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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

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

POSTAL RATE AND FEE CHANGES, 2000

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Docket No. R2000-1

**MOTION OF THE COALITION OF
RELIGIOUS PRESS ASSOCIATIONS TO
COMPEL ANSWERS TO INTERROGATORIES
CRPA/USPS-T-32-8 AND T-32-10(c)**

Pursuant to Sections 26(d) and 27(d) of the Commission's Rules of Practice, the Coalition of Religious Press Associations (CRPA) hereby moves that the Commission compel Witness Mayes to fully respond to CRPA/USPS-T-32-8, and to CRPA/USPS-T-32-10(c), (both attached hereto as Appendix A).¹ In support of its Objection, USPS raises, as it inevitably and tediously does, whenever it does not feel like taking time to respond to relevant discovery, naked assertions of lack of relevance and materiality, *ipse dixit*.

Likewise, USPS raises spurious and unsubstantiated privileges, in this case a vague,

¹The USPS Objection refers only to CRPA/USPS-T-32-8. However in the written April 6 responses to CRPA's March 23 interrogatories directed to Witness Mayes, for the first time, USPS indicated an objection to 10(c). The substance of this interrogatory is similar to, although not identical to T-32-8. See, App. A, *infra*. During efforts by CRPA counsel to resolve in whole or in part the objection by discussion with USPS counsel immediately after the objection to interrogatory T-32-8, no mention by USPS about T-10(c) was made, nor has USPS responded to CRPA's efforts to resolve these issues in part or in whole without filing a Motion to Compel.

communication- with- Congress privilege, and USPS' old standby, "burdensome". No USPS substantiation of burden or time to comply was made in the Objection, which Commission Rules 26 and 27(c) require. This worn-out and fallacious tactic must be rejected so that a complete response is compelled prior to Witness Mayes' appearance.

I. THE INFORMATION AND DOCUMENTS SOUGHT ARE RELEVANT AND MATERIAL TO THE ISSUES BEFORE THE COMMISSION IN R2000-1.

The interrogatory and request for production of documents to which USPS filed a responsive Objection is CRPA/USPS-T-32-8, which asked:

"Produce all reports, testimony, briefing papers, memoranda or correspondence (including fax or e-mail) that USPS has sent to or received from members of Congress, Congressional staff, USPS government affairs staff, representatives of trade, industry, professional or lobbying groups since January 1, 1999 regarding "legislative amendments to the RFRA" to which you refer on p. 12 of your testimony. If such documentation does not exist, please identify all individuals who do not work for USPS along with their organizational affiliation [sic], who have conversed and/or met with USPS headquarters personnel since January, 1999, particularly in government affairs, pricing and marketing divisions, about this particular amendment to RFRA."

CRPA/USPS-T32-10 (c) asked:

"Has USPS, or to the knowledge of USPS any other party , provided any member of Congress or any Congressional staff employee with legislative language to effect the reclassification of Periodicals Mail, either as separate legislation or as an amendment to H.R. 22 or any other bill that has been or is before the 106th Congress? If your answer is affirmative, please provide all drafts of such legislation."

Despite its claim that lobbying in this instance is irrelevant to R2000-1, USPS expresses an unequivocal desire to lobby for RFRA amendments: "It is my [Witness Mayes] understanding that the Postal Service endeavors to pursue the proposed RFRA amendment by whatever means will most likely assure its enactment into law. It would

be pure speculation to try to predict which vehicle will best accomplish that objective.” The testimonies of both Witnesses Mayes and Taufique are replete with references to inchoate Congressional action to merge Regular, Nonprofit and Classroom Periodical subclasses into one Out-of-County Subclass, for which joint attributable costs would be calculated, and a unitary cost coverage determined. Rate anomalies are the primary, although not the only reasons cited for the elimination of long-standing classifications established by Congress early in the century and re-affirmed as recently as 1993. See, e.g., USPS-T-32, at 12; USPS-T-38, 2-4, 15-16.

Witness Mayes again analyzes Congressional intent when she states that in “some instances” (not quantified), “application of the RFRA resulted in rates and relationships which, while conforming to the specifications of the RFRA, appeared to contravene the intentions of Congress in establishing the preferred subclasses.” USPS-T-32, at 12. USPS’ own testimony shows that the determination of Congressional policy and efforts to influence Congress are relevant and material to the issue of change to the law and to the Domestic Mail Classification Schedule, as proposed herein by USPS.

