

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

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

Docket No. C2004-1

PRESIDING OFFICER'S RULING  
ON COMPLAINANTS' MOTIONS TO COMPEL  
AND REQUEST FOR DECLARATORY ORDER

(Issued October 28, 2004)

*Introduction.* This ruling addresses discovery disputes over the production of certain data and information, much of it in the form of electronic files and spreadsheets, related to various analyses, claims, and representations on the part of American Business Media (ABM) witnesses. The requested material contains commercially sensitive material related to current and Complainant-proposed rate scenarios.<sup>1</sup> It is associated with publications of members of ABM, who are not technically parties or participants in this case, including some members who are the employers of ABM-sponsored witnesses.

Disputes over disclosure of the type of data sought here have arisen in other cases at the Commission, but the circumstances here are unique in several respects. I shall not completely grant the relief Complainants seek, which entails compelling production of the requested data (including reconstruction of files). At the same time, I note that ABM acknowledges that, as Complainants urge, an adverse inference may be drawn.

I find that the Exhibit LB-1 and related testimony in issue here are replete with elements that address "impact," although they may also stand for other propositions in

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<sup>1</sup> Complainants, also referred to as Time Warner Inc. et al., include 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.

terms of ABM's entire case. Arguments to the contrary are not persuasive, as evidenced by the numerous citations Complainants have provided.

Based on a reading of the pleadings, it appears that ABM already has provided, subject to an arrangement to preserve confidentiality, any relevant input and output files (such as mail.dat, Access and Excel) that are still within its custody or control (or within the custody or control of the member companies who participated in the referenced analyses or the witnesses it sponsors here). I will not require reconstruction of files. However, in the absence of sufficient supporting data to allow replication an analysis of certain ABM evidence, ABM and supporters of its position are placed on notice that the Commission may draw an adverse inference as to the support Exhibit LB-1 provides for any impact-related claims made by ABM or its witnesses. This exhibit, as Complainants note, purports to represent the impact of the Complainants' proposed rates on a sample of Periodical publications published by ABM members.

Complainants could reasonably expect that a more complete data set providing underlying support for this exhibit would have been made available, and they have reason to be concerned about whether appropriate steps were taken to ensure preservation of data. Fortunately, the Postal Service has undertaken to provide extensive representative data that should prove far more useful to the Complainants in contesting the impact of their proposal on publications in the Periodicals mailstream. This is not a substitute or excuse for the absence of otherwise discoverable material, but should provide a far more probative source for the Complainants to use to test the validity of impact claims.

The Commission welcomes industry witnesses, with the understanding that they understand the scope and extent of their responsibilities. In this instance, there may have been some misunderstanding about the operation of Commission rule 31(k), especially as it relates to providing supporting documentation for studies and analyses, and rule 27, which addresses the production of documents or things for the purposes of discovery. In particular, it appears that the fluidity of case preparation by ABM may have altered original intentions about the use to which certain material would be put. In

addition, there is considerable overlap between the interests of ABM as an organization participating in this case and the interests of the organizations that employ the ABM witnesses. In these cases, rule 27 may not necessarily provide as neat a distinction as ABM suggests.

Nonetheless, ABM correctly cites Commission practice not to require private firms to produce confidential business information in the absence of exceptional circumstances. In this instance, where the Postal Service has reliable, more representative, and more complete information available, there is no justification for granting Complainants' motions to compel.

#### I. Overview

*Pleadings.* There are four underlying motions to compel production of requested files or other data and information, including a related request for two orders addressing significant evidentiary points if certain requested material is not produced.<sup>2</sup> The Complainants' First Motion seeks production of electronic copies of the mail.dat files, Access files and Excel spreadsheets generated in the course of analyses of the rate impact on certain ABM member publications.

