

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

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COMPLAINT OF TIME WARNER INC. ET AL.  
CONCERNING PERIODICALS RATES

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Docket No. C2004-1

OPPOSITION OF TIME WARNER INC. ET AL.  
TO REQUEST FOR RECONSIDERATION  
OF PRESIDING OFFICER'S RULING ON HEARING SCHEDULE  
(June 17, 2004)

Time Warner Inc., Condé Nast Publications, a Division of Advance Magazine Publishers Inc., Newsweek, Inc., The Reader's Digest Association, Inc., and TV Guide Magazine Group, Inc. (collectively, "Time Warner Inc. et al." or "complainants") respectfully oppose the Request for Reconsideration of Presiding Officer's Ruling on Hearing Schedule filed by American Business Media (ABM) on the afternoon of June 16 (but incorrectly dated "June 14, 2004").

Complainants filed their direct testimony in this proceeding on April 26, 2004. On May 25, the Presiding Officer issued a "Ruling on Scheduling Matters" in which, after noting that discovery had been "minimal" during the month that had passed since the testimony was submitted (a total of three interrogatories had been filed), he set Monday, June 14--49 days after the submission of testimony--as the deadline for written discovery. POR C2004-1/1. On June 9, one week prior to the filing of ABM's request, the Presiding Officer issued his ruling scheduling hearings for Tuesday, June 29, and Wednesday, June 30--respectively, 15 and 16 days after the deadline for filing written discovery. POR No. C2004-1/2. That ruling also set Thursday, June 24, and Friday, June 25, as the respective dates for designations of

written cross-examination for the witnesses testifying the following Tuesday and Wednesday, and expressly contemplated that "[r]esponses to discovery filed after those dates may be designated up to seven days following their filing with the Commission." *Id.* at 1.

Based on that ruling, complainants' witnesses and counsel have made vacation plans and travel reservations. Witness Stralberg, for instance, has purchased airline tickets to travel from California to Washington on Sunday, June 27, in order to prepare for and give his scheduled June 29 testimony, and then to travel directly from Washington to Norway for a long-planned family gathering.

ABM, on behalf of itself, The McGraw-Hill Companies (McGraw-Hill), and the National Newspaper Association (NNA), now belatedly stirs itself to object that the hearing schedule issued by the Presiding Officer eight days ago is "unfair," "would present obvious logistical nightmares," and "would seriously compromise due process rights." ABM's arguments for these conclusions are feeble.

ABM worries that "there is a high probability that responses will be filed after the dates set for designations." It is impossible to disagree, since that probability was expressly acknowledged and provided for in the Presiding Officer's Ruling of a week earlier. However, the phenomenon of interrogatory responses being filed after the dates set for designations is utterly commonplace in Commission proceedings--so much so that when receiving written cross-examination into evidence, the Presiding Officer unfailingly inquires whether any party wishes to designate additional responses *received subsequent to the date for designations*.

The prospect that furnishes ABM's apparently more weighty ground for objection--as we infer from ABM's citation of two federal court cases for the proposition that the practice in question "would seriously compromise due process rights"--is that "[b]y permitting the designation of evidentiary material as late as July 5th, seven days after June 28th [the due date for responses to interrogatories filed

on the last day of the discovery period], the Order would permit the introduction of *written cross-examination* after all of the sponsoring witnesses have been excused" (emphasis added). It is hard to know what answer to give to this objection, the possibilities being so various. ABM has every right to object to the admission of such evidence, or to request that the sponsoring witness be recalled. However, the Commission does not treat designations of written cross-examination as automatic passports into the evidentiary record. Rather, when objection is made, the Commission entertains and rules on the objection. When a request for oral cross-examination of a sponsoring witness is made, the Commission entertains and rules on that. In fact, it would be remarkable in the in the highest degree if admitting written cross-examination after the witness's appearance were held to be a serious compromise of due process rights, since that is what the Commission has done and continues to do in virtually every rate case that has ever come before it. It therefore is not remarkable that the two cases cited by ABM, *United States v. Caudle*, 606 F.2d 451, 458 (4th Cir. 1979) and *United States v. Riggi*, 951 F.2d 1368, 1375-76 (3d Cir. 1991), turn out to have nothing at all to do with the matter. These cases concern the right of defendants in *criminal* proceedings, under the Sixth Amendment's Confrontation Clause, to conduct additional cross-examination "[w]hen material new matters are brought out on *redirect* examination," 951 F.2d at 1375 (emphasis added).

