

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 ANSWER IN OPPOSITION TO MOTION  
OF NEWSPAPER ASSOCIATION OF AMERICA TO COMPEL PRODUCTION  
OF DOCUMENTS REQUESTED IN INTERROGATORY NAA/USPS-11**

On May 4, the Postal Service filed a timely response to subparts (a) and (d) to interrogatory NAA/USPS-1, in compliance with P.O. Ruling No. R2000-1/53. On May 31, twenty-seven days after the filing of Postal Service's response, NAA filed interrogatory interrogatory NAA/USPS-11, requesting production of "a more recent marketing plan" than the Postal Service's 1998 Marketing Plan. On June 12, the Postal Service filed a timely objection to Interrogatory 11 on the grounds of timeliness, commercial sensitivity, deliberative process privilege, overbreadth, relevance, and burden (hereinafter "Objection"). On June 19, NAA filed its Motion to Compel the United States Postal Service to Respond to Interrogatory NAA/USPS-11 (hereinafter "Motion").<sup>1</sup> The Postal Service opposes this Motion on the same bases stated in the Objection to this discovery request, namely: timeliness, commercial sensitivity, deliberative process privilege, overbreadth, relevance, and burden. NAA's Motion should be denied because NAA has manifestly failed to overcome any of the Postal Service's grounds for

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<sup>1</sup> NAA neglected to attach the text of the discovery request to its Motion, as required by Rules 26(d) and 27(d). As a courtesy to the Commission, the Postal Service has undertaken to provide a copy of the discovery request as an attachment to this pleading.

objection to the production of the 1999-2000 United States Postal Service Business and Channels Plans (hereinafter "Marketing Plan").

**Timeliness**

In its Motion, NAA insists that its discovery request is timely because it was filed before the discovery period has ended. NAA Motion at 2-3. NAA's argument reveals a complete ignorance of the Procedural Schedule in this docket, not to mention the Commission's Rules of Practice and longstanding Commission precedent. See Rules 25-27 of the Commission's Rules of Practice; Presiding Officer's Ruling Nos. R2000-1/72 at 13-14; R2000-1/68 at 4; R97-1/89; R97-1/85 at 4; MC96-3/21 at 2; R87-1/118 at 2; R87-1/108.

NAA's contention that its discovery request is timely is simply wrong. NAA's discovery request was filed more than two months *after* March 23, which represents the end of the "initial discovery period" as provided by P.O. Ruling No. R2000-1/4. Since NAA's discovery request was filed *after* March 23, NAA is bound by the provision in Rule 26(a) that 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). NAA has failed to satisfy the conditions of this safe harbor. Inexplicably, NAA filed Interrogatory 11 more than *three weeks* after the filing of the compelled response to interrogatories 1(a) & (d). Contrary to Rule 26(a), NAA has failed to document any "extraordinary circumstances" justifying its late

filing. NAA's failure to do so renders the late filing of interrogatory 11 inexcusable.

Furthermore, NAA cannot rely on Rule 25(a) to salvage its late-filed request. Rule 25(a), which is the successor to Special Rule of Practice 2E,<sup>2</sup> provides that “[g]enerally, discovery against a participant will be scheduled to end prior to the receipt into evidence of that participant’s direct case.” This date was set as March 23 under P.O. Ruling No. R2000-1/4. An exception in Rule 25(a), which is identical to former Special Rule 2E, permits participants to request “information (such as operating procedures or data) available only from the Postal Service.” As clearly provided in Rule 25, however, the exception for operating procedures or data is “permissible only for the purpose of the development of *rebuttal testimony* . . . .” Rule 25(a) (emphasis added). The burden of establishing that the purpose of the discovery request is for the development of *rebuttal testimony* rests with the party conducting discovery. In Ruling No. R87-1/118, the Presiding Officer warned parties of their responsibility:

parties seeking to rely on 2.E should be aware that upon Postal Service objection, *it is their burden* to demonstrate how the requested information is to be used in the party’s testimony. . . . Otherwise, it would be possible for Special Rule 2.E to evolve into another round of discovery against the Service.

P.O. Ruling No. R87-1/118 at 2 (emphasis supplied). Here, NAA has not only failed to meet this burden, but its Motion *does not even bother to offer as a pretext* the argument that interrogatory 11 is intended for the purpose of rebutting the testimony of another intervenor. Since NAA has failed to meet its burden, NAA’s opportunity to pose interrogatory 11 has long expired, and its attempt to

conduct discovery at this late stage must be denied, consistent with P.O. Ruling Nos. R2000-1/72 at 13-14 and R2000-1/68 at 4.