In each of the three other motions, Complainants seek production of a recent representative mail.dat file for each publication published by the employers of ABM witnesses Cavnar, Bradfield and McGarvy (respectively, Hanley Wood, VNU and Crain Communications). In addition, Complainants' Third Motion seeks a response from witness Bradfield to a request for a set of mailing-related characteristics for each VNU publication. The Complainants' Fourth Motion seeks any analyses witness McGarvy has conducted to determine if changes in mailing behavior could be made to mitigate

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<sup>2</sup> 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 (Complainants' First Motion); Motion of Time Warner Inc. et al. to Compel Production Responsive to TW et al./ABM-T1-3, October 6, 2004 (Complainants' Second Motion); Motion of Time Warner Inc. et al. to Compel Production and Responses to TW et al./ABM-T2-3 & 9, October 6, 2004 (Complainants' Third Motion); and Motion of Time Warner Inc. et al. to Compel Production and Responses to TW et al./ABM-T3-2 & 3, October 6, 2004 (Complainants' Fourth Motion).

the impact of the proposed rates on Crain Communications publications, along with supporting data.

ABM objects to these questions on several grounds, including attorney work product and commercial sensitivity, and has filed answers in opposition to the Complainants' motions to compel.<sup>3</sup> The McGraw-Hill Companies Inc. (McGraw-Hill) have filed a statement in support of ABM's position.<sup>4</sup>

## II. Institutional Interrogatories (TW et al./ABM-5(c) and ABM-68(k))

Question 5(c) asks for electronic copies of the mail.dat files, Access files, and Excel spreadsheets used or generated in rate impact analyses performed for ABM member publications. Question 68(k) follows up on this request, asking that ABM provide copies of related mail.dat files and accompanying Excel spreadsheets. It notes that identities of particular publishers and publications may be masked and includes a stipulation that materials provided in response to this question will be subject to the terms of an existing nondisclosure agreement.

ABM's response to Question 5(c) asserts that the studies in issue were conducted at the request of counsel for purposes of the instant litigation and therefore represent attorney work product that is not subject to discovery. However, it also states that it is willing to provide Complainants with electronic versions of spreadsheets "covering more than 141 publications belonging to 5 member organizations, with names of individual publications deleted" within its custody or control that show certain billing

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<sup>3</sup> Answer of American Business Media to Motion of Time Warner Inc., et al. to Compel Production Responsive to Time Warner et al./ABM-5(c) and Time Warner et al./ABM-68(k), October 12, 2004 (ABM Answer to First Motion); Answer of American Business Media to Motion of Time Warner Inc., et al to Compel Production of Documents Responsive to TW et al./ABM-T1-3, October 12, 2004 (ABM Answer to Second Motion); 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 (ABM Answer to Third Motion); Answer of American Business Media to Motion of Time Warner Inc., et al. to Compel Production and Responses to TW et al./ABM-T3-2 & 3, October 12, 2004 (ABM Answer to Fourth Motion).

<sup>4</sup> Statement of The McGraw-Hill Companies in Support of Answer of American Business Media to Motion of Time Warner et al. to Compel Production of Documents Responsive to TW et al./ABM-T1-3, October 15, 2004 (McGraw-Hill Statement). This document indicates that McGraw Hill also supports ABM's opposition to the Complainants' other motions on this issue.

determinants along with postage at present and proposed rates.<sup>5</sup> ABM later acknowledged that “summary spreadsheets” were provided in lieu of all underlying files and that the correct number of publications is 152, based on a review of the original list. It also asserted that it has never had custody or control of the referenced mail.dat files and Excel spreadsheets.<sup>6</sup>

*Motion to compel/request for declaratory order.* Complainants note that ABM witness Bradfield’s Exhibit LB-1 represents a calculation of the impact of the Complainants’ proposed rates on a sample of publications published by five ABM member companies (with witness McGarvy providing the calculations for both Crain Communications and ComputerWorld publications). Each company performed calculations employing both mail.dat files and an Access file to determine postage for an actual, recent issue under the Complainants’ proposed rates and to compare the result to postage at current rates. Complainants’ First Motion at 3.

Complainants assert that because Exhibit LB-1 contains only summaries of the alleged results, having been transposed or transcribed from the Excel files containing the actual results, they cannot verify the accuracy or faithfulness of even the exhibit’s *transcription* of results without access to those files, much less validate, replicate or spot-check the appropriateness of the procedures followed or the accuracy of the computations performed. *Ibid.* (emphasis in original).