Witness Mayes however puts the cart before the horse when she states, *id.*, that legislative amendments, “which the Postal Service expects will be enacted” ought to cause the Commission, possibly prior to any change in current law, to “address these circumstances.” *Id.*

Witness Mayes claims that USPS will not be a passive legislative observer when RFRA legislation is either introduced or circulated: "The statement [that USPS expects changes in current law, USPS-T32, at 12] is not based on information received by the Postal Service. It reports the intention of the Postal Service to work diligently to assist in the introduction, passage and enactment of legislation amending the RFRA."

Response of Postal Service Witness Mayes to CRPA/USPS-T-32-9, filed April 6, 2000.

Based on expectation, not fact, Witness Mayes calculated a unitary cost coverage for "Out-of-County" Periodicals, which applies to Regular, Classroom and Nonprofit alike, which, in the absence of new legislation would be illegal. The Presiding Officer quite naturally wondered if parallel (contingent?) rate schedules based on current classifications might be useful to have, in case Congress might not act as USPS (and perhaps others) would wish. See, Response of United States Postal Service Taufique To Presiding Officer's Information Request Number 2, question 1. Rate schedules for separate nonprofit and regular subclasses in the test year were then provided by Witness Taufique in response to that Presiding Officer's Information Request.²

The current option for nonprofit periodicals to pay regular rates when the comparable nonprofit postage is higher was established by the Commission in its Opinion and

²Puzzlingly, when asked (NNA/USPS-T-38-4a), what the passthroughs would be for cost savings in separate, test year nonprofit or preferred subclass(es), Witness Taufique responded that he had not determined appropriate passthroughs for a separate nonprofit subclass, and he did not provide the information requested. Nevertheless, he did provide a separate rate schedule for nonprofit periodicals in response to the Presiding Officer's Information Request, *supra*. That calculation has to assume some percentages of passthroughs.

Recommended Decision in Docket MC99-3. The Commission recognized that there that this freedom of choice solution was temporary. It recommended no specific long-term solution to the crossover into regular rates of some, but certainly not all, if not most, nonprofit journals.³ The Commission expected the Postal Service and affected mailers to “work together to address the anomaly’s underlying causes in an effort to develop a long range solution prior to the next omnibus rate proceeding.” *Id.*, at 9. Thus the development of the proposal in this case either was the result of collaborative effort, or the Postal Service has ignored the Commission’s understanding.

Although USPS witnesses rely on future and unpredictable Congressional action, USPS states, that “It is immaterial to the issues in Docket No. R2000-1 what may have been said or what may yet be said among representatives from the Postal Service, the various nonprofit mailers, and the Congress concerning legislation the Postal Service *anticipates* will be introduced and enacted.” Objection at 2, [Emphasis added].

Yet Witness Taufique cites the classification criteria of 39 U.S.C. sec. 3623(c) to justify a new subclass in his testimony, USPS-T-38 at 15-16. He, like Witness Mayes, expresses an expectation that the law will be changed and hastens to propose significant and historic change to the mail classification schedule before legislation is

³Indeed, the Commission noticed that in MC99-3, that Witness Taufique who was a witness in that case, projected that the proposal “will have minimum impact on Postal Service costs and the allocation of costs to subclasses.” Op. and Rec. Dec. at 7.

introduced, let alone enacted. Information about the input by public groups and interests, as well as the legislative policy of USPS is part and parcel of the legislative process. It is USPS, not CRPA, which has tied Congressional action to DMCS revision which will affect thousands of nonprofit organizations and the readers of their periodicals.⁴ USPS should not be permitted to hinder discovery by a hypocritical “relevance” objection.

