

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

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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

POSTAL RATE AND FEE CHANGES, 2000

Docket No. R2000-1

ASSOCIATION FOR POSTAL COMMERCE'S
COMMENTS IN SUPPORT OF
ALLIANCE OF NONPROFIT MAILERS
MOTION TO COMPEL

The Association for Postal Commerce ("Postcom") writes in support of the Alliance for Nonprofit Mailers ("ANM") Motion to Compel responses to discovery requests ANM/USPS-T9-18(j) & (k), 19(g) & (h), 22(c), 22(f), & 23(a); and T10-4, 7, 8, 10, 11, and 32(d). The Postal Service objected to the production of these documents principally on the grounds that they were (1) irrelevant and (2) pre-decisional. This brief will focus on these two Postal Service arguments. They are without merit.

A. Relevancy of Documents

The Postal Rate Commission's Rules of Practice note that participants may only request "information relevant to the subject matter in such proceeding." But such information need only be "reasonably calculated to lead to the discovery of admissible evidence." 39 C.F.R. § 3001.26(a).

This language essentially mirrors that of the Federal Rules of Civil Procedure ("FRCP"), and indicates an intent to subscribe to the FRCP's liberal discovery scheme. See FRCP Rule 26(b)(1). Simply put, any information that is reasonably calculated to lead to the discovery of admissible evidence is relevant and, barring some other privilege, required to be produced regardless of its own admissibility. See, e.g., Rozier v. Ford Motor Co., 573

F.2d 1332 (5th Cir. 1978) (holding that document which at a minimum could lead to discovery of other relevant documents was reasonably calculated to lead to discovery of admissible evidence); Wilstein v. San Tropai Condominium Master Association, 189 F.R.D. 371, 375 (N.D. Ill. 1999) (“requests for discovery ‘should be considered relevant if there is any possibility that the information sought may be relevant to the subject matter of the action.’”); Scuderi v. Boston Ins. Co., 34 F.R.D. 463, 466 (D. Del. 1964) (“[i]nformation can be relevant even if it only leads to other relevant information.”)

It can hardly be doubted that the rates or discounts offered for automation compatible mail are within the “subject matter” of this case (Wilstein, 189 F.R.D. at 375); and the interrogatories propounded by ANM seek information relating to the costs and cost savings underlying those rates. ANM’s interrogatories clearly meet the “reasonably calculated” standard. The Postal Service has no grounds for claiming irrelevancy.

B. Pre-Decisional Privilege

The Postal Service can not withhold information based on some notion of a pre-decisional or deliberative process privilege. Such a privilege if available at all, applies only to documents and memoranda prepared in contemplation of litigation, or in the process of formulating agency practice or policy. See, e.g. Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 868 (D.C. Cir. 1980) (no privilege for documents not involving “suggestions or recommendations as to what agency policy should be.”)

The information sought by ANM relates neither to a potential litigation nor to the formulation of agency policy. Rather, ANM seeks information on Postal Service procurement decisions. When an agency acts in a commercial or proprietary capacity, it

can not make use of the deliberative process privilege to withhold information relating to its purchasing decisions. See United States Postal Service v. Phelps Dodge Refining Corp., 852 F. Supp. 156, 166 (E.D.N.Y. 1994) (noting that "with respect to discovery, a governmental litigant should not be armed with the deliberative process privilege as a shield to prevent disclosure . . . where the context is (as here) merely commercial"). Simply because information obtained about purely commercial decisions may ultimately impact the Postal Service's rate structure, does not mean the Service can use the deliberative process privilege as a shield to protect such information from disclosure. As ANM points out, a protective order will satisfy concerns there may be about protecting the integrity of the procurement process.

Postcom joins ANM in urging that the ANM Motion to Compel be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ian D. Volner", is written over a horizontal line.

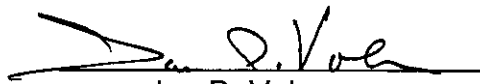
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March 10, 2000

CERTIFICATION

I hereby certify that I have this day served the foregoing document upon all participants of record in this proceeding having requested service of discovery documents in accordance with Section 12 of the rules of practice.


Ian D. Volner

Dated: March 10, 2000