

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

**UNITED STATES POSTAL SERVICE OBJECTION TO INTERROGATORY OF
NEWSPAPER ASSOCIATION OF AMERICA (NAA/USPS-11)**

On March 23, 2000, Newspaper Association of America (hereinafter "NAA") filed interrogatories NAA/USPS-1-10. The Postal Service objected to subparts (a) and (d) of interrogatory 1. Subpart (a) asked whether the United States Postal Service still uses the 1998 Marketing Plans, prepared in October 1997. Subpart (d) asked whether the Postal Service has produced a more recent marketing plan comparable to the one prepared in October 1997. On April 27, in P.O. Ruling No. R2000-1/53, the Presiding Officer granted NAA's Motion to Compel a response by the Postal Service to these subparts. On May 4, the Postal Service provided a timely response to NAA/USPS-1(a) and (d). On May 31, twenty-seven days after the filing of Postal Service's response, NAA filed interrogatory NAA/USPS-11, requesting production of "a more recent marketing plan" than the Postal Service's 1998 Marketing Plan. The Postal Service objects to Interrogatory 11 on the grounds of timeliness, commercial sensitivity, deliberative process privilege, overbreadth, relevance, and burden.

Timeliness

The Postal Service objects to interrogatory 11 on the grounds that it is untimely filed under Rule 26(a) of the Commission's Rules of Practice and Procedure. Rule 26(a) explicitly provides that "[f]ollow-up interrogatories to

clarify or elaborate on the answer to an earlier discovery request . . . *must be served within seven days* of receipt of the answer to the previous interrogatory *unless extraordinary circumstances* are shown.” (emphasis added). Thus, under Rule 26(a), NAA’s opportunity to pose Interrogatory 11 expired seven days after receipt of the Postal Service’s compelled response filed on Thursday, May 4. Under ordinary circumstances, NAA should have received the compelled response on or about Friday, May 5, thereby making follow-up discovery due on or about May 12. NAA, however, filed interrogatory 11 more than three weeks after the anticipated date of receipt of the compelled response to interrogatory 1(a) & (d). NAA did not accompany its discovery request with a request for leave to file its discovery request out of time. In view of NAA’s failure to take preemptive action to explain why its interrogatory is late, there is no credible basis to believe that there are any “extraordinary circumstances” that could possibly warrant the late filing of its follow-up discovery request. In essence, interrogatory 11 constitutes late-filed discovery under Rule 25(a) of the Commission’s Rules of Practice and Procedure, and the Presiding Officer has made clear that such discovery is impermissible. See P.O. Ruling No. R2000-1/72 at 13-14.

Furthermore, it would be highly prejudicial to the Postal Service to permit this late-filed discovery request, particularly since it was strategically filed after the filing of the participants’ cases-in-chief. It is too late for the document to become incorporated into the evidentiary presentations of the participants’ cases-in-chief, and, as such, participants will not be able to file rebuttal testimony in relation to

the document. As a consequence, the other participants, including the Postal Service, have been deprived of the opportunity to rebut any participant's use of information in the document during the rebuttal stage of this proceeding.

Moreover, the filing of unauthorized discovery at this stage of the proceeding unfairly diverts the Postal Service's precious resources from conducting discovery on the cases-in-chief of the other participants, much to the Postal Service's detriment.

Commercial Sensitivity

The Postal Service also objects to Interrogatory 11 on the basis of commercial sensitivity. The document responsive to the discovery request consists of a 1999-2000 United States Postal Service Business Channels Plans (hereinafter "Marketing Plan"). The requested document contains proprietary and sensitive commercial information, and its disclosure would result in commercial harm to the Postal Service.

The contents of the Marketing Plan are clearly sensitive. The document outlines the vision, strategic goals and initiative-specific objectives of each of the Postal Service's business sectors (Correspondence and Transactions, Publications, Ad Mail, Expedited and Package Services, International, Stamp Services, Special Services, Specialty Markets), and business channels (Retail, Business Mail Entry, Call Centers, and Internet).

