

DOCKET SECTION

PRESIDING OFFICER'S
RULING NO. R97-1/46

RECEIVED
OCT 5 1 28 PM '97
POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

UNITED STATES OF AMERICA
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268

Postal Rate and Fee Changes

Docket No. R97-1

PRESIDING OFFICER'S RULING GRANTING IN PART MOTION OF ASSOCIATION
OF ALTERNATE POSTAL SYSTEMS TO COMPEL RESPONSE TO
INTERROGATORY AAPS/USPS-6

(October 15, 1997)

On September 25, the Association of Alternate Postal Systems (AAPS) submitted a motion to compel production of information and materials requested in its interrogatory AAPS/USPS-6.¹ That September 5 interrogatory asks if the Postal Service has "conducted or commissioned a study on alternate delivery since the SAI [Strategic Analysis, Inc.] report revealed during the course of Docket MC95-1," and, if so, to provide a copy of such study or report, or a description of any work in progress. AAPS/USPS-6. The Postal Service filed an objection on September 15 which acknowledged the requested information as existing in the form of subsequent SAI research,² but maintained that the information is irrelevant to this proceeding,

¹ Motion of Association of Alternate Postal Systems to Compel Production by the United States Postal Service of Report on Alternate Delivery (September 25, 1997) (Motion).

² In its October 2 Answer in Opposition of United States Postal Service to Motion of Association of Alternate Postal Systems to Compel Production by the United States Postal Service of Report on Alternate Delivery (AAPS/USPS-6) (Opposition), the Postal Service identified the subsequent SAI research as including

- definition of alternate delivery and categorization of alternative delivery providers;
- identification of alternative delivery providers by name, location, size, areas served, business practices and strategies, pricing, etc.;
- methods of collection of information;

commercially sensitive in nature and also “confidential, proprietary and/or a trade secret possessing competitive value.” Objection of United States Postal Service to Interrogatory of the Association of Alternative (sic) Postal Systems Directed to the Postal Service (AAPS/USPS-6) (Objection) at 3-4.

In its Motion to Compel, AAPS argues that the study in question is indeed relevant to this proceeding, where 39 U.S.C. § 3622(b)(4) mandates consideration of the effect of rate changes on competition, and the Postal Service now proposes to reduce the rates “for the most significant material for which it permits AAPS members to compete.” Motion at 1-2. According to AAPS, as a substantial portion of the Postal Service’s case depends upon its witnesses’ assessment of elasticity of demand, which in turn requires examination of alternatives and competitors, an ongoing study addressing alternate delivery is clearly relevant. *Id.* at 2. This is particularly true where the Postal Service’s proposed rate design is presented as an effort to meet costs while mitigating rate increases on mailers, but *without* adversely affecting competitors or competition to a significant degree. Yet, AAPS notes, the Postal Service apparently has shielded its own witnesses from the contents of its current study on alternate delivery.³

-
- a summary of changes in the alternative delivery industry, including failures, consolidations, mergers and acquisitions, and public offerings;
 - annual volume by market segment (*e.g.*, catalog or magazine) and by provider type from 1993 to 1996 and forecast of growth to 2005;
 - revenue trends and profitability potential of alternative delivery;
 - market delivery rates offered by alternative delivery;
 - analysis of factors influencing the success of alternative delivery;
 - researchers’ recommendations to the Postal Service regarding alternative delivery; and
 - reaction to price change.

Opposition at 2.

³ According to AAPS, both witness Tolley, when questioned about Postal Service studies on alternate delivery of periodicals, and witness Moeller, when similarly queried after concluding that the proposed Standard A ECR rates would not adversely affect competitors, claimed no knowledge of such alternate delivery information. Motion at 2. It should be noted that it was witness O’Hara, not witness Moeller, who claimed ignorance of any alternative delivery system in the interrogatory cited by AAPS. AAPS/USPS-T30-1(d).

With regard to the Postal Service's claims of commercial sensitivity and possible competitive harm upon disclosure of the material at issue, AAPS maintains that it is unable to address these assertions at present, where the SAI material is essentially unknown and the Service has been unwilling to agree to AAPS's proposal of its counsel's limited viewing under any protective order the Postal Service deemed appropriate. Motion at 1,3. However, given the relevance of the material in question, disclosure is still merited.

The Postal Service Opposition reasserts its arguments that the information sought, its ongoing alternate delivery research, is irrelevant to the proceedings, is "not reasonably calculated to lead to the discovery of admissible evidence," and qualifies as "confidential research" protected from disclosure. Opposition at 3-5.

On the issue of relevance, the Postal Service argues that R97-1 contains no claim that a competitive threat from alternate delivery forms the basis for any of the proposed rate or classification changes. *Id.* at 3. Moreover, the Service contends that § 3622(b)(4) does not broadly "invite evaluation on the effect of any price change proposal on alternative delivery," but rather narrowly requires only an evaluation of "rate increases" on alternative delivery, and is silent with respect to rate decreases, as the Service now proposes for pound-rated ECR pieces. *Id.* at 4.