Not only did CRPA ask for the content of USPS communications about RFRA, but CRPA/USPS-T-8(b) asked for an “identification” of private sector and other non-USPS individuals who communicated with USPS about the RFRA legislation, within a specified time limit, i.e., since January 1999. This request for a list, regardless of what anyone said or wrote, was also deemed, without explanation, an irrelevant request by USPS. USPS merely asserts that “A list of names of persons who have contacted the Postal Service regarding RFRA reform could not *possibly* [emphasis added] be relevant to or improve the Commission’s understanding of *any* issue in this proceeding.” [Emphasis supplied]. USPS seems somewhat presumptuous about what the Commission can and cannot understand. In any event none of this hysteria shows why the information sought by CRPA is either irrelevant or would not result in the discovery of evidence reasonably calculated to lead to admissible evidence during a noticed proceeding. Rule 25(a) of the

⁴There would not be separate nonprofit and classroom subclasses if Congress had not established in 1917, and, in the 1993 RFRA legislation, re-affirmed, the distinction between these subclasses and the regular subclass. Precipitate action by USPS and by the Commission prior to further Congressional action, if any, would be unwarranted by the long legislative history of separate nonprofit periodical classifications.

Commission Rules of Procedure. This legitimate request for production of documents would enable CRPA, the Commission, and other interested parties' to better understand why the proposed RFRA amendment which is a predicate to the requested classification change, is desirable.⁵ It seems that the Presiding Officer too is aware, by issuance of question no. 1 of Information Request No. 2, that the enactment of RFRA legislation is not a "sure thing".⁶ It is reasonable to request clarification of why classification merger of Periodical subclasses is proposed, especially when it is dependent on the uncertainty of Congressional action. USPS could have resolved the long-standing questions about increasing periodical costs instead, and thereby avoided the option of classification merger, as so-called "rate anomalies" would no longer exist.⁷

II. THERE IS NO "CONGRESSIONAL" PRIVILEGE WHICH ALLOWS USPS TO AVOID DISCOVERY

The Postal Service has invented a non-existent privilege to justify withholding of the information requested by CRPA/USPS-T-32-8. According to the Objection, at 2, communications between USPS and various nonprofit mailers and Congress are

⁵USPS' presumption that some mailers go, or can afford to go, to a Postal Forum to have exchanges with USPS, and that further inquiries about interchanges with mailing groups are therefore irrelevant, deserves little comment and should be accorded no weight. See, USPS Objection, at 1, n.1.

⁶See also, Order Requesting the Submission of Evidence on Periodicals Processing Costs, March 28, 2000.

⁷Witness Taufique, in response to ANM/USPS-T38-2, stated that the separate rate schedules he provided in response to Presiding Officer's Information Request No. 2 "do not constitute an alternative proposal of the Postal Service". Thus if the legislation never becomes law, USPS has no alternative plan in reserve. This could cause uncertainty and confusion among nonprofit and regular mailers, whose postage projections are based on the unified schedule set forth by Witnesses Mayes and Taufique. See also, CRPA/USPS-T-32-5 (e).

“privileged”. The burden of assertion of a privilege is on USPS to show that a “Congressional deliberation” privilege or “legislative” privilege actually exists. *Bank Line, Ltd. v. United States*, 163 F.2d 133, 138 (2 Cir. 1947). This is not a case of commercially sensitive information where 39 U.S.C. 410 might apply. There is no assertion here of national security discussions between USPS and the Congress which might justify the withholding of information about agency discussions with Congress. See, *Dow Jones & Co. Inc. v. Department of Justice*, 724 F. Supp. 985 (D.D.C 1989).

USPS grasps for an inapplicable First Amendment-type argument when it conjures a new “chilling effect” doctrine that would allow it to withhold relevant information because the “routine, candid exchanges which occur during the delicate process of legislative drafting” would be hindered by disclosure of the identity of parties, if any, who may have discussed RFRA reform with USPS prior to the filing of this case. (At least USPS admits “candid exchanges” exist!). It is possible, even likely, that such “exchanges” may have been with interveners in this case. If so, the disclosure of this information could allow and expedite further discovery to those parties. Discussions by an agency with outside lobbyists and advocates are subject to disclosure. *Center for Auto Safety v. Department of Justice*, 576 F. Supp. 739 (D.D.C. 1983).

III. THE USPS EMBRACE OF ITS OLD FRIEND “BURDENSOME” IS PREDICTABLE BUT FUTILE

Finally, USPS pulls out of its bag of old tricks the well-worn “burdensome” privilege.

