

BEFORE THE  
POSTAL RATE COMMISSION  
WASHINGTON, D.C. 20268-0001

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EDUCATION AND THE POSTAL SERVICE  
OFFICE OF THE ATTORNEY GENERAL

POSTAL RATE AND FEE CHANGES, 2000

Docket No. R2000-1

**UNITED STATES POSTAL SERVICE ANSWER IN OPPOSITION TO  
NEWSPAPER ASSOCIATION OF AMERICA MOTION TO COMPEL THE  
UNITED STATES POSTAL SERVICE TO RESPOND TO INTERROGATORY  
NAA/USPS-12**

On July 31, 2000, the Newspaper Association of America (NAA) filed interrogatory NAA/USPS-12. The interrogatory asks if the Postal Service has, at any time since 1997, conducted a "study or analysis of preprint advertising in daily newspapers or in newspaper Total Market Coverage [(TMC)] Programs, including, but not limited to volumes of or revenues associated with preprint advertising." If the answer is affirmative, subpart (a) asks for a description of the study or analysis. Subpart (b) of interrogatory 12 requests that the study or analysis be produced. On August 10, 2000, the Postal Service filed a timely objection to interrogatory 12. The Postal Service objected to interrogatory 12 on grounds of timeliness, commercial sensitivity, cumulativeness, deliberative process privilege, overbreadth, burden, and relevance. On August 22, 2000, NAA filed a *Motion to Compel the United States Postal Service to Respond to Interrogatory NAA/USPS-12* (hereinafter "*Motion*"). NAA has manifestly failed to overcome the Postal Service's objections. Its *Motion* should accordingly be denied. Each ground is addressed separately.

Timeliness

NAA has manifestly failed to overcome the Postal Service's timeliness objection. NAA tersely claims that the interrogatory 12 was timely "filed before the deadline for discovery on USPS." NAA Motion at 3. Interrogatory 12, however, is a broad-based discovery request covering all studies or analyses in the Postal Service's custody on newspaper and TMC preprint advertising. Interrogatory 12 is clearly a general request for production. Under P.O. Ruling No. R2000-1/4, the deadline for posing such discovery expired over five months ago, on March 23, 2000. NAA's argument necessarily hinges on whether interrogatory 12 falls within the exception to Rule 25(a), which permits participants to request "information (such as operating procedures or data) available only from the Postal Service." This argument fails for two reasons.

First, as the Presiding Officer emphasized in P.O. Ruling No. R2000-1/96, in order to qualify for the exception, the discovering party must show that the discovery request is intended for the purpose of the preparation of *rebuttal testimony*. The Presiding Officer recently explained this requirement in denying NAA's Motion to Compel interrogatory NAA/USPS-11:

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.

P.O. Ruling No. R2000-1/96 at 5 (emphasis supplied). As clearly stated in P.O. Ruling No. R2000-1/96, the burden of establishing that the purpose of the discovery request is for the *development of rebuttal testimony* rests with the party

conducting discovery.<sup>1</sup> 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 12 is intended for the purpose of preparing rebuttal testimony. NAA instead admits that its purpose is to unearth evidence to enable it test the accuracy of statements made by Postal Service rebuttal witness O'Hara (USPS-RT-19), and possibly Saturation Mail Coalition (SMC) rebuttal witnesses. NAA Motion at 3. This is clearly impermissible. Rule 25(a) creates no exception for discovery for the purpose of conducting oral cross-examination of rebuttal witnesses. Since NAA has failed to meet its burden, NAA's opportunity to pose interrogatory 12 has long expired, and its attempt to conduct discovery at this late stage must be *denied on this ground alone, consistent with P.O. Ruling Nos. R2000-1/72 at 13-14, -1/68 at 4, and -1/96 at 5.*

Even assuming that NAA had bothered to construct a pretextual argument that its discovery is for the purpose of preparing rebuttal testimony, with respect to subpart (b) of interrogatory 12, it has failed to satisfy the criteria for the exception in Rule 25(a). As clearly stated in Rule 25(a), the exception applies to information that is "*available only from the Postal Service*" (emphasis supplied). This criterion was also emphasized by the Presiding Officer in P.O. Ruling No.

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<sup>1</sup> This is consistent with longstanding Commission precedent on Special Rule of Practice 2E, which is the predecessor to Rule 25(a). 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).

R2000-1/96: "rule 25(a) . . . allows for requests from information *available only from the Postal Service*." P.O. Ruling No. R2000-1/96 at 5 (emphasis added). As the subject matter of the interrogatory ultimately pertains to information about the newspaper industry, it is not "available *only* from the Postal Service" (emphasis supplied). NAA can easily commission its own market research about preprint advertising. It can also survey its own members for information about preprint advertising in newspapers or TMC products, as this is precisely the type of commercial activity in which members of NAA are engaged. Thus, subpart (b) of interrogatory 12 does not seek information "available only from the Postal Service." NAA's opportunity to pose interrogatory 12 has long expired, and its attempt to conduct discovery at this late stage must be denied, consistent with longstanding Commission precedent. See P.O. Ruling Nos. R2000-1/68 at 4; - 1/72 at 13-14; -1/83 at 3-4; -1/96 at 4-5; -1/98 at 2; -1/109 at 1.

