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 NEWSPAPER ASSOCIATION OF AMERICA AND ASSOCIATION OF ALTERNATE POSTAL SYSTEMS JOINT MOTION TO LIFT CONFIDENTIALITY RESTRICTIONS FROM LIBRARY REFERENCE USPS LR-I-268**

On August 22, 2000, the Newspaper Association of America (NAA) and the Association of Alternate Postal Systems (AAPS) filed a Joint Motion to Lift Confidentiality Restrictions from Library Reference USPS LR-I-268 (hereinafter "Joint Motion"). On that same date, NAA and AAPS (hereinafter "Joint Movants") filed a Joint Motion for Accelerated Response, requesting that the Commission issue an order directing the Postal Service to respond promptly so that, if the Joint Movants prevailed on the merits, they could use the SAI Report at a hearing scheduled on August 29. In a Ruling from the bench at the hearing on August 23, the Presiding Officer granted the Joint Movants' request for accelerated response, and directed that a responsive pleading be filed by Thursday, August 24.[1] The Postal Service hereby opposes the Joint Motion.

BACKGROUND

The subject matter of this dispute relates to two reports filed as USPS LR-I-268, entitled *SAI Reports Responsive to Interrogatories AAPS/USPS-T35—9-10, Redirected to the Postal Service (Filed Under Protective Conditions)*. The

[1] Tr. 38/17049.

library reference contains two studies prepared by Strategic Analysis, Inc. (SAI) for the Postal Service. Neither of these documents formed part of the Postal Service's direct case.[2] Rather, the documents were provided in a compelled response to interrogatories AAPS/USPS-T35—9-10, filed on February 23, 2000, to which the Postal Service filed objections on March 6.[3] The Postal Service cited several grounds in support of its Objection, but since the prior version of one of the SAI reports was ordered to be produced under strict protective conditions in Docket No. R97-1, the Postal Service offered to stipulate to the production of the revised version of that report under the same conditions as in Docket No. R97-1.[4] AAPS thereafter moved to compel the production of the documents.[5] In its Answer in Opposition, the Postal Service stated that, with respect to the revised SAI report:

> it does not wish to engage in needless motions practice in this instance, particularly given that Commission precedent in P.O. Ruling Nos. R97-1/46 and -1/52 provided that a prior version of the SAI report was relevant to the issues at stake in the last omnibus rate proceeding. Thus, without prejudice to its right to object to the production of any other proprietary market research, the Postal Service does not contest AAPS's Motion to the extent AAPS requests the production of the most recent version of the SAI report on alternative delivery responsive to interrogatory AAPS/USPS-T35—9 under protective conditions specified in, and in redacted

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[2] The Postal Service's pricing witnesses did not consider these documents in formulating rate proposals. Tr. 10/3836-38; Tr. 11/4206-07.

[3] United States Postal Service Objection to Interrogatories of Association of Alternate Postal Systems Directed to Witness Moeller (AAPS/USPS-T35--9-10) (filed March 6, 2000).

[4] *Id.*

[5] Motion of Association of Alternate Postal Systems to Compel Production of Documents Requested in Interrogatories AAPS/USPS-T35-9 and 10 (filed March 16, 2000).

> form under, a ruling of the Presiding Officer identical to P.O. Ruling No. R97-1/52.[6]

The Postal Service emphasized, however, that it "oppose[d] . . . disclosure of the contents of the SAI report under terms more liberal than those granted in P.O. Ruling No. R97-1/52."[7] The Postal Service did not, moreover, make a similar offer with respect to the other SAI study, which consisted of an assessment of a single provider operating in two geographic markets. Instead, the Postal Service opposed production of this document on grounds of relevance, privilege, overbreadth, and commercial sensitivity. In addressing AAPS's Motion to Compel in P.O. Ruling No. C99-1/21, the Presiding Officer explicitly directed that *both* of the SAI studies be provided under protective conditions. With respect to the revised version of the SAI report, the Presiding Officer explained:

