

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

ANSWER OF AMERICAN BUSINESS MEDIA TO  
MOTION OF TIME WARNER INC., ET AL. TO COMPEL  
PRODUCTION RESPONSIVE TO TIME WARNER ET AL./ABM-5(c) AND TIME  
WARNER ET AL. /ABM-68(k)  
(October 12, 2004)

“responses dribbled in” . . . “audacious” . . . “specious objection”. . .  
“obfuscation” . . . “misdirection” . . . “gamesmanship” . . . “bluster” . . .  
“disingenuousness”

Just as it did in its gratuitously pugnacious (and unsuccessful) objection to American Business Media’s June 16<sup>th</sup> request for reconsideration of the procedural schedule, Time Warner, et al. (hereafter “Time Warner”<sup>1</sup>) have managed to turn a legitimate discovery disagreement into a flailing and *ad hominem* attack on American Business Media’s ethics, tactics and motives. American Business Media is confident that neither the Presiding Officer nor the other Commissioners will be distracted by this unseemly tactic but will consider the merits and not the rhetorical flourish of which Time Warner seems so enamored. This answer, submitted pursuant to section 27(d) of the Commission’s Rules of Practice, will demonstrate why the motion to compel should be denied.

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<sup>1</sup> The Motion is signed only by Time Warner’s counsel.

The gist of the Time Warner motion is that it is unable to replicate and analyze fully exhibit LB-1 without the mail.dat files containing the underlying data used by several American Business Media members to estimate the impact of the proposed rates and without the Excel spreadsheets that were generated with respect to each of the publications included in that exhibit. The subtext of the Time Warner complaint is that American Business Media was less than forthcoming in responding to certain requests for data. American Business Media agrees that Time Warner cannot replicate the Exhibit without the mail.dat files, a subject to be addressed in detail below, and, of course, strenuously disagrees that it is guilty of “gamesmanship” or any other of the pejorative terms that spring so readily from Time Warner’s thesaurus.

It is appropriate to point out at the outset of this discussion two sets of facts that Time Warner understandably fails to mention:

1. Time Warner has the burden of proof in this proceeding, and although it recognized in its testimony (Mitchell at Tr. 851-52), as it does throughout the motion, that impact on mailers is an important issue in this case, its direct case does not reveal the impact of its proposal *on a single publication, not even of the complainants*.

2. American Business Media, on grounds of confidentiality as well as the fact that the mail.dat files underlying exhibit LB-1 were in four of the five cases not retained in the normal course of business and in any event were never in the custody or control of American Business Media, did not and could not produce the mail.dat files requested. However, as stressed in American Business Media’s objections, it did produce 155 mail.dat files from a few years ago the sources of which substantially overlap the publications on LB-1, as Time Warner knows.<sup>2</sup>

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<sup>2</sup> Time Warner was given the complete mail.dat files for the 155 publications, so it knows the identity of the publications. It knows (from the response TW et al./ABM-T2-8(g)) the publishers of the 153 publications on LB-1 and therefore most of the titles included. It thus knows that it has relatively recent mail.dat files for more than 75% of the publications on exhibit LB-1.

As to the first and to a lesser extent the second of these issues, it is appropriate to offer a bit of history to put this dispute into context. On January 19, 2004, shortly after the filing of the Time Warner complaint, counsel for ABM sent an email to all of the American Business Media members on his e-mail list containing a brief description of the Time Warner complaint and a request that those who could do so attempt to analyze the impact of the proposed rates on their publications, using an Access file developed by Time Warner. The information was to be provided in order to assist American Business Media with developing its position, a position it then believed it would probably need to file in a pleading.

The Commission thereafter acted to accept the complaint and set it for hearing without comment from intervening parties, and the case proceeded. After the direct case of complainants was filed with no impact data whatsoever, American Business Media decided to address the issue first by seeking impact data from the complainants with respect to their publications. Then, shortly before the testimony was filed on September 9<sup>th</sup>, it was decided that the impact data provided in response to counsel's January 19<sup>th</sup> request and already provided to Time Warner in a response to a request for production, while not a scientific sample, would at least assist the Commission with an idea of the range of impacts—from positive to negative—on a group of smaller circulation publications.

