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POSTAL RATE COMMISSION OR  
OFFICE OF THE SECRETARY

PRESIDING OFFICER'S  
RULING NO. R2000-1/96

UNITED STATES OF AMERICA  
POSTAL RATE COMMISSION  
WASHINGTON, DC 20268-0001

Postal Rate and Fee Changes

Docket No. R2000-1

PRESIDING OFFICER'S RULING ON  
NAA MOTION TO COMPEL RESPONSE TO NAA/USPS-11

(Issued July 25, 2000)

The Newspaper Association of America (NAA) has moved for a compelled response from the Postal Service to NAA/USPS-11. This interrogatory seeks production of a marketing plan identified in the Service's compelled response to an earlier interrogatory.<sup>1</sup> NAA Motion to Compel the United States Postal Service to Respond to Interrogatory NAA/USPS-11, June 19, 2000 (NAA Motion to Compel).

The Postal Service has objected to providing the plan on grounds of untimeliness, commercial sensitivity, the deliberative process privilege, overbreadth, lack of relevance and undue burden. United States Postal Service Objection to Interrogatory of Newspaper Association of America (NAA/USPS-11), June 12, 2000 (Postal Service Objection.) The Service has reiterated these grounds in a subsequent opposition to NAA's Motion to Compel. 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, June 25, 2000 (Postal Service Opposition).

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<sup>1</sup> NAA/USPS-1(d), filed March 23, 2000.

*The Postal Service's Initial Objection.* In its Objection, the Service notes that NAA filed the interrogatory in issue 27 days after it (the Service) had provided a timely response to NAA/USPS-1(d). The Service asserts that the interrogatory is therefore untimely under Commission rule 26a, which provides that follow-up interrogatories must be served within seven days of receipt of the answer to the previous interrogatory, unless extraordinary circumstances are shown. Postal Service Objection at 1-2. The Service asserts that it would be highly prejudicial if this late-filed discovery request were permitted, "since it was strategically filed after the filing of the participants' cases-in-chief." *Id.* at 2. It notes that it is now too late for the document to become incorporated into the evidentiary presentations of the participants' cases-in-chief and that participants will not be able to file rebuttal testimony with respect to the document. *Id.* at 2-3.

The Service also states that NAA did not accompany its discovery request with a request for leave to file out of time. It maintains that 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 request." *Id.* at 2.

*Additional Grounds.* In addition to lack of timeliness, the Service says the requested document contains proprietary information, and describes the topics it addresses. *Id.* at 3-4. The Service also says the document is predecisional and subject to the deliberative process privilege. It reviews case law, and distinguishes the material presented in the document at issue here from other reports on the alternative delivery industry that have been filed under protective conditions. *Id.* at 4-8. The Service also details the reasons why it believes NAA's request is overbroad, lacks relevance, and imposes an undue burden. *Id.* at 8-10.

*NAA Motion to Compel.* In support of its Motion to Compel, NAA first addresses relevance, and invokes an earlier presiding officer's ruling that directed the Service to file an answer to interrogatory 1(d) to the Postal Service. NAA Motion to Compel at 1. NAA says the Service has conceded the relevance of the information because it has

acknowledged that the Ad Mail section contains the Service's market analysis and related interpretations and recommendations. *Id.* at 2.

NAA dismisses the Service's other objections as meritless. In particular, it says the Service incorrectly asserts that NAA/USPS-11 was untimely filed. NAA's position is that the procedural schedule in this case explicitly provides for discovery on the Postal Service through July 31, 2000. Thus, it claims "the initial discovery period" has not expired, so Postal Service's reliance on Rule 26 is misplaced. *Id.* at 2-3. As to the Service's argument that allowing this discovery request now would be prejudicial because it was filed after the participants' case-in-chief, NAA reiterates that its motion was properly filed within the established discovery timeframe. *Id.* at 3.

With respect to commercial sensitivity, NAA asserts that the Commission already has found the USPS marketing plan to be relevant, and that it therefore should be made available to NAA. *Id.* at 3. It says that the deliberative process 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." *Id.* at 4.