Objection at 3. In other words, the Postal Service complains that searching headquarters for anyone who may have discussed RFRA reform in the last year (not five or ten years) is “burdensome”. USPS cannot seem to calculate, before raising its Objection, how many responsible people actually work in Government Relations at USPS, or in positions at the Marketing or Pricing components, who might have this information or know who might have this information. CRPA believes that by requesting these data from the relevant divisions, the burden of an organization-wide search is avoided. Is USPS claiming that the public can’t call headquarters and find out what USPS is doing about major legislation, or who at USPS works on which aspect of legislative policy? CRPA doubts that.⁸

CRPA has a suggestion to avoid the putative burden: ask the Government Relations Office to open its file cabinet and/or computer files and look under “RFRA”. It is just a suggestion, but the heavy burden claimed might well be lifted from the shoulders of the Postal Service.

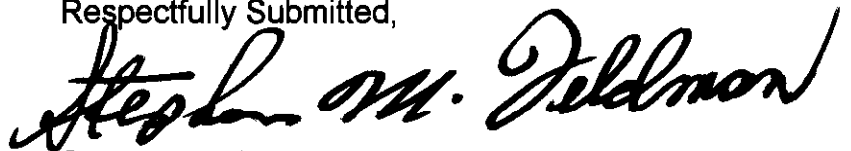
Needless to say, the Commission’s rules prohibit use of the “burdensome” privilege without documentation of *why* a request for information would cause the burden. Rules

⁸For example, just about everyone in a high USPS executive position who interacts with the public, including the Postmaster General, seems to express an opinion, usually positive, on the need for “postal reform”, a long-time legislative issue. Why is disclosure of USPS opinion on postal reform and disclosure of who its advocates are, public information, whereas disclosure about activities related to RFRA amendments is not?

26 and 27 (c). This required substantiation has not been supplied. The request is not for complex computer files or sophisticated interpretations of data, which often arise in rate cases. The CRPA request is simple: who, in a relatively small universe of people, knew what, when and to whom did they talk ?

Whereas, CRPA' Motion to Compel should be granted and Witness Mayes should be compelled to answer CRPA/USPS-T-32-8 and 10(c).

Respectfully Submitted,

A handwritten signature in black ink that reads "Stephen M. Feldman". The signature is written in a cursive, flowing style.

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April 11, 2000

Appendix A

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

RECEIVED
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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

POSTAL RATE AND FEE CHANGES, 2000

Docket No. R2000-1

OBJECTION OF THE UNITED STATES POSTAL SERVICE
TO CRPA INTERROGATORY T32-8
(April 3, 2000)

The United States Postal Service hereby files this objection to the following interrogatory directed by Coalition of Religious Press Associations to witness Mayes: CRPA/USPS-T32-8, filed on March 23, 2000.

The interrogatory asks witness Mayes to disclose copies of all documents exchanged between the Postal Service and any other party since January 1, 1999, regarding "legislative amendments to the RFRA." Alternatively, the interrogatory requests a list of the names and affiliations of all persons "who have conversed and/or met with USPS headquarters personnel since January, 1999, particularly in government affairs, pricing and marketing divisions, about this particular proposed amendment to RFRA."

The Postal Service interprets the interrogatory as pertaining to RFRA reform referenced by witness Mayes at USPS-T-32, pages 12-13. The Postal Service (and, undoubtedly, CRPA and others) have been in communication with Congressional Representatives and staff members, to express their views concerning the need for such legislation and what its content should be.¹

The only issues concerning RFRA reform which are material to the Postal Service's Docket No. R2000-1 request are (1) the Postal Service's view of what such

¹ And with a National Postal Forum having just concluded, it can be presumed that the Postal Service has exchanged ideas with interested members of the mailing community about such legislation.

Appendix A

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reform should accomplish for purposes of Docket No. R2000-1 and (2) the actual legislative language that is formally introduced by a member of Congress for the purpose of accomplishing such RFRA reform. The first of these is known; it is reflected in the testimony of witness Mayes. The second of these cannot be known until such time as a member of Congress either (a) publicly discloses draft legislation that he or she plans to sponsor or (b) formally introduces a bill for consideration of RFRA reform.