> I find their request for protective conditions to be applied to the SAI report reasonable. The protective conditions found in attachment A of this ruling reflect those conditions imposed on the SAI report at issue in Docket No. R97-1. As in that docket, the Postal Service is hereby instructed to provide the study, but *not* including the Service's and SAI researchers' comments and conclusions on, and analysis and/or interpretation of, the underlying factual data. The Postal Service also may redact the company and product names of the alternate delivery providers comprising the study.[8]

The Presiding Officer also ruled that the other SAI report, which consisted of an assessment of a single provider operating in two geographic markets, be produced under similar circumstances.[9]

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[6] United States Postal Service Answer in Opposition to Motion of Association of Alternate Postal Systems to Compel Production of Documents Requested in Interrogatories AAPS/USPS-T35--9-10 (March 23, 2000) at 2-3.
[7] *Id.* at 3 n.1.
[8] P.O. Ruling No. R2000-1/21 at 3.
[9] *Id.* at 5.

As indicated in the quoted passage in P.O. Ruling No. R2000-1/21, discovery related to prior versions of the SAI report led to protracted motions practice in Docket Nos. MC95-1 and R97-1. In Docket No. R97-1, the Presiding Officer directed the Postal Service to produce a copy of the report under the protective conditions attached to P.O. Ruling No. R97-1/46. The Presiding Officer explained:

> The underlying data and collected information should be available to those evaluating Postal Service testimony, so long as it is subject to protective conditions adequate to assure that this information is not available to anyone involved in competitive decisionmaking to the potential detriment of the Service.[10]

The Postal Service sought clarification of P.O. Ruling No. R97-1/46.[11] In P.O. Ruling No. R97-1/52, the Presiding Officer made clear that the Postal Service could redact SAI researchers' comments and conclusions on, and analysis and/or interpretation of, the underlying factual data, and company and product names of alternative delivery providers. AAPS thereafter sought reconsideration of P.O. Ruling No. R97-1/52. Specifically, AAPS sought to prevent the redaction of the SAI researchers' analysis and interpretation of underlying facts, conclusions and recommendations. AAPS's motion was denied in P.O. Ruling No. R97-1/60.

ARGUMENT

The Joint Motion is riddled with mischaracterization, faulty assumptions, and flawed understandings of civil and evidentiary practice. The Joint Movants

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[10] P.O. Ruling No. R97-1/46 at 5.
[11] Motion Of United States Postal Service for Partial Reconsideration and Clarification of P.O. Ruling No. R97-1/46 (filed October 21, 1997).

have also failed to overcome the Postal Service's objections to public disclosure. The Joint Motion should accordingly be denied.

First, the Joint Movants incorrectly characterize P.O. Ruling No. R2000-1/21, claiming that the Ruling "merely accepted the Postal Service's willingness to produce a redacted version of the SAI Report under confidentiality."[12] To the contrary, P.O. Ruling No. R2000-1/21 contains an explicit recognition that the "request for protective conditions to be applied to the [revised version of the] SAI report [is] *reasonable*."[13] The Presiding Officer, moreover, referenced the use of protective conditions in Docket No. R97-1 for the prior version of the SAI report as further proof of his consideration of the merits of the application of the protective conditions to USPS LR-I-268.[14] In addition, P.O. Ruling No. R2000-1/21 necessarily addressed the merits of the application of the protective conditions to the second SAI report, since the Postal Service never offered to provide this document under the same terms as those specified in P.O. Ruling Nos. R97-1/46. -1/52, and -1/60.[15] With respect to the second SAI report, P.O. Ruling No. R2000-1/21 explicitly directed that it be provided under protective conditions.[16] As this document is also included in USPS LR-I-268, and given the similarity in content in both SAI reports, this provides further proof that the Presiding Officer explicitly considered the merits of the Postal Service's

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[12] Joint Motion at 3.
[13] P.O. Ruling No. R2000-1/21 at 3 (emphasis supplied).
[14] P.O. Ruling No. R2000-1/21 at 3.
[15] See United States Postal Service Answer in Opposition to Motion of Association of Alternate Postal Systems to Compel Production of Documents Requested in Interrogatories AAPS/USPS-T35--9-10 (March 23, 2000) at 3-6.
[16] P.O. Ruling R2000-1/21 at 5.

objections in determining the suitability of protective conditions for the redacted SAI reports. In sum, it is disingenuous for the Joint Movants to now represent that P.O. Ruling No. R2000-1/21 simply accepted the Postal Service's offer to provide the reports without consideration of the necessity of protective conditions.