Furthermore, as noted in the Objection, it would be unfairly prejudicial to the Postal Service to compel a response to such a belated discovery request. Interrogatory 11 was filed after the filing of the participants' cases-in-chief, notwithstanding the seeming importance of the Marketing Plan to NAA's litigation objectives. The Postal Service and the other participants have been deprived of the opportunity to counter any participant's use of the information in the Marketing Plan during the rebuttal state of the proceeding, since this interrogatory was filed too late for incorporation into the participants' cases-in-chief. NAA should not be permitted to frustrate the Commission's mandate to "conduct its proceedings with the utmost expedition consistent with procedural fairness," 39 U.S.C. § 3624, by burdening the Postal Service with such an unbridled discovery request.

### **Commercial Sensitivity**

NAA fails to overcome the Postal Service's commercial sensitivity ground. NAA's argument rests on the mistaken premise that the Postal Service's commercial sensitivity objection was "previously rejected" by the Presiding Officer in P.O. Ruling No. R2000-1/53. NAA Motion at 3. To the contrary, P.O. Ruling No. R2000-1/53 did not address the Postal Service's commercial sensitivity objection as it relates to the Marketing Plan; rather, the ruling simply addressed the Postal Service's objection to interrogatories NAA/USPS-1(a) and

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<sup>2</sup> Rule 25(a) was adopted in its present form in accordance with Order No. 1284,

(d), neither of which delved into the contents of the Marketing Plan. Indeed, the Ruling explicitly states that considerations of commercial sensitivity and privilege must be considered on a "case-by-case basis." P.O. Ruling No. R2000-1/53 at 4. NAA is simply wrong to suggest that the Presiding Officer has prematurely determined that the Marketing Plan is not commercially sensitive, as that issue is precisely what the instant controversy is intended to resolve.

NAA offers nothing further to overcome the Postal Service's well-documented commercial sensitivity objection. In the Objection, the Postal Service outlined the contents of the Marketing Plan, precisely for the purpose of informing the Commission in its evaluation of the commercial sensitivity of the document at the appropriate time. As the Postal Service noted in the Objection, the Marketing Plan contains commercially valuable and proprietary information. Disclosure of this document would allow competitors to enjoy the proprietary fruits of the Postal Service's research and analysis, unfairly impeding the Postal Service's future attempts to improve its products and services. With such valuable, proprietary commercially sensitive information at stake, it makes no sense "to risk competitive injury from disclosure based on a generalized concept favoring public scrutiny of regulated industry ratemaking," as this can prove to be "unduly harsh." 44 F.E.R.C. P61,066 at 23 (reversing ALJ order granting motion to compel production of commercially sensitive information exempt from disclosure under FOIA, 5 U.S.C. § 552 (b)(4)).

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which was issued on February 3, 2000, at the conclusion of Docket No. RM98-3.

**Deliberative Process Privilege**

NAA improperly characterizes the basis for the Postal Service's assertion of the deliberative process privilege. In its Motion, NAA states that deliberative process privilege is somehow invalidated based on the unproven assertion that the plan was integral to decisionmaking related to the pending rate docket. NAA Motion at 4. NAA, however, cannot point to a single testimony or document submitted into evidence in this proceeding to support its speculation that the Marketing Plan has been instrumental in the Postal Service's rate proposal deliberations. In any event, the Postal Service has not asserted that the Marketing Plan has been involved in the preparation of the pending rate proceeding. Rather, as explicitly stated in the Objection, 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." Objection at 5.

NAA's is also wrong to suggest that the filing of the pending omnibus rate docket, or the alleged influence of the document on any given rate proposal, somehow invalidates the invocation of the privilege. NAA fails to cite any legal authority to support this bald and erroneous interpretation of law. Indeed, as the Presiding Officer noted in P.O. Ruling No. R2000-1/28, the "pre-decisional" status of a document survives *after* a decision is made unless the "document is expressly incorporated or adopted into a final decision." P.O. Ruling No. R2000-1/28 at 3. This is precisely the case here. The Marketing Plan is designed as a repository of current institutional knowledge and recommendations. Its broad

contents, which delve into all of the major postal product markets, and the general nature of its analysis, make it unsuitable for incorporation into a final decision. It is therefore not intended to serve as the final document in a chain of inputs to decisionmaking, and the protection of the privilege survives notwithstanding the possibility that any of its recommendations have ultimately been adopted.