The nonprofit mailing community's diverse interests may well mean that different members of that community have different views concerning the content of the legislation that Congress should pass. It apparently also means that some of them want to be privy to others' communications with the Postal Service and Congressional representatives concerning RFRA reform. Nevertheless, the Postal Service considers it inappropriate for parties to use the discovery process in Commission proceedings for the purpose of pursuing their legislative interests and concerns. Accordingly, the Postal Service objects to CRPA/USPS-T32-8.

It is immaterial to the issues in Docket No. R2000-1 what may have been said or what may yet be said among representatives from the Postal Service, the various nonprofit mailers, and the Congress concerning legislation the Postal Service anticipates will be introduced and enacted. The Postal Service also considers such communications privileged. Public disclosure of all communications among the aforementioned parties pertaining to draft legislation would "chill" such communications and only hinder the routine, candid exchanges which occur during the delicate process of legislative drafting. The opportunity for all parties interested in RFRA reform to express and exchange views is anticipated to continue as part of the normal legislative process. It is not uncommon for that process to include an opportunity for the formal, public presentation and exchange of the views of all interested parties. However, Docket No. R2000-1 is not a forum for that exchange.

Appendix A

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The Postal Service objects to the second part of the interrogatory as well. It, too, is not calculated to lead to the production of admissible evidence. A list of names of persons who have contacted the Postal Service regarding RFRA reform could not possibly be relevant to or improve the Commission's understanding of any issue in this proceeding. Moreover, it would be unduly burdensome for the Postal Service to interview employees in Government Relations and Marketing (which includes Pricing) and to require a search of their files for the purpose of compiling a list of the names and affiliations of any persons to whom any of them have spoken in the last 15 months concerning RFRA reform.

As with disclosure of the views of various parties concerning possible RFRA reform legislative language, disclosure of the names and affiliations of interested parties would add nothing of substance that would be relevant to the issues in this proceeding. CRPA is free to pursue its legislative agenda. It should not, however, be permitted to use the postal ratemaking discovery process for those purposes.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

Daniel J. Foucheaux, Jr.
Chief Counsel, Ratemaking



Michael T. Tidwell

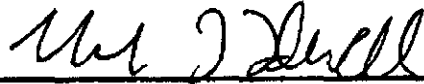
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April 3, 2000

Appendix A

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all participants of record in this proceeding in accordance with section 12 of the Rules of Practice.



Michael T. Tidwell

April 3, 2000

Appendix A

RESPONSE OF POSTAL SERVICE WITNESS MAYES TO CRPA INTERROGATORIES

CRPA/USPS-T32-10

(a) According to an article on p.2 of the *Business Mailers Review*, March 20, 2000, Chairman McHugh of the House Postal Service Subcommittee prefers that the kind of amendment to RFRA, which you discuss and support, be part of H.R. 22, the omnibus postal reform bill. Since H.R. 22 has been under consideration for three years, and has yet to be voted on by the full House, and has never been formally considered by the Senate at all, would USPS want to link a major classification change like the elimination of Nonprofit and Classroom Periodical mail to this controversial and uncertain-to-pass legislation?

(b) Is the above-referenced article inaccurate? If so, what are the inaccuracies?

(c) Has USPS, or to the knowledge of USPS any other party, provided any member of Congress or any Congressional staff employee with legislative language to effect the reclassification of Periodicals Mail, either as separate legislation or as an amendment to H.R. 22 or any other bill that has been or is before the 106th Congress? If your answer is affirmative, please provide all drafts of such legislation.

Response:

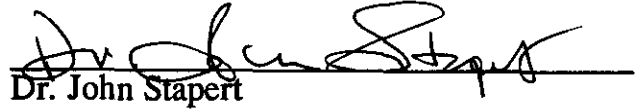
(a) It is my understanding that the Postal Service endeavors to pursue the proposed RFRA amendment by whatever means will most likely assure its enactment into law. It would be pure speculation to try to predict which vehicle will best accomplish that objective.

(b) Without the ability to review all of the information to which *Business Mailers Review* had access, or the opportunity to judge how that information was interpreted, or access to the editorial processes employed at *Business Mailers Review*, I am not able to judge the accuracy of the article.

(c) An objection to this interrogatory was filed on April 3, 2000.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding in accordance with Section 12 of the Rules of Practice.


Dr. John Stapert

APRIL 11,
~~March 22~~, 2000