Interwoven with the imaginary "procedural and due process problems" that ABM tries to conjure up is the repeated suggestion that the schedule is simply too tight and would impose burdens that ABM is not up to handling. ABM fears a "logistical nightmare" if it has to designate responses for the record that may have been filed only a day earlier (although this situation has been a routine occurrence in previous cases). It is certain that "it will be nearly impossible to cross-examine witness Stralberg on June 29th with respect to interrogatory responses and

documents produced the day before" (although ABM and other parties have found it possible on many past occasions to conduct cross-examination in these circumstances). It even frets over "its concern, already real rather than theoretical, that its witnesses will face the far more serious issues than those faced by the complainants' witnesses in selecting available dates in July"--a cause for concern that, putting aside its total irrelevance to the subject at hand, is farfetched at best, since the probability is somewhere between infinitesimal and nonexistent that the Commission, having concluded hearings on the complainants' case on the last day of June, would then require ABM to produce testimony, undergo discovery, and put its witnesses on the stand all before the end of July.

Since the relevant procedural dates, and their proximity to one another, were abundantly clear from the moment the Presiding Officer issued his ruling scheduling hearings, ABM is driven to suggest that it is not so much the procedural schedule in itself that is the source of the problem as the volume of interrogatories filed on the last day of discovery. After primly exonerating itself from any responsibility for this unfortunate state of affairs ("American Business Media submitted nearly all of its discovery requests more than two weeks ago"), ABM regretfully observes, "by our count there were 137 separately numbered requests . . . filed on June 14th. Many of these requests call for answers that will be complex." Complainants sympathize with the burden that this volume of last-minute interrogatories must place on ABM. Still, we cannot help remarking that: (1) June 14 was established as the last day for discovery by the Presiding Officer on May 25 (POR No. C2004-1/1), so that it should not have come as an absolute surprise to ABM that interrogatories were still being filed on that date; (2) although ABM itself may have been exemplary in its quickness off the mark, it ought to have noticed, when counting the 137 requests it states were filed on June 14, that 63 of them came from NNA and 44 from McGraw-Hill, the two parties that join in its request; and (3) that permitting parties to have the established

procedural schedule thrown out, based on claims of unfairness and denial of due process that are traceable to their own dilatoriness, would set an unwholesome example for future litigants in Commission proceedings.

ABM's final reason for requesting that the procedural schedule upon which complainants have based their plans be revoked by the Presiding Officer is of a piece with its preceding reasons:

There is a great deal at stake in this case for both sides. The multi-million dollar rate reductions hoped for by the complainants, if they are successful, would be matched with equivalent increases for many smaller publishers.

For a party that professes its concern chiefly with "permit[ting] the parties and the Commission to develop a factual record in a fair and orderly fashion," ABM has a disquieting propensity to assume the answers to the questions this proceeding is about, such as whether its members will change their mailing characteristics, and to argue its case by simply repeating the same unsupported assertions at every conceivable opportunity.

Complainants do not share ABM's own low opinion of its ability to deal with the procedural pace that has been set by the Presiding Officer. However, they do share ABM's aversion to "logistical nightmares," which in their case would be occasioned not by honoring the established procedural schedule but by rescinding it. Therefore, in order that there be no doubt that ABM will have an adequate amount of time to choose the responses it wishes to designate as evidence and to prepare its cross-examination of complainants' witnesses, complainants are prepared to commit themselves to filing responses to all outstanding interrogatories by June 23, six days before the first day of scheduled hearings. Complainants are also prepared to support one minor adjustment in the procedural schedule--namely, making designations for witnesses Stralberg and Gordon due on June 25 rather than June 24, as currently scheduled, so that there will be at least one full day

intervening between the date on which all interrogatory responses have been filed and the date on which ABM must make its designations.

Respectfully submitted,

s/ \_\_\_\_\_  
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