On the subject of privilege, the Postal Service asserts that the SAI research is "manifestly" commercially sensitive, containing researchers' detailed mental impressions, analyses and recommendations on the alternate delivery industry, and that even application of protective conditions would not adequately safeguard the Service from competitive harm. *Id.* at 5. Providing a general description of the contents of the research, the Service maintains that the research is not shared with the general public and, in fact, is provided to Postal employees only on a need-to-know basis, with a clear understanding that the information is confidential. *Id.* at 5-6. Finally, the Service notes that the ongoing research is not unique to its agency, but rather "constitutes a compilation of industry information that AAPS could well assemble by itself or with the aid of an industry analyst." *Id.* at 6.

DISCUSSION

As AAPS noted in its Motion to Compel, the issue of the Postal Service's disclosure of alternate delivery research previously arose in MC95-1. *Id.* at 3. In that reclassification case, the Postal Service had asserted that second-class mail should be restructured in part to meet the threat of alternate delivery, but objected to disclosing its ongoing studies on the subject on the basis of relevance and privileged trade secret status, further noting the chilling effect such disclosure could have on "postal information gathering." P.O. Ruling MC95-1/11 at 3-4. The Postal Service's argument was found unpersuasive, since the alternate delivery report had direct bearing on the Service's reclassification proposal. Therefore, the Service was directed to produce the report or an edited version thereof. *Id.* at 5. This ruling specifically highlighted that the Postal Service's arguments against disclosure were too general in nature to be independently evaluated, where the Postal Service failed to disclose even a broad overview of the structure, direction and methodology of the study at issue, and further made no attempt to identify which portions of the report were believed to be commercially sensitive.⁴ *Id.* at 4.

The Postal Service's efforts to distinguish R97-1 from MC95-1, with its direct impact on alternative delivery due to the proposed classification restructuring, as well as the Service's current provision of a general description of the contents of the SAI research, are duly noted. However, I am unpersuaded that the research is irrelevant to this proceeding, and disagree with the Postal Service's narrow interpretation of § 3622(b)(4), which effectively ignores the underlying public policy consideration and spirit of the statute. In an omnibus rate case, information regarding the effect of the

⁴ In MC95-1, American Business Press (ABP), the party requesting production of the Postal Service's alternative delivery study, was able to inspect the requested report in camera upon arrangement of a confidentiality agreement with the Postal Service, in an apparently futile effort to avoid the necessity of filing a motion to compel. American Business Press Motion to Compel, Docket No. MC95-1 (April 28, 1995) at 2. That limited examination, which the Postal Service has denied AAPS in the current case, allowed ABP to address the Postal Service's additional claim of confidentiality and privilege in its motion.

Postal Service's proposal on its competition is relevant to the Commission in performing its statutory ratemaking responsibilities.

More compellingly, Postal Service witness Moeller, in justifying the proposed lower pound rate for Standard A ECR mail, notes in his direct testimony that "a lower pound rate is more consistent with the rates for other advertising media that are not as sensitive to weight." USPS-T-36 at 26. Moeller's response to a subsequent interrogatory on the lower pound rate issue refers for support to an earlier alternate delivery industry trade publication which concluded that "pound rate reduction will reduce the savings at higher weights, but will not eliminate the significant advantages alternate delivery has with heavier packages." NAA/USPS-T-36-28, citing *Optimum Delivery* (April 17, 1995) in Docket No. MC95-1, Tr. 22/9910. Witness O'Hara also relies upon this qualitative assessment study on alternate delivery and the effects of mail weight in response to an interrogatory voicing concern about the proposed lowering of the Standard A ECR pound rate. AAPS/USPS-T30-1(d). Thus, although the Postal Service requests no restructuring of its mail classes, in the context of this case, information concerning alternate delivery is certainly germane to *both* §§ 3622(b)(4) and 3622(b)(5).⁵ Information in the possession of Postal Service management that is directly relevant to the subject of testimony should be discoverable even if the information was not made available to the witness.

The Postal Service's argument with regard to competitive harm has merit, as AAPS represents firms which compete directly with the Service for the delivery of mail matter other than letters. The Service's analysis and interpretation of the SAI research, along with the SAI researchers' recommendations, may be regarded as privileged information not subject to disclosure. However the factual materials requested generally are in the public domain. The underlying data and collected information should be available to those evaluating Postal Service testimony, so long as it is subject to protective conditions adequate to assure that this information is not available to

⁵ Section 3622(b)(5) specifically requires consideration of "the available alternative means of sending and receiving letters and other mail at reasonable costs." 39 U.S.C. § 3622(b)(5).

anyone involved in competitive decisionmaking to the potential detriment of the Service. Expanded protective conditions have been developed to provide this assurance.

Consequently, I shall direct the Postal Service to produce a portion of the requested SAI research listed in footnote 2. Subject to both the above limitations and the protective conditions set forth in attachment A to this ruling, the following information should be provided:

- definition of alternate delivery and categorization of alternative delivery providers;
- identification of alternative delivery providers by size, areas served, business practices and strategies, pricing, etc.;
- methods of collection of information;
- a summary of changes in the alternative delivery industry, including failures, consolidations, mergers and acquisitions, and public offerings;
- annual volume by market segment (e.g., catalog or magazine) and by provider type from 1993 to 1996;
- market delivery rates offered by alternative delivery; and
- reaction to price change.