They discount ABM’s attorney work product objection as “patently frivolous,” given that ABM has decided to use the results and the unavailability of the data from any other source. *Id.* at 4. As for ABM’s production of underlying files, Complainants assert that what was received was not what was expected: that is, instead of an Excel spreadsheet for each publication, they were provided with summary spreadsheets. These consist of one Excel file with four worksheets, each containing a summary of the analysis done by one of the four ABM members and containing only one line per publication. *Id.* at 5, citing ABM’s Response to TW et al./ABM-T2-8(d).

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<sup>5</sup> Response of American Business Media to TW et al./ABM-5, included in Responses of American Business Media to TW et al./ABM-4–5, 7, 64 (revised), August 31, 2004.

<sup>6</sup> Responses of American Business Media to TW et al./ABM-65–68, September 28, 2004.

Complainants further note that ABM's response to follow-up Question 68(k) indicates that ABM claims it does not, nor never has had, custody or control of the mail.dat files and Excel spreadsheets in issue; that neither the mail.dat files nor the individual spreadsheets have been retained by the member companies whose publications were analyzed; that the Excel spreadsheets but not the mail.dat files have been retained by one participant; and that both have been retained by another. (ABM's response indicates that Crain Communications, for whom witness McGarvy performed the analysis, and VNU, for whom witness Bradfield performed the analysis, are among the participants that provided neither.) *Id.* at 6.

Complainants assert that the issue of the likely impact of Complainants' proposals is "the central theme" of ABM's testimony in this proceeding, and that Exhibit LB-1 — and the McGarvy and Bradfield testimonies relying on that exhibit — "constitute the heart of ABM's evidence regarding impact." *Id.* at 7. It takes issue with ABM's contentions to the contrary, and provides numerous citations to testimony where impact is addressed by ABM's witnesses. *Id.* at 11–12 (citations omitted).

Complainants further cite Commission rule 31(k) and Federal Rule of Evidence 1006 in support of disclosure of the requested material. They assert a belief that grounds exist to strike the exhibit in question and related testimony, but point to the likelihood that this would preclude rebuttal. *Id.* at 13. They therefore seek issuance of two orders. One would compel ABM to produce the requested mail.dat files and Excel files to the extent that it is capable of doing so, along with a specific instruction that ABM inquire of its relevant members (a) whether they are in possession of, are able to come into possession of, or are able to reconstruct the mail.dat and/or Excel files and, if so, (b), whether 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. The other order would state that the Commission will consider whether ABM's failure to provide any or all of the foundational data underlying Exhibit LB-1 warrants drawing an adverse inference as to the weight that should be given to the exhibit and associated testimony.

*ABM's position.* ABM's response addresses numerous points, including the rationale behind its conduct. This includes the following acknowledgement: "American Business Media fully understood that the Commission encourages production of underlying data so that calculations can be replicated, and that the use to which the exhibit could be put and the weight given it could be affected by an inability (or refusal) to produce the highly confidential mail.dat files." ABM Answer to First Motion at 4. It also refers to a pledge it made to members concerning protection against release of any current mail.dat files and asserts that it took care that ABM testimony did not overstate the significance of the Exhibit LB-1 data. *Ibid.*

Among other things, ABM denies any "nefarious motives" or other inappropriate conduct, explains the circumstances leading to production of Exhibit LB-1, and why underlying supporting information came to be unavailable. *Id.* at 5-6.

*Analysis.* The pleadings indicate that there is a disagreement among counsel as to the extent and nature of the data that was to be produced pursuant to a private understanding. Complainants indicate that they did not anticipate receiving summary spreadsheets, and point to their inability to verify and replicate the exhibit without individual spreadsheets for each publication represented therein. Complainants' First Motion at 3-4. ABM, on the other hand, claims it has produced what was promised and, in any event, that much of the supporting data was either not retained or is otherwise not available. It also asserts that the requested material constitutes attorney work product. ABM Answer to First Motion at 3-4.

