

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

**NEWSPAPER ASSOCIATION OF AMERICA
MOTION TO COMPEL THE UNITED STATES POSTAL SERVICE
TO RESPOND TO INTERROGATORY NAA/USPS-11
June 19, 2000**

Pursuant to sections 26(d) and 27(d) of the Commission's rules of practice, the Newspaper Association of America ("NAA") respectfully moves to compel the United States Postal Service to respond to interrogatory NAA/USPS-11.

The interrogatory in dispute seeks the production of the Postal Service's current Marketing Plan document identified in the Service's compelled response to interrogatory NAA/USPS-1(d). In that compelled response, the Postal Service acknowledged that "a more recent marketing plan" exists. On May 31, 2000, NAA filed an interrogatory (NAA/USPS-11), seeking to obtain the document. On June 12, 2000, USPS objected on the grounds of timeliness, commercial sensitivity, deliberative process privilege, overbreadth, relevance and burden. Each of these grounds, however, are wholly without merit .

The Presiding Officer has already ruled that the requested information is reasonably calculated to lead to the discovery of admissible evidence. On April 27, 2000, in granting NAA's Motion to Compel, he ruled:

The potential relevance of this information is evident. . . . Section 3622(b)(4) mandates that the Commission consider the effect of

proposed rates upon the general public, business mail users and competitive entities. The marketing plans were clearly informative about such Postal Service's considerations in its proposal to reduce the Standard (A) ECR pound rate in Docket No. R97-1, and that proposal again is on the table in this docket.

The Postal Service's objection, perhaps inadvertently, concedes the relevance of this information. For example, the Postal Service concedes that the Ad Mail section contains the Postal Service's market analysis, interpretations of market data and recommendations pertaining to Standard Mail (A), including market changes in Ad Mail and overall strengths, weakness and threats to the Postal Service. Such information is highly relevant, and as stated earlier, the Commission has previously agreed that this information is relevant. Indeed, one wonders why such plainly relevant information was not made part of the Postal Service's direct case.¹

The Postal Service's other objections are similarly meritless. First, the Postal Service incorrectly asserts that NAA/USPS-11 was untimely filed. On the contrary, the procedural schedule in this proceeding explicitly provides for discovery on the Postal Service through July 31, 2000.² The Postal Service bases its objection on an excerpted quotation for Commission rule of practice 26(a), which states that "follow-up interrogatories to clarify or elaborate on the answer to an earlier discovery request . . . must be served within seven days of the receipt of the answer to the previous

¹ The Postal Service has gone to great lengths to avoid any reference to competitive intents in this proceeding, going so far as to sponsor testimony by pricing and rate design witnesses who never examined relevant market materials. This is aptly summarized in the testimony of AAPS witness White.

² See Presiding Officer's Ruling No. 2000-1/71, Attachment A.

interrogatory.” However, the Postal Service has chosen to omit from this quote the language that explicitly provides that this provision applies only to follow-up interrogatories “filed after the initial discovery period ends.” As the initial discovery period has not expired, the provision of Rule 26(a) relied upon by USPS does not apply.

The Postal Service also argues that allowing this discovery request now would be prejudicial because it was filed after the participants’ case-in-chief. This argument must fail. NAA’s motion to compel was properly filed within the established discovery timeframe. To disallow NAA’s discovery request on the grounds it would be prejudicial is tantamount to shortening the discovery process because *all* discovery requests filed after the end of the participants’ case-in chief could be attacked on this ground. Moreover, the Postal Service’s incorrectly assumes that evidence enters the record only through testimony: the Commission’s rules of practice provide for a number of means by which relevant evidence may be entered into evidence, including Requests for Admission and the designation of institutional interrogatory responses.

Second, USPS objects on the basis of commercial sensitivity. The Postal Service’s argument repeats its prior – and previously rejected – assertion of commercial sensitivity. In granting NAA’s previous motion to compel, the Presiding Officer ruled:

[T]here is ample Commission precedent to indicate that the mere fact that a document may contain sensitive business information does not of itself preclude the production in a proceeding, although it may be subject to protective conditions. Rather, the nature of the information and its manner of use (i.e., as part of a deliberative process, as with the SAI study cited by the Postal Service) must be considered on a case-by-case basis.

Given the Commission has already found the USPS marketing plan to be relevant to the current proceeding, it should be made available to NAA.

Third, the Postal Service claims the marketing plan is subject to deliberative process privilege. It is striking that the Service does not consider the effect of its withholding of the material on the Commission's decisional processes. The "predecisional deliberation" privilege, if it applies at all, plainly does not apply when the Postal Service has already proposed rates that are under active consideration in a Commission proceeding. Indeed, the very act of asserting a "predecisional privilege" implicitly concedes that information in the Marketing Plans may have influenced – and thus are highly relevant to – the rate proposals in this proceeding even if the Postal Service has strategically withheld such materials from its witnesses. Moreover, even if privilege were to apply in the instant case, it has already been overruled: "precedent supports limited disclosure of marketing plans and competitive information on the basis of privilege."³

Fourth, the Postal Service also objects on the grounds of overbreadth, claiming that NAA has not "limit[ed] its request to the portions of the case that relate to its particular subject matter interest." This is preposterous -- NAA cannot be logically expected to target its request for information when it has never viewed the document. The Postal Service's objection admits that the document contains a section on "Ad Mail" which on its face may contain information relevant to the proposed reduction in the Standard A ECR pound rate. However, other sections may be relevant to the proper

³ See *Presiding Officer's Ruling Granting the Newspaper Association of America's Motion to Compel Responses To Interrogatory NAA/USPS-1(a) and (d)*, April 27, 2000, at 3.

institutional cost contribution of First Class Mail, Periodicals rates, and other issues in the case.

Fifth, the Postal Service objects that it would create an unfair burden to review the document for the relevant redactions and estimates that it would take between 75 and 200 persons-hours to complete the task. A review of the version of the 1997 Marketing Plans makes this estimate hard to credit. In any event, the Postal Service need not redact the document; no redaction occurred to the 1997 Marketing Plans and the Postal Service has flourished since.

For all these reasons, the Presiding Officer should compel the Postal Service to respond to interrogatories NAA/USPS-1(a) and (d).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served the instant document on all participants of record in this proceeding in accordance with section 12 of the Rules of Practice.

June 19, 2000



William B. Baker