RULING

The Motion of the Association of Alternate Postal Systems to Compel Production of Information and Materials Requested in Interrogatory AAPS/USPS-6, filed September 5, 1997, is granted in part, as specified above and subject to the conditions prescribed in the body of this ruling.



Edward J. Gleiman
Presiding Officer

**ATTACHMENT A: STATEMENT OF COMPLIANCE
WITH PROTECTIVE CONDITIONS**

The following protective conditions limit access to materials provided in response to P.O. Ruling R97-1/46. Individuals seeking to obtain access to that library reference must agree to comply with these conditions, and complete the attached certifications.

1. Only those persons who are either:
 - (a) employees of the Postal Rate Commission (including the Office of the Consumer Advocate) with a need-to-know; or
 - (b) a participant in Postal Rate Commission Docket No. R97-1; or a person employed by such a participant, or acting as agent, consultant, contractor, affiliated person, or other representative of such participant for purposes related to the litigation of Docket No. R97-1; shall be granted access to materials provided in response to P.O. Ruling R97-1/46. However, no person involved in competitive decision-making for any entity that might gain competitive advantage from use of this information shall be granted access to this material. "Involved in competitive decision-making" includes consulting on marketing or advertising strategies, pricing, product research and development, product design or the competitive structuring and composition of bids, offers or proposals.
2. No person granted access to materials provided in response to P.O. Ruling R97-1/46 is permitted to disseminate those materials in whole or in part to any person not authorized to obtain access under these conditions.
3. The final date of any participant's access shall be
 - (a) the date on which the Postal Rate Commission closes the evidentiary record in Docket No. R97-1; or
 - (b) the date on which that participant formally withdraws from Docket No. R97-1; or
 - (c) the last date on which the person who obtains access is under contract or retained or otherwise affiliated with the Docket No. R97-1 participant on whose behalf that person obtains access, whichever comes first. The participant immediately shall notify the Postal Rate Commission and United States Postal Service counsel in Docket No. R97-1 of the

termination of any such business and consulting arrangement or retainer or affiliation which occurs before the closing of the evidentiary record.

4. Immediately after the Commission issues its recommended decision in Docket No. R97-1, a participant (and any person working on behalf of that participant) who has obtained a copy of materials provided in response to P.O. Ruling R97-1/46 shall certify to the Commission:
 - (a) that the copy was maintained in accordance with these conditions (or others established by the Commission); and
 - (b) that the copy (and any duplicates) either have been destroyed or returned to the Commission.
5. The duties of any persons obtaining access to materials provided in response to P.O. Ruling R97-1/46 shall apply to material disclosed or duplicated in writing, orally, electronically or otherwise, by any means, format, or medium. These duties shall apply to the disclosure of excerpts from or parts of the document, as well as to the entire document.
6. All persons who obtain access to materials provided in response to P.O. Ruling R97-1/46 are required to protect the document by using the same degree of care, but no less than a reasonable degree of care, to prevent the unauthorized disclosure of the document as those persons, in the ordinary course of business, would be expected to use to protect their own proprietary material or trade secrets and other internal, confidential, commercially-sensitive, and privileged information.
7. These conditions shall apply to any revised, amended, or supplemental versions of materials provided in response to P.O. Ruling R97-1/46 filed in Docket No. R97-1.
8. The duty of nondisclosure of anyone obtaining access to materials provided in response to P.O. Ruling R97-1/46 is continuing, terminable only by specific order of the Commission.
9. Any Docket No. R97-1 participant or other person seeking access to materials provided in response to P.O. Ruling R97-1/46, by requesting access, consents to these or such other conditions as the Commission may approve.

CERTIFICATION

The undersigned represents that:

Access to materials provided in response to P.O. Ruling R97-1/46 in Docket No. R97-1 has been authorized by the Commission.

The copy obtained is marked on every page with my name.

I agree to use the information only for purposes of analyzing matters at issue in Docket No. R97-1.

I will maintain in strict confidence the information obtained from the Commission in accordance with the conditions as set out above.

Name _____

Firm _____

Title _____

Representing _____

Signature _____

Date _____

**CERTIFICATION UPON RETURN OF
PROTECTED MATERIALS**

Pursuant to the Certification which I previously filed with the Commission with respect to information received in accordance with Presiding Officer's Ruling I, on behalf of myself and/or the party which I represent (as indicated below), affirm as follows:

1. I have maintained in strict confidence the information provided by the Commission in accordance with Presiding Officer's Ruling.
2. I have used the information only for purposes of analyzing matters at issue in Docket No. R97-1.
3. I have returned the information to the Postal Rate Commission.
4. I have surrendered to the Postal Rate Commission/destroyed all copies of the information which I obtained or which have been made from that information.

Name _____

Firm _____

Title _____

Representing _____

Signature _____

Date _____