The circumstances surrounding the development of ABM's exhibit and the terms related to production of spreadsheets are not clear; however, it is apparent that much of the supporting data has not been retained. Instead of pursuing reconstruction of data or other avenues that may prove time-consuming or costly, I have concluded that the Service's presentation of more comprehensive and more reliable data presents a pragmatic solution to this dispute. Given this independent source of data, Complainants will not be deprived of an opportunity to explore the validity of impact arguments. At the same time, the absence of documentation for ABM's exhibit and related testimony will

limit its usefulness. As it has in the past, the Commission will weigh all relevant circumstances in reaching its decisions.

III. Motions to Compel Recent Representative Mail.dat Files (TW et al./ABM-T1-3; TW et al./ABM-T2-3 and TW et al./ABM-T3-3)

Complainant's Question No. 3 (directed separately to ABM witnesses Cavnar, Bradfield and McGarvy) asks for a recent representative mail.dat file for each publication published by their respective employers (Hanley Wood, VNU or Crain Communications).

*ABM's position.* ABM asserts that it does not believe that an objection is necessary because none of the mail.dat files of the publications of these three companies are within its custody or control, and therefore are not within the ambit of rule 27. It asserts that neither Crain Communications, nor Hanley Wood, nor VNU is a party to this case, and the fact that each company has permitted an employee to testify for ABM does not make any of them a party.<sup>7</sup>

ABM also objects to these discovery requests on grounds that the requested mail.dat files contain commercially sensitive, proprietary and confidential information; that Complainants have established no need for such material; and that this material, if relevant at all, is only marginally so.<sup>8</sup> It asserts that the Commission's policy with respect to discovery of intervenors' commercially sensitive information is that such data need not be produced, absent exceptional circumstances.<sup>9</sup> ABM distinguishes the status of each of its expert witnesses from the status of their employers, saying: "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, a standard heightened further by the fact that Ms. McGarvy does not even testify about the impact

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<sup>7</sup> See Objection of American Business Media to Request for Production Time Warner et al./ABM-T1-3, September 23, 2004, at 1-2.

<sup>8</sup> Objection of American Business Media to Requests for Production Time Warner et al./ABM-T3-2 Time Warner et al./ABM-T3-3, September 23, 2004 (ABM Objection–McGarvy).

<sup>9</sup> ABM Objection–McGarvy at 5, citing Presiding Officer's Ruling No. R2000-1/102 (July 31, 2000).

of the complainants' proposal upon Crain Communications publications or Periodicals in general." *Id.* at 5 (emphasis in original).

*Complainants' position.* Complainants generally concede that ABM cannot be compelled to produce documents that are not within its custody or control, but claims this does not end the matter. Instead, they say ABM is not entitled to present testimony without regard to whether it (or its witnesses) are in a position to respond to legitimate discovery to the extent necessary "to afford opposing parties a meaningful hearing." Second Motion at 4 (footnote omitted). They also invoke Federal Rule of Evidence 705, which provides that an expert may be required to disclose the underlying facts or data in cross-examination. *Id.*

*Analysis.* As Complainants' pleading makes clear, ABM's argument that witness McGarvy does not address impact cannot be supported by a plain reading of her testimony. While it may well stand for the additional points ABM refers to, it also clearly concerns impact or reaction to the proposed rates. Complainants are also correct that non-party status cannot legitimately be used to foreclose the type of discovery that will provide them with a meaningful opportunity for a hearing. However, here, as noted in the preceding discussion, the emergence of the Service's more comprehensive and reliable data base provides an opportunity for Complainants to explore the validity of its witnesses' claims and any related arguments ABM may make on brief. Thus, their rights to a meaningful hearing are not in jeopardy. Accordingly, I will not require production of the requested data in this instance.

IV. Motion to Compel Response of ABM Witness Bradfield to Question Seeking Set of Mail Characteristics for VNU Publications (TW et al./ABM-T2-9)

This question asks witness Bradfield to: "Please provide the following information, to the extent that it can be extracted from mailing statements, mail.dat files or any other available sources, for each VNU publication that is mailed under Periodicals rates:

- (1) frequency of publication;
- (2) average mailed volume per issue;

- (3) average weight per piece;
- (4) average total print order per issue;
- (5) printer and ZIP Code where printed;
- (6) percent at each presort level (carrier route, 5-digit, 3-digit and basic);
- (7) for each presort level, the percent that is pre-barcoded;
- (8) percent qualifying for each per-piece discount provided under current rates;
- (9) percent that is palletized;
- (10) percent editorial content;
- (11) percent of advertising pounds entered in each zone;
- (12) average number of pieces per bundle;
- (13) for sacked pieces, average number of pieces per sack;
- (14) for palletized pieces, average number of pieces per pallet;
- (15) the minimum number of pieces per sack, as currently set for this publication in the fulfillment program used.

