contends (motion at 10) that the Presiding Officer "saw merit" in those arguments, he in fact did not. Rather, all that the witness was required to produce was "a brief description of the business of Publishers Express" (*Presiding Officer's Ruling No. MC95-1/11* at 9), on whose board he served, information that was otherwise publicly and readily available. Similarly, the Presiding Officer (*id.* at 8) denied the attempt by American Business Press (as it was then known) to obtain alternate delivery information from witness Baer because "alternate delivery is not central to witness Baer's testimony."

As this discussion shows, quite apart from consideration of confidentiality or other grounds for withholding the mail.dat files, Time Warner must demonstrate not in general terms that impact is an issue in this case (despite its failure to offer any impact evidence) but that the commercially sensitive data in VNU's mail.dat files are "central" to witness Bradfield's testimony. It has not even shown that the requested mail.dat files are related to that testimony.¹

Time Warner (combined motion at 7) in fact devotes only a single paragraph and a nine-line quotation from witness Bradfield's testimony to an attempted showing that the mail.dat files are central to the witness's testimony. Far from showing that VNU's mail.dat files are substantially related to the testimony, Time Warner's discussion shows the opposite. Time Warner's first reference is to witness Bradfield's testimony that,

¹ Time Warner does not mention in this discussion the relationship of VNU's mail.dat files to exhibit LB-1, apparently relying on its separate motion to compel directed at American Business Media (filed October 5th). American Business Media addresses that issue in its response to that motion. In addition, American Business Media is providing additional information related to exhibit LB-1 in response to other requests.

according to Time Warner, “goes on for some pages describing in highly general terms the alleged impediments to drop shipping and co-mailing by publications *unlike those owned by his employer. . .*” (emphasis added). In other words, it appears that Time Warner is alleging a need for VNU’s mail.dat files not because the witness testifies about the details of VNU’s publications but because the witness testifies about publications that *are not like VNUs*. Furthermore, even that discussion has to do with the capabilities of other publishers, not the specific mailing characteristics of their or VNU’s publications.

The second portion of Time Warner’s attempt to link Mr. Bradfield’s testimony to VNU’s mail.dat files—the nine-line quotation—is equally unpersuasive. There witness Bradfield explains that publishers, including VNU, are moving toward co-mailing without the need for a “carrot and stick” rate approach, and he generally quantifies the postage saving he anticipates. Once again, Time Warner simply throws out that quotation without even a semblance of an attempt to link VNU’s fledgling efforts to co-mail with production of its mail.dat files.

No such link is possible, because, as Time Warner no doubt realizes, witness Bradfield’s testimony does not address the impact of the proposed rates on VNU’s publications. Here is what it does address. It begins with an introduction (pages 1-2), then moves to an autobiographical sketch (pages 2-3). Witness Bradfield next (page 4) criticizes Time Warner witness Mitchell for not addressing impact, then explains (page 5) how exhibit LB-1 was created. He includes two sentences (page 6) describing the range of impacts revealed in that exhibit, followed by a longer discussion (page 6) admitting that the exhibit does not changes in mailing practices that could affect impact.

The witness next (page 7) explains why cost-based rates are not the only goal, quoting the Commission, and moves (pages 8-10) to a discussion of the extent to which today's rates are, and are not, cost based. Witness Bradfield then addresses (pages 10-12) the need for accurate information if rates are to be made "more" cost based and the need to consider changes in mail processing that are now underway and planned. He concludes (pages 12-15) with a discussion of the practical limitations of co-palletizing and co-mailing and VNU's experience with co-mailing. Time Warner has demonstrated no nexus between the testimony and the highly confidential mail.dat files.

For this reason alone, the motion should be denied. The Commission need not reach the issue of confidentiality, but should it choose to do so, American Business Media submits that there is no compelling need for the confidential mail.dat files and that Time Warner has available to it ample data—including its own data, mail.dat files for 155 American Business Media-member publications and data it is in the process of obtaining from the Postal Service—with which to make its rebuttal case. Clearly, with all of these sources available, Time Warner cannot meet the Commission's standard that absent "exceptional circumstances" an intervenor (as opposed to the Postal Service) will not be ordered to produce confidential data.²

² See *Presiding Officer's Ruling No. R2000-1/02* (July 31, 2000), addressed in American Business Media's Objections. See also *Presiding Officer's Ruling No. R2000-1/97* (July 25, 2000), at 8, where the Presiding Officer ruled that the proponent of a new rate or classification sometimes has a higher burden for disclosure and *Presiding Officer's Ruling No. R97-1/104* (February 27, 1998) at 1-2, confirming that "a strong interest in protecting" commercially sensitive information prevails, "regardless of the availability of protective conditions." The Time Warner citations at page 11, note 13, offered in support of its assertion that once relevance is established, disclosure with protective conditions is mandatory all deal with discovery from the Postal Service, and, as shown here, the Commission has sharply distinguished between the Postal Service and intervenors.

As for TW et al./ABM-T2-9, Time Warner states correctly that it will “rise or fall” with the request in TW et al./ABM-T2-3, but for the added issue of burden. Time Warner seeks to reserve the right to address burden in the event that the motion to compel production of the mail.dat files is denied but the Commission is inclined to grant the motion with respect to TW et al./ABM-T2-9. American Business Media submits that there are no independent grounds for granting the motion with respect to that request but that the Commission should deny the request to reserve the right to raise later contentions that should be included in the motion.

Respectfully submitted,

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