NAA also misrepresents that the Commission has "overruled" the application of the deliberative process privilege to the Marketing Plan in P.O. Ruling No. 2000-1/53. NAA Motion at 4. To the contrary, Ruling No. R2000-1/53 *expressly reserved* consideration of the applicability of the deliberative process privilege until such time as the Postal Service was faced with a timely request for production of the Marketing Plan. The Presiding Officer explicitly stated that "it is premature to suggest that the documents would be de facto inadmissible as evidence on the basis of commercial sensitivity and privilege . . . ." P.O. Ruling No. R2000-1/53 at 4.

NAA's Motion, moreover, is completely silent with respect to the detailed—and now unrebutted—legal analysis offered in the Postal Service's Objection discussing the extension of the privilege to factual matter in contained within deliberative material. As the Postal Service explained in its Objection, prior rulings where the Commission has permitted the redaction of opinions, recommendations, and prospective analyses, while authorizing the disclosure of factual data, *see, e.g.*, P.O. Ruling Nos. R97-1/46, R97-1/52, R97-1/60, and R2000-1/21, are inapposite here. The Marketing Plan should be protected in its

entirety under the deliberative process privilege because the distilling of market data out of other sources itself requires an exercise of agency discretion.

Indeed, courts have clearly recognized that factual summaries used in making complex decisions can be part of the deliberative process and thus exempt from disclosure. See *Montrose Chemical*, 491 F.2d 63, 71 (D.C. Cir. 1974); *Mapother v. Department of Justice*, 3 F.3d 1533, 1537-1539 (D.C. Cir. 1993). For example, in *Mapother*, the District of Columbia Circuit Court of Appeals addressed whether a report relating to wartime activities of former U.N. Secretary General and Austrian President Kurt Waldheim was properly withheld under FOIA exemption

5. In rejecting the plaintiff's request for disclosure of the report, the Court first observed that "the fact/opinion test, while offering a 'quick, clear, and predictable rule of decision,' is not infallible and must not be applied mechanically." *Id.* at 1537 (citing *Wolfe v. Department of Health & Human Services*, 839 F.2d 768, 774 (D.C. Cir. 1988) (en banc)). Rather, the Court reasoned that it should "examine the information requested in light of the policies and goals that underlie the deliberative process privilege." *Id.* at 1538. The court decided that factual information contained in the report had to be protected, if the deliberative process privilege was to serve its central purpose of protecting the deliberative process itself:

the selection of the facts thought to be relevant clearly involves "the formulation or exercise of . . . policy-oriented *judgment* " or "the process by which *policy* is formulated," in the sense that it requires "exercises of discretion and judgment calls." Such tasks are not "essentially technical" in nature, rather they are part of processes with which "the deliberative process privilege ... is centrally concerned." Given the need for deliberation to inform discretion and for confidentiality to protect



deliberation, we have felt bound to shelter factual summaries that were written to assist the making of a discretionary decision.

*Id.* at 1539 (internal citations omitted).

Applying the reasoning of the D.C. Circuit Court in *Mapother* here, the Marketing Plan, including factual summaries of market data, should be completely shielded from disclosure under the deliberative process privilege. In deciding which data to highlight in the report, Postal Service marketing staff exercised discretion, culling relevant information from multiple sources in order to substantiate their recommendations to senior management. Disclosure of such information, used as inputs in the marketing analysts' decisionmaking process, would reveal the essence of their analyses, opinions and recommendations to senior Postal Service management. Since the privilege "serves to protect the deliberative process itself," the Postal Service should not be required to produce the Marketing Report, including market data for the limited purpose of informing Postal Service marketing decisions. *Cf. Mapother*, 3 F.3d at 1539.

Furthermore, as the Postal Service explained in its Objection, the Marketing Plan should be protected under the deliberative process privilege because the factual matter contained therein is "inextricably intertwined" with the drafters' analysis and recommendations. *See Soucie v. David*, 448 F.2d 1067, 1078 (D.C. Cir. 1971).