Second, the relief sought by the Joint Motion is barred by the doctrine of *res judicata*, or claim preclusion. Claim preclusion bars not only matters that were actually litigated, but also "matter[s] that never have been litigated," because of a determination that they "should have been raised in an earlier suit."[17] Here, the issue of the protective conditions for USPS LR-I-268 was actually litigated, both in this docket and Docket No. R97-1. Indeed, AAPS explicitly agreed to the application of protective conditions with respect to *both* of the SAI studies, not only in the body of its Motion to Compel, but also in its prayer for relief:

> AAPS hereby requests that the 1998 revision to the SAI Study be produced *under protective conditions specified in, and in (reasonably) redacted form under, a ruling* identical to that identified above. This is exactly what the Postal Service said it would do, and it should be ordered to do so.
> * * * * *
> AAPS respectfully requests that the Presiding Officer order the documents sought *under the protective conditions* described above.[18]

Thus, AAPS has manifested its consent to the application of protective conditions in connection with USPS LR-I-268. Under the doctrine of claim preclusion, the

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[17] *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1 (1984).

Joint Movants cannot reopen matters which have already been litigated and to which the Joint Movants could have raised challenges when the AAPS Motion to Compel was still pending. To permit the Joint Movants to do otherwise would contravene the interests of fairness, finality, and economy of the Postal Service's and the Commission's resources.

Third, the Joint Motion is based on flawed understandings of evidentiary practice. The Joint Movants admit that they intend to pose questions about USPS LR-I-268 to rebuttal witnesses, including Saturation Mail Coalition (SMC) witnesses Bradpiece and Giuliano. Yet, the Movants admit that none of these witnesses has signed the "confidentiality agreement",[19] that is, the certification for access to protected materials attached to P.O. Ruling No. R2000-1/21. Thus, the witnesses to whom NAA and AAPS intend to ask about the contents of USPS LR-I-268 have not even seen the library reference. The Joint Motion therefore rests on the legally and factually defective assumptions that the witnesses *could* be asked about the contents of USPS LR-I-268 if protective conditions were lifted. In fact, nothing in this docket indicates that the rebuttal witnesses have any familiarity with the document. Indeed, none claim to be the "sponsor" of this library reference. Under standard evidentiary practice, since none of the rebuttal witnesses is known to have familiarity with, or first-hand knowledge of, the contents of the library reference, none can fairly be compelled to respond to oral cross-examination about its contents, whether it is protected or publicly

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[18] Motion of Association of Alternate Postal Systems to Compel Production of Documents Requested in Interrogatories AAPS/USPS-T35-9 and 10 (filed March 16, 2000) (emphasis supplied).

available.[20] Simply put, lifting the protective conditions would not enhance the Joint Movants' ability to conduct oral cross-examination about its contents.

Fourth, the Joint Movants' argument rests on the misleading premise that no remedy, short of complete public disclosure of the library reference, will adequately preserve the Joint Movants' interests. In fact, nothing prevents the Joint Movants from requesting that proceedings be closed to all who are willing and able to sign certifications to permit oral cross-examination on USPS LR-I-268. Furthermore, it is of no moment that "neither AAPS nor any other party (except, presumably, the Postal Service had it chosen to do so) has been able to use the content of the SAI Report in testimony or in cross-examination."[21] This argument simply describes a strategic decision that the Joint Movants elected to make--and now apparently regret. The Joint Movants are sophisticated associations with abundant resources at their disposal. Any claim that the Joint Movants were unable to retain consultants, or to find industry representatives, eligible to sign certifications for access to protected materials would simply not be credible. Indeed, NAA's President signed a certification attesting to his eligibility, thereby providing ample proof that the participants could have chosen, but obviously elected not, to offer testimony from industry representatives who are familiar with the contents of USPS LR-I-268.[22] There is no reason to upset prior

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[19] Joint Motion at 1.
[20] *See* Fed. R. Evid. § 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.").
[21] Joint Motion at 2.
[22] NAA Notice of Filing Certifications for Access to Materials Provided in Response to Presiding Officer's Ruling No. R2000-1/21 (filed April 21, 2000).

established precedent simply to accommodate the Joint Movants' choice not to offer witnesses to testify about the SAI studies. The Postal Service's market research program should not be made to suffer for the failings of the Joint Movants' tactical decisionmaking.