*ABM's position.* Witness Bradfield's answer stated that "some of this material" can be found in Exhibit LB-1. As for the remainder, he referred to ABM's objection, which stated that the requested information was not in the control or custody of ABM, but within that of non-participant VNU. The objection, among other things, also reiterated ABM's position that much of the information is confidential, lacks direct relevance to the proffered testimony, and is less complete and less useful than information already provided.<sup>10</sup>

*Analysis.* Complainants' interest in obtaining the requested data is understandable, but VNU's non-participant status generally limits the reach of discovery requests. Given this situation and the availability of the Service's data base, I will not require production of the requested data. At the same time, data and statements that are unsupported leave open the possibility that this material will be given little or no weight, or that an adverse inference will be drawn from the lack of support.

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<sup>10</sup> 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 (ABM Objection-Bradfield) at 6-7.

V. Interrogatory TW et al./ABM-T3-2 Directed to ABM Witness McGarvy (Analyses and Data Supporting Any Assessment of Changes in Mailing Behavior)

This question asks whether witness McGarvy has conducted analyses to determine if any changes in mailing behavior could be made to mitigate the impact of the Complainants' proposed rates on Crain Communications publications and, if so, for copies of all such analyses and the data they are based on, such as mail.dat files. In response, witness McGarvy noted that an objection had been filed to the second part of the question, but stated, as to the first part: "Yes, at the request of counsel we ran some comparisons of the results of changing our sack minimums, although this was a purely hypothetical calculation, because we believe that increasing our sack minimums would produce unacceptable service deterioration." Response of ABM to TW et al./ABM-T3-2, included in Responses of American Business Media to TW et al./ABM-T3-1-7, September 28, 2004.

*ABM's position.* ABM acknowledges that witness McGarvy has conducted the type of analysis referred to in the first part of the question, but contends that the second part of the question constitutes a request for production of documents. It objects to such production on grounds that the documents (which include mail.dat files) are confidential and constitute attorney work product, as ABM counsel requested that the analyses be performed. ABM also notes that Crain Communications, witness McGarvy's employer, is a non-party.<sup>11</sup>

ABM further claims that witness McGarvy's testimony does not deal with impact on Crain Communications or anyone else, but instead "... addresses the mailing practice changes that are taking place and the limits on such changes, the need for making changes slowly, and the extent to which present rates reflect costs." *Id.* at 3.

*Analysis.* A reading of the McGarvy testimony as a whole reveals that it addresses impact, and arguments to the contrary are not persuasive. As for production of the requested data, Crain Communications' status as a non-party generally limits the reach of discovery. This does not mean that data and statements lacking adequate

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<sup>11</sup> ABM Objection-McGarvy at 1-2.

record support will be accorded any weight; instead, an adverse inference may be drawn from its absence. Given ABM's stated awareness of this consequence, I will not require production of the requested data. Any related Commission decisions will balance all appropriate considerations.

## VI. McGraw-Hill's Position

McGraw-Hill supports ABM's opposition to the Complainants' motions to compel. It asserts that the Complainants "are plainly wrong" in suggesting that Commission precedent requires an intervenor to disclose commercially sensitive mail.dat files to actual and potential competitors so long as a "relevance standard" has been met. McGraw-Hill Statement at 1-2. Instead, it claims Commission precedent establishes that a strict "exceptional circumstances" test applies to requests for discovery of commercially sensitive information from intervenors, even under protective conditions.