### Overbreadth

NAA further does nothing to overcome the Postal Service's overbreadth ground. NAA Motion at 4-5. As the Postal Service explained in its Objection, NAA has failed to specifically limit its request to the portions of the document that

relate to its particular subject matter interest. NAA offers the feeble excuse that it "cannot be logically expected to target its request for information when it has never viewed the document." NAA, however, cannot deny that it has access to abundant information that could be used to inform a narrowing of its request. In particular, NAA has the prior Marketing Plan from 1998, which it acquired through unknown channels and undertook to offer as library reference NAA/R97-1 LR-2 in Docket No. R97-1, and on which the current plan is modeled. Secondly, the Postal Service offered a detailed description of the contents of the plan in its Objection, from which NAA could have drawn conclusions as to the utility of the information.

### **Relevance**

In its Motion, NAA alleges that the Postal Service conceded the relevance of the document. NAA Motion at 1-2. In support of this proposition, NAA cites the portion of the Objection describing the contents of the document. NAA, however, misrepresents the Postal Service's intent. Specifically, the Postal Service did not offer a description of the contents in its Objection in order to establish the irrelevance of its contents to this docket. Rather, the description was offered for the purpose of establishing the Postal Service's commercial sensitivity ground.

NAA, moreover, misplaces reliance on P.O. Ruling No. R2000-1/53 for the proposition that the Presiding Officer has ruled on the document's relevance. In that ruling, the Presiding Officer did not rule on the admissibility of the Marketing Plan, but rather addressed the relevance of questions related to that document.

Thus, the Ruling does not establish the document's relevance, as that is what the instant controversy is intended to resolve.

**Burden**

NAA has also failed to overcome the Postal Service's burden ground. In its Objection, the Postal Service explained that if a ruling were issued requiring production of factual information in the report, reviewing the document to determine which types of information should be redacted would consume 75 to 100 person hours. NAA disputes this estimate, but its challenge to the estimate should be given absolutely no weight whatsoever, because it is based on the mistaken impression that the Postal Service estimated that performing redactions would consume up to 200 person hours. NAA Motion at 5. In fact, the Postal Service's Objection clearly states that the Postal Service's maximum estimate was 100 hours -- one-half the estimate reported in NAA's Motion. In any event, if the Commission has any doubt about the Postal Service's estimate, the Commission need only review the contents of Library Reference NAA/R97-1 LR-2, on which the current document is modeled, for convincing proof that the Postal Service's 75 to 100 hour estimate is manifestly reasonable.

Further, NAA is wrong to suggest that the Postal Service's performance was unaffected by disclosure of its "1997 Marketing Plans."<sup>3</sup> These speculative claims do not withstand scrutiny. There is no meaningful way to measure the harm caused to the Postal Service by disclosure of its 1998 Marketing Plan, since competitors do not publicly admit the extent to which their success in

competitive postal markets is attributed to the acquisition of the Postal Service's commercial information. Furthermore, the fact that the Postal Service has achieved favorable financial results in the years following the filing of NAA/R97-1 LR-2 does not provide a meaningful basis to judge whether the Postal Service in fact suffered commercial harm as a result of the widespread disclosure of its marketing plan. Indeed, the Postal Service's financial results may have been far better, particularly in competitive markets, had the document not been exposed by NAA in the prior docket.

#### CONCLUSION

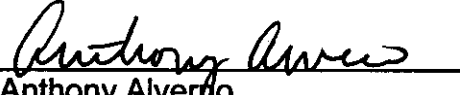
WHEREFORE, for the foregoing reasons, the Postal Service respectfully requests that NAA's Motion be denied.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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<sup>3</sup> As a point of clarification, the Marketing Plan that NAA acquired and filed in Docket No. R97-1 was the 1998 Marketing Plan.

Attachment to USPS  
Answer in opposition

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  
INTERROGATORY TO  
THE UNITED STATES POSTAL SERVICE  
(NAA/USPS-11)  
May 31, 2000


The Newspaper Association of America hereby submits the attached interrogatory to the United States Postal Service (NAA/USPS-11) and respectfully requests a timely and full response under oath.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

May 31, 2000

  
William B. Baker

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

**NAA/USPS-11. Please refer to the compelled response of the United States Postal Service to interrogatory NAA/USPS-1 (d). Please provide a copy of the "more recent marketing plan" which the Postal Service acknowledges to exist in its answer.**

**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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