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' rebuttal testimony. It is too late for the any responsive information to become incorporated into the evidentiary presentations of the participants' cases-in-chief or rebuttal, and, as such, participants will not be able to file rebuttal testimony in relation to any responsive information. The other participants, including the Postal Service, have been deprived of the opportunity to rebut any participant's use of any responsive information 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 oral cross-examination of rebuttal witnesses, much to the Postal Service's detriment.

*Commercial Sensitivity, Cumulativeness, & Deliberative Process Privilege*

In its Objection, the Postal Service identified the SAI Report 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)*,<sup>2</sup> as well as a draft update (and underlying information) to that report,<sup>3</sup> as "potentially responsive" to interrogatory 12.<sup>4</sup> NAA's Motion apparently excludes these documents from the Motion to Compel. Specifically, NAA states that its discovery request is not "meant to include the SAI report or any update." NAA Motion at 2 (emphasis omitted). As the Postal Service explained in its Objection, it has conducted a good-faith search of postal records. The Postal Service is unable to identify any other documents potentially responsive to the NAA request, other than the SAI research identified in the Postal Service's Objection. NAA's Motion to Compel is accordingly moot as it relates to the grounds of commercial sensitivity, privilege, and cumulativeness.

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<sup>2</sup> The Postal Service reiterates that it objects to the production of USPS LR-I-268 on terms more liberal than those in P.O. Ruling No. R2000-1/21.

<sup>3</sup> The Postal Service reiterates that it objects to the production of the draft update, and the accompanying underlying information, on grounds of commercial sensitivity and deliberative process privilege. As it is in draft form, the update, along with the underlying information, are works in progress and therefore predecisional. Furthermore, these items consist of commercially valuable, proprietary market research, the disclosure of which could result in harm to the Postal Service's commercial interests.

Overbreadth and Burden

NAA has also not overcome the Postal Service's overbreadth ground. NAA has apparently narrowed its discovery request to Headquarters, for its Motion states that if a study exists, "surely it would have been commissioned at headquarters and not in the field." NAA Motion at 4. Limiting the response to any information at Headquarters, however, does not address the totality of the Postal Service's overbreadth ground. Specifically, NAA has failed to address the Postal Service's argument that the discovery request predates the base year, and is therefore overinclusive.

Relevance

Surprisingly, NAA's Motion concedes that the request for production in Interrogatory 12(b) is *irrelevant*. That's right. Not once, but *twice* in its Motion, NAA confirms that the information requested in subpart (b) of interrogatory 12 is irrelevant. NAA states:

[a]ny data the Postal Service has regarding newspaper preprint insert volumes is, we submit, strictly irrelevant to this proceeding. If the Postal Service is willing to stipulate that such data is irrelevant, it may redact it from any responsive document.

NAA Motion at 3. NAA further confirms that "it is the existence of the study itself and the Postal Service's position towards the Postal Service and the newspapers that is the issue, not any newspaper advertising data." NAA Motion at 3. If, as NAA claims, any Postal Service data on preprint insert volumes is "irrelevant,"

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<sup>4</sup> Indeed, the SAI studies arguably are not responsive to interrogatory 12, since neither "preprint advertising in daily newspapers or in newspaper Total Market

and if, as NAA admits, "newspaper advertising data" is not "the issue," then one may reasonably question what purpose subpart (b) of interrogatory 12 serves. By NAA's own admission, interrogatory 12 boils down to nothing more than a fishing expedition to test whether the Postal Service, by having conducted any studies on preprint advertising, has manifested a belief that newspaper preprint advertising is considered competition to mail. Such invasive discovery is clearly impermissible and constitutes an abuse of the Commission's discovery process. The Presiding Officer should accordingly deny NAA's Motion in its totality, for both subparts of interrogatory 12 amount to nothing more than a blatant attempt to cause "undue annoyance, embarrassment, oppression, or expense" to the Postal Service. Cf. Rule 26(g).

#### CONCLUSION

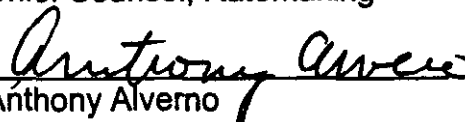
WHEREFORE, the Postal Service respectfully requests that NAA's Motion be denied.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

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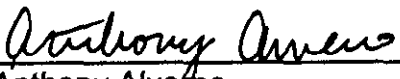
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Cover programs" was the objective focus of the research.

**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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Anthony Alvefro

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