The document is lengthy, and a complete discussion of its contents would be quite consuming; however, review of a representative section of the document clearly reveals its sensitive nature. For example, the AdMail section contains

the Postal Service's market analysis, as well as subordinates' interpretation of market data and recommendations pertaining to Standard Mail (A), including (i) overall advertising industry trends, including cost and budgetary changes, acquisitions, growth of internet as a media, annual changes in total advertising expenditures, by media and between local and national levels; (ii) market changes in alternative media; (iii) market changes in AdMail, such as forecasted market share, volume, revenue, and contribution on advertising industry-wide and segmented levels; (iv) comparative advantages and specific advertising needs of customers in each industry segment; (v) overall strengths, weaknesses, opportunities and threats to the Postal Service; (vi) recommendations based on overall advertising industry trends; (vii) sectoral analysis, and (viii) analysis of Postal Service's performance. As is evident from the above representative listing, the document contains commercially valuable, proprietary data and competitive information. Disclosure of the document would not only reveal the extent of the Postal Service's market knowledge, but also impair the Postal Service's ability to launch new product initiatives, product improvements, and promotional programs without being out-manuevered by competitors.

Deliberative Process Privilege

The Postal Service also objects to Interrogatory 11 because the Marketing Plan is predecisional and subject to the deliberative process privilege.

Disclosure of this document would not only allow competitors to enjoy the fruits of the Postal Service's labor, but also expose the very heart of the Postal Service's decision-making approach to product development and postal policy.

The Commission has long accorded such information protection under the deliberative process privilege. As the Presiding Officer noted in Docket No. R97-1, the deliberative process privilege safeguards predecisional deliberations, thereby encouraging intra-agency candor and enabling agency decision-makers to fully consider all relevant legal and policy issues without fear of "premature disclosure." P.O. Ruling R97-1/60 at 3. Presiding Officer's Ruling No. R97-1/60 recognized that "[m]anifestly, the ultimate purpose of this long-recognized privilege is to *prevent injury to the quality of agency decisions.*" *Id.* (quoting *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975) (citing *Mapother v. Department of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993); *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)) (emphasis added).

By its very nature, the Marketing Plan is predecisional, as it is intended to inform future marketing and policy decisions of Postal Service managers. The Marketing Plan encompasses the preliminary analysis and recommendations of the Postal Service's staff as to the marketing of products and services for the years 1999 and 2000. Disclosure of the Marketing Plan would harm the decision-making process within the Postal Service by impeding the ability of marketing analysts to make specific recommendations to senior management and substantiate these recommendations with analysis of relevant marketing data. It would also chill the exchange of ideas by discouraging subordinates from candidly exposing vulnerabilities and recommending action.

On prior occasions, the Commission has sometimes undertaken to protect documents subject to the deliberative process privilege by authorizing the filing of the factual information contained in such documents under protective conditions, and permitting redaction of opinions, recommendations, and prospective analyses contained in the documents. Specifically, in Docket No. R97-1 as well as this proceeding, the Commission permitted the filing of SAI reports on the alternative delivery industry under certain protective conditions, with the redaction of opinions, recommendations, and prospective analyses. See P.O. Ruling Nos. R97-1/46; -1/52; 1/60; see also P.O. Ruling No. R2000-1/21. With respect to the Marketing Report at issue here, however, disclosure of the factual material contained therein will necessarily reveal a conveniently assembled set of facts that decisionmakers will use in order to make informed decisions on postal policy and product development, thereby disclosing the thought process that the privilege is designed to protect. Thus, the Postal Service submits that disclosure of only the factual portions of the document would not provide sufficient protection here.

First, the very selection of this factual matter, the distilling of data out of other sources, constitutes an exercise of agency judgment. As several circuits have noted, when the "facts themselves reflect the agency's deliberative process," such material should be withheld. *Skelton v. U.S. Postal Serv.*, 678 F.2d 35, 38-39 (5th Cir. 1992); see also *Mapother*, 3 F.3d at 1539. While the fact/opinion distinction "offers a quick, clear, and predictable rule of decision, . . . courts must be careful not to become victims of their own semantics." *Mead*

Data Cent. Inc. v. U.S. Dep't of Air Force, 566 F.2d 242, 256 (D.C. Cir. 1977).