McGraw-Hill contends that Complainants have not met this test because the information is "by no means essential" to the Commission's deliberations. *Id.* at 4. It asserts that Postal Service witness Tang has provided testimony focusing on the impact of the rates proposed by the Complainants, and is in the process of providing an array of additional information in response to Presiding Officer's Information Request No. 2 and Complainants' discovery requests. *Id.* at 4 (citation omitted). It further states that Complainants already have access to numerous mail.dat files, both of their own publications and those of ABM members who consented to the release of non-current mail.dat files. *Ibid.*

McGraw-Hill distinguishes the series of rulings cited by the Complainants by arguing that those concerned discovery sought from the Postal Service, which has frequently offered to provide materials subject to protective conditions. It says the Commission has sharply distinguished the Postal Service from intervenors in this regard. *Id.* at 3-4. It contends that "it is important to adhere rigorously to this test" to avoid discouraging broad participation by intervenors in Commission proceedings. *Id.* at 1.

McGraw-Hill also discounts Complainants' need for access to commercially sensitive mail.dat files to "verify the accuracy or faithfulness ... of the ... *transcription* of results" to ABM Exhibit LB-1 or the "accuracy of the computations performed." Ibid. (citation omitted, emphasis in original). It claims:

Any material transcription or computational errors are entirely speculative, and the mail.dat files would simply be corroborative. The Commission could instead rely in this regard on the declarations of witnesses that the exhibit is accurate to the best of their knowledge and belief upon reasonable inquiry, just as the Commission has in other proceedings (e.g., MC95-1) where the impact of proposed rates were estimated and considered in the absence of mail.dat files. The ABM exhibit in question is not akin to a statistical survey or econometric study governed by rule 31(k) where assumptions, input and methodology may truly be in doubt and material.

Id. at 4-5.

McGraw-Hill asserts that ABM's inability to provide Complainants with commercially sensitive information of its members should not prevent the Commission from according that exhibit the full weight ABM claims for it. Id. at 5. It says the declaratory order would not be appropriate where the "exceptional circumstances" test is not met. Id. at 4.

Finally, McGraw-Hill states that while mail.dat files may contain commercially sensitive information that could have some relevance to an issue before the Commission, they typically contain a wealth of other commercially sensitive data that is not relevant. Accordingly, even in an exceptional case where some information in mail.dat files might be considered essential to the Commission's deliberations (a circumstance McGraw-Hill says does not presently exist), it argues that only essential information should be subject to required disclosure (under protective conditions), not entire mail.dat files. Ibid. It views such files as somewhat analogous to mailing statements, and says the Commission has never previously found it appropriate to order

the production of individual postage statements. *Id.* at 5 (citation omitted). More generally, McGraw-Hill says it shares the concerns of others that to require intervenors to disclose commercially sensitive information short of truly “exceptional circumstances” may ultimately deter broad participation in Commission proceedings, even as limited intervenors. *Id.* at 6 (footnote omitted).

*Analysis.* McGraw-Hill makes several points that favor ABM’s position: the availability of other data; the distinction that has been drawn between the Postal Service and other participants; and potential deterrence of broad participation in Commission proceedings, should production be required. On the other hand, the Commission cannot simply accept the word of the witness that there are no errors in the supporting data, as McGraw-Hill urges, nor can it accord the exhibit and testimony “the full weight” ABM might urge for it without more detailed documentation. It is not necessary to consider whether this material is within rule 31(k), as basic rules of evidence require that participants be given an opportunity to probe the basis for presentations such as those presented in the witnesses’ testimony. In these circumstances, where there is no documentation that allows an adequate assessment of what the exhibit purports to represent, challengers may argue that an adverse inference should be drawn.

RULING

1. Based on the discussion in the body of this ruling, the following motions are denied:
  - a. 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, filed October 5, 2004;
  - b. Motion of Time Warner Inc. et al. to Compel Production of Documents Responsive to TW et al./ABM-T1-3, filed October 6, 2004;
  - c. Motion of Time Warner Inc. et al. to Compel Production and Responses to TW et al./ABM-T2-3 & 9, filed October 6, 2004; and
  - d. Motion of Time Warner Inc. et al. to Compel Production and Responses to TW et al./ABM-T3-2 & 3, filed October 6, 2004.
  
2. Participants are hereby placed on notice that in the absence of adequate foundational support for Exhibit LB-1 and related testimony, an adverse inference may be drawn.

George Omas  
Presiding Officer