Finally, the Joint Movants have failed to overcome the objections raised by the Postal Service relating to disclosure of the reports. Specifically, the Joint Movants challenge the Postal Service's commercial sensitivity and deliberative process privilege grounds for objection, as they apply to the unredacted portions of USPS LR-I-268.[23] These arguments are easily defeated.

With regard to commercial sensitivity, it is beyond question that, even in redacted form, the documents in USPS LR-I-268 constitute proprietary market research. The Postal Service commissioned these studies from SAI. Such information is certainly not free; the Postal Service paid for this research. Public disclosure of these documents, even in redacted form, would allow competitors to enjoy the fruits of the Postal Service's research and analysis, thereby giving competitors unimpeded, free access to valuable market research that they could have purchased on their own. Public disclosure would be devastating to the Postal Service, not only because its resources would be squandered in favor of the interests of its competitors, but also because free access to the Postal Service's proprietary information would have a chilling effect on the Postal Service's willingness to conduct such research altogether. From a practical and business perspective, it would make little sense for the Postal Service to continue

[23] Joint Motion at 3-4.

to conduct market research if the Commission were to permit unimpeded, free public access to the proprietary results of that effort, *particularly* when the market research in question was never used in support of the Postal Service's direct case,[24] and where such information is not unique to the Postal Service, as is the situation here. Furthermore, in this instance, the Postal Service would suffer commercial harm as a result of public disclosure. Public disclosure would reveal to competitors the scope of the Postal Service's knowledge about the market for alternative delivery, thereby allowing competitors to analyze, assess, and ultimately neutralize the Postal Service's competitive capabilities.

In addition, the Joint Movants are incorrect in alleging that the deliberative process privilege does not apply to the factual portions of the studies.[25] The library reference should be protected in its entirety under the deliberative process privilege because the distilling of market data in the reports requires an exercise of the researchers' discretion. Indeed, courts have clearly recognized that factual summaries can be part of the deliberative process and thus exempt from disclosure.[26] 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

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[24] The fact that the documents were not used for pricing and classification purposes in no way diminishes their sensitivity. The documents enable organizational units to better understand markets for other purposes, such as sales and service improvement.
[25] Joint Motion at 4.
[26] *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).

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."[27] Rather, the Court reasoned that it should "'examine the information requested in light of the policies and goals that underlie the deliberative process privilege.'"[28] 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."[29]

Applying the reasoning of the D.C. Circuit Court in *Mapother* here, the factual summaries of market data in the SAI reports should be protected from public disclosure under the deliberative process privilege. In deciding which data to highlight in the report, SAI researchers exercised discretion, culling relevant information to substantiate their conclusions. Disclosure of such information would reveal the essence of their analyses, opinions and recommendations. Since the privilege "serves to protect the deliberative process itself," the Postal Service should not be required to produce the market data.[30] Disclosure of the factual information in the reports, moreover, would reveal the depth of the Postal

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[27] *Id.* at 1537 (citing *Wolfe v. Department of Health & Human Services,* 839 F.2d 768, 774 (D.C. Cir. 1988) (en banc)).
[28] *Id.* at 1538.
[29] *Id.* at 1539 (internal citations omitted).
[30] *Cf. Mapother*, 3 F.3d at 1539.

Service's knowledge, and this information would enable others to assess the range of predecisional reactive and proactive strategies that might be undertaken. Furthermore, the market data should be protected under the deliberative process privilege because the factual matter contained therein is "inextricably intertwined" with the drafters' analysis and recommendations.[31]

CONCLUSION

WHEREFORE, the Postal Service respectfully requests that the Joint Motion be denied.

Respectfully submitted,

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[31] *See Soucie v. David*, 448 F.2d 1067, 1078 (D.C. Cir. 1971).

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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