Rather, the requested information should be examined "in light of the policies and goals that underlie the deliberative process privilege." *Wolfe v. U.S. Department of Health and Human Services*, 839 F.2d 768, 774 (D.C. Cir. 1988). Material that at first glance appears factual is nonetheless protected under the deliberative process privilege if it reveals the "mental processes of decisionmakers." *National Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d 1114, 1119 (9th Cir. 1988) (citing *Montrose Chemical*, 491 F.2d 63, 67-68 (D.C. Cir. 1974)). In creating a factual summary, such as a table representing changes in market share within a particular market, Postal Service analysts exercise discretion in culling out significant facts. Such a summary "is part of the deliberative process," disclosure of which would expose the heart of the decisionmaking processes within the Postal Service. *Cf. Montrose Chem. Corp.*, 491 F. at 66.

Second, this factual matter is so inextricably intertwined with analysis and recommendations that disclosure of such matter would inevitably reveal the deliberative process inherent in the marketing decisions of the Postal Service. As noted by the Court of Appeals for the D.C. Circuit, even factual portions of documents "are protected from disclosure as not being purely factual if . . . the facts are 'inextricably intertwined' with the policy-making process." *Ryan v. Department of Justice*, 617 F.2d 781, 790 (D.C. Cir. 1980) (quoting *Soucie v. David*, 448 F.2d 1067, 1078 (D.C. Cir. 1971)) (footnotes omitted). Mere inclusion of numbers or statistical figures in a portion of a document, such as a table, does not necessarily render that material "purely factual" and therefore subject to

disclosure. See *Jowett v. Dept. of the Navy*, 729 F. Supp. 871, 877 (D.D.C. 1989) (holding quantitative analysis contained in an audit report “inextricably intertwined” with the Navy’s deliberative process). The analysis of conditions and trends in the advertising market contained in the Postal Service’s Marketing Report are not “purely factual” material. Rather, these analytical figures are inextricably connected with market forecasts and recommendations for future marketing policy decisions. Accordingly, any factual material contained therein must be protected from any form of disclosure under the deliberative process privilege.

Overbreadth

The Postal Service furthermore objects to Interrogatory 11 on the grounds of overbreadth. NAA has failed to specifically limit its request to the portions of the case that relate to its particular subject matter interest. Indeed, in Docket No. R97-1, NAA’s use of the 1997 Marketing Plan, which it had acquired through unknown channels, was largely confined to a few excerpts on competition related to Standard Mail (A) which, incidentally, were taken out of context during oral cross-examination and on brief. Using past experience as a guide, NAA should know full well that the 1997 Marketing Plan, which it introduced as a library reference in Docket No. R97-1, contains a great deal of information on a broad array of topics, most of which are of absolutely no interest to NAA whatsoever. Furthermore, even if the ADMail section is at the heart of NAA’s request, it has in

no way attempted to limit the scope of its request to the subject matter within that section that it believes is relevant to its case.¹

Relevance

On a more general level, Interrogatory 11 requests documentation that is not reasonably calculated to lead to admissible evidence. With the possible exception of any portion of the AdMail section addressing competition in the Standard Mail (A) market, NAA should have no interest in the remainder of the document, which delves into a multitude of topics unrelated to the issues in this proceeding. Furthermore, as it does not necessarily serve as a factual foundation for the Postal Service's rate case, consideration of this document would only detract from the central issue of this proceeding; that is, the Postal Service's evidentiary support for the proposed rates submitted in this proceeding.

Burden

The Postal Service also objects to Interrogatory 11 on the grounds of burden. It would be unduly burdensome to review the requested document for redactions, such as those necessary to protect commercial sensitivity and deliberative process privilege. The document, which is 201 pages in length, consists of sensitive material on a variety of topics. Putting aside, for purposes of argument, the Postal Service's argument that the entirety of the document is privileged, if a ruling were issued requiring production of factual information in the report, the Postal Service estimates that it would consume approximately 75 to

¹ Even if NAA succeeded in narrowing its request, however, given the document's commercially sensitive and predecisional nature, NAA would not be entitled to any portion of it.

100 person-hours to review the document to determine which types of information should be redacted. In addition to the time spent by the reviewer performing the redactions, this figure includes time spent by managers to advise on the sensitivity of the information included in the report. This would be unduly burdensome, particularly given the immateriality of the requested information.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

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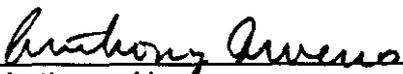
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CERTIFICATE OF SERVICE

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.



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