

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

**Complaint of Time
Warner Inc. et al.
Concerning Periodicals Rates**

) **Docket No. C2004-1**

**OBJECTION OF AMERICAN BUSINESS MEDIA
TO REQUEST FOR PRODUCTION
Time Warner et al. /ABM-T1-3
(September 23, 2004)**

Pursuant to rule 27(c), American Business Media hereby objects to the following request for production:¹

Time Warner et al./ABM-T1-3

This request for production (not, as captioned by the complainants, an interrogatory) seeks a representative mail.dat file for each publication produced by Hanley Wood, the publisher by which witness Cavnar is employed.

American Business Media does not believe that an objection is necessary, since the mail.dat files of Hanley Wood's publications are not within the custody or control of American Business Media, and therefore (as specified in the footnote above), those files do not fall within the ambit of rule 27. Hanley Wood

¹ American Business Media notes that the complainants' caption on the discovery requests to witness Cavnar describes the contents only as "interrogatories," although some are clearly requests for production. By contrast, the contemporaneous fourth set of requests directed to American Business Media itself are correctly described as both interrogatories and requests for production. American Business Media does not know whether the incomplete description of the discovery directed against this and American Business Media's other witnesses is inadvertent, or whether it represents a subtle attempt to avoid rule 27(a), which limits requests for production of documents to those in the "custody or control of the participant," and here American Business Media is the participant. Rule 5(a) limits the term "participant" to parties. American Business Media's witnesses and the companies for which they work are not parties or participants.

is not a party to this case, and the fact that it has agreed to permit its employee to testify for American Business Media does not make it a party. American Business Media's truthful answer, to be provided separately, that it has neither custody nor control over Hanley Wood's files, should be a sufficient response to this request for production.²

In an excess of caution, however, American Business Media objects to the request on the ground that the mail.dat files sought contain commercially sensitive, proprietary and confidential information for which the complainants have established no need and that is, if relevant at all, only marginally relevant to the issues in this proceeding.

The Commission has long recognized that participation of the public in its proceedings would be seriously impeded if such participation required that the books, contracts and other commercially sensitive information of participating companies thus became fair game for discovery. For example, in Presiding Officer's Ruling No. R2000-1/102 (July 31, 2000), he stated:

The Commission's policy regarding the discovery of intervenors' commercially sensitive information has been reiterated in a series of rulings—absent exceptional circumstances, such data need not be produced.

The Ruling added that “[t]he balance between disclosure and commercial

² We note that the Magazine Publishers of America, the association to which Time Warner and other complainants belong, has used this same defense when other parties sought discovery against its members, even a member that offered a witness. In Objections filed on February 2, 1998 in Docket No. R97-1, MPA argued that the information sought from it and its member, Meredith, “is not within the custody or control of MPA” and that, even if the members had the data, “MPA has no legal right to obtain that information from its members.” It appears that the matter was not further pursued.

sensitivity rests initially on whether the data are essential for the Commission's deliberations, including importantly, evaluating the direct case of the party resisting disclosure."

This ruling and those that it cites protect a *party* from an obligation to disclose commercially sensitive information. Here, the complainants seek commercially sensitive information from a *non-party*, which, even if a permissible request, must be subject to an even higher standard, a standard heightened further by the fact that Mr. Cavnar does not even testify about the impact of the complainants' proposal upon Hanley Wood publications or Periodicals in general.

There should be no disputing the fact that mail.dat files contain commercially sensitive, confidential and proprietary information. In fact, they contain all of the information that is contained on a form 3541 Periodicals mailing statement, and more, and the Postal Service routinely rejects Freedom of Information Act requests for mailing statements, citing the commercial sensitivity and confidentiality of their contents.

American Business Media anticipates that the complainants will contend that, since American Business Media through other witnesses has raised an issue in this case about the impact of the proposed rates on Periodicals, it is entitled to probe into the details of the Periodicals published by Hanley Wood. If they do so, they would be wrong. We begin with the fact American Business Media has made no claim about the impact of the proposal upon Hanley Wood,

and, indeed, Mr. Cavnar's testimony (at 3) reveals that all of his company's Periodicals are now being co-palletized.

To be sure, American Business Media has presented an exhibit (LB-1, presented by witness Bradfield) that shows the impact of the rates proposed by the complainants upon 156³ publications, and in doing so witness Bradfield agreed with the complainants (see Bradfield at 6) that the impacts portrayed could in some cases be ameliorated or even reversed if the publishers (and printers) changed the way that the mail is prepared.

But the impact issue in this case is not the impact of rates (that are not even directly at issue) on those 156 publications, or even all American Business Media-member publications, but on the twenty thousand or more publications entered into the mail. The complainants cannot make even a colorable case that there are "exceptional circumstances" warranting an order directing disclosure *by a non-party* of commercially sensitive information related to a mere twelve publications produced by Hanley Wood.

Nor is such disclosure essential for the Commission to be able to evaluate the direct case presented by American Business Media or for the complainants to be able to prepare rebuttal testimony. As stated above, American Business Media has contended that that the rates proposed would have a wide range of impacts and has recognized that changes in mail preparation will affect that impact. Complainants would no doubt like to show with greater detail how such

³ There are 156 publications included on the 144-line Exhibit LB-1, since line 77 contains five co-palletized publications and line 78 contains nine co-palletized publications.

changes would affect the impact. They certainly had but did not take advantage of the opportunity to do so in their direct testimony, where such a demonstration belonged, either through use of data on their own publications or by constructing realistic but hypothetical publications.

More importantly, they now have every opportunity to do so in their rebuttal testimony, and to do so without the need to obtain and review a “representative” mail.dat file from Hanley Wood or any other American Business Media member. First, the complainants can use their own data, which include publications in a wide range of sizes, or hypothetical publications. Note that the complainants in fact produce a number of publications that are similar in size to American Business Media-member publications, and they routinely make supplemental mailings of their larger publications that mirror the mailing characteristics of much smaller publications. See Tr. 73-75, which show 25 individual mailings of less than 70,000 pieces.

Second, they can use the 155 mail.dat files already provided to them by American Business Media to calculate “before and after” rate impacts with as many combinations and permutations as they desire. Although those mail.dat files are a few years old, and thus may not be representative in all cases of the current mailing characteristics of those 155 specific publications, the data are certainly representative of small and medium size publications in general. Third, the complainants can pursue additional data related to the publications used in the testimony of Postal Service witness Tang.

Again, the issue in this case is not the impact of the proposal on Hanley Wood or on the 156 publications in Exhibit LB-1. If the complainants seek to show that in some, many, most or all cases, the adverse impact of the rates they propose on smaller circulation publications can be ameliorated by shifting from sacks to pallets or by building bigger bundles or sacks, they can use other data available to them.⁴ For its part, American Business Media will not contend that the general results of such an inquiry by complainants are not relevant or material based on the age of the files, which are sufficiently dated to offer mailer protection but not so dated as to be unrepresentative of certain types of Periodicals.

For these reasons, even if the request for production directed against a non-party is proper, a proposition with which American Business Media does not agree, the mail.dat files sought need not be provided. An order directing the disclosure of this non-essential, confidential information by a non-party merely because an employee of that non-party offered his testimony would send a chilling notice that parties to these proceedings that cannot afford or locate

⁴ One reason that certain American Business Media members were willing to provide the 155 mail.dat files is that such files would provide the complainants with data they could use for this purpose, but without the need to provide more recent files or files attributed to any particular member.

independent “consultants” but must rely on employees or employees of members do so at great peril.

Respectfully submitted,

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