NAA also challenges the Service's argument regarding overbreadth, saying it cannot be expected to target its request for information when it has never viewed the document. *Id.* With respect to burden, NAA says it finds the Service's estimate (which placed the time needed for review and redactions at between 75 and 200 hours) hard to credit, and further questions the need for redactions. *Id.* at 5.

*The Service's Opposition.* In its Opposition, the Postal Service reiterates the reasons why interrogatory 11 was not timely filed. It also takes issue with NAA's contentions regarding the relevance of the document. In particular, the Service asserts that the Docket No. R97-1 controversy does not establish general principles regarding relevance of marketing plans. Instead, it says that the Service's objection at that time and the ruling thereon concerned procedural and timing issues related to discovery, not relevance. Postal Service Opposition at 1-2. The Service also notes that in Docket No. R97-1, it was NAA, rather than the Postal Service, that undertook to file the document

with the Commission. *Id.* at 2. Accordingly, the Service says NAA can take little from the R97-1 controversy, as it did not establish general principles regarding the discoverability of marketing plans. Among other things, it says: "Indeed, past Commission precedent clearly reveals sensitivity to the Postal Service's concerns regarding the disclosure of marketing plans and competitive information." *Id.*

The Postal Service also says that NAA incorrectly characterizes the Postal Service's commercial sensitivity and deliberative process privilege objections. *Id.* at 4. It says it made clear in its objection that these grounds were intended to "preserve [the Postal Service's] rights with respect to any follow-up and related discovery." *Id.* It says it raised this objection at this stage so as to avoid arguments (to which it does not now wish to give credence) that it had somehow waived these grounds by not having raised them in connection with the pending discovery dispute. *Id.*

Finally, the Service says NAA's contention the Service "made no attempt to show that the disclosure of the 1998 Marketing Plans in Docket No. R97-1 caused it even an iota of injury in the years since" cannot be taken seriously. *Id.*

*Decision.* Both parties in interest have raised numerous considerations regarding the validity of interrogatory 11 and the extent to which previous rulings (in this proceeding and in Docket No. R97-1) are controlling. However, I find that the dispositive issue is whether the interrogatory was timely filed. In this regard, there is no dispute that the interrogatory, which was worded as a follow-up to interrogatory 1(d), was filed on May 31, 2000, or about 27 days after the response to the earlier interrogatory was provided. Therefore, the question is whether NAA is correct that the interrogatory was filed within "the initial discovery period," given the issuance of a revised procedural schedule.

Having considered the arguments advanced by each side, I find that the initial discovery period ended March 23, 2000, as provided in P.O. Ruling No. R2000-1/4. Thus, interrogatory 11 is governed by Commission rule 26(a)'s 7-day filing deadline, barring a successful showing that extraordinary circumstances exist. The motion does

not identify any "extraordinary circumstances," nor do I find, on my own review, that any exist.

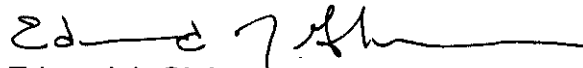
I have considered whether rule 25(a), which allows for requests from information available only from the Postal Service, is applicable. Significantly, this rule is directed to the development of rebuttal testimony, and places the burden of establishing that the discovery request is directed to that purpose on the participant filing the question. Again, in this situation, I find the motion does not make any representations regarding the use of this interrogatory for rebuttal.

In this situation, NAA's interest in obtaining the information is obvious but, on balance, there is a broader obligation to ensure orderly administration of the case and fairness for all participants. Accordingly, NAA's motion to compel a response to NAA/USPS-11 is denied.

Given my finding on the question of timeliness, I am not addressing the other grounds raised here, any of which (either individually or cumulatively) may have been found sufficient to warrant a similar outcome.

#### RULING

The Newspaper Association of America Motion to Compel the United States Postal Service to Respond to Interrogatory NAA/USPS-11, filed June 19, 2000, is denied.

  
Edward J. Gleiman  
Presiding Officer