As just stated, at the time the decision was reached to submit what was the only impact information it had, American Business Media had already

received and responded to Time Warner's request TW et al./ABM-5, one of the requests that is subject to the motion to compel. It responded that the studies referred to in the question were work product but that, in accordance with a discussion with Time Warner's counsel, we would deliver the spreadsheets provided to American Business Media by the companies that had in fact performed the analyses. At that time, American Business Media did not know, one way or the other, whether the original, individual Excel files or the mail.dat files still existed.

American Business Media did consider that, if it submitted the impact information on exhibit LB-1, Time Warner might press for the mail.dat files. If it did, American Business Media expected that it would assert that it does not have custody or control of those files and that, in any event, they are confidential. American Business Media fully understood that the Commission encourages production of underlying data so that calculations can be replicated, and that the use to which the exhibit could be put and the weight given to it could be affected by an inability (or refusal) to produce the highly confidential mail.dat files.

Based upon its pledge to its members to protect against release of any current mail.dat files, especially since some members had only reluctantly agreed to allow the earlier mail.dat files to be provided to Time Warner under a strict non-disclosure agreement, American Business Media took care in its testimony not to over-state the significance of the data contained in exhibit LB-1 and in fact to state affirmatively (ABM-T-2 at 6) that the exhibit reflects only present mailing

practices and that changes in such practices could reduce or even reverse the impact of the proposed rates.<sup>3</sup>

Time Warner now sees nefarious motives at every turn, criticizing American Business Media's interrogatory responses, claiming that it would be prejudiced if exhibit LB-1 is either admitted into evidence or rejected and again asking that documents that do not exist be produced and/or that the Commission consider whether the failure of American Business Media to provide sufficient backup for exhibit LB-1 should affect the weight that it and related testimony should be given.

As to its interrogatory responses, American Business Media will not address each of labels attached to them. Nevertheless, some response is in order.

For example, Time Warner says (at 4) that "as ABM's responses dribbled in," it became clear that it had no intention of producing the mail.dat or Excel files. First of all, the reference to "dribbling in" is both incorrect and unfortunately typical of the Time Warner motion. On August 18<sup>th</sup>, American Business Media responded to 62 of the 64 Time Warner requests that "dribbled in" on July 27<sup>th</sup>, August 4<sup>th</sup> and August 12<sup>th</sup>. The remaining two responses (as well as an updated response to one request) were filed on August 31<sup>st</sup>.<sup>4</sup>

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<sup>3</sup> Witness Mitchell presented no impact data but he did state in his direct testimony (Tr. 851) that the impact on some publications would be "substantial." Exhibit LB-1 makes the same point.

<sup>4</sup> ABM's responses were filed earlier than the deadline to which Time Warner agreed. Moreover, in Ruling C2004-1/6, which established the September 9<sup>th</sup> deadline for the filing of these responses (that were actually filed on August 18<sup>th</sup> and August 31<sup>st</sup>), the Presiding officer asked that, if possible, discrete responses should be filed sooner. They were.

Next, it was hardly “audacious” (motion at 4) for American Business Media to assert on August 31<sup>st</sup> that the studies were subject to an attorney work product privilege. First, it was true. Second, it was not decided until after that date to produce and offer Exhibit LB-1.<sup>5</sup> And third, even after the submission of LB-1, the work product privilege is not waived as to “other documents of the same character,” such as Excel files generated. *Pittman v. Frazier*, 129 F. 3d 983, 988 (8<sup>th</sup> Cir. 1997), discussed at pages 2-3 of American Business Media’s “Objection of American Business Media to Requests for Production: Time Warner et al./ABM-T3-2 and Time Warner et al./ABM-T3-3).”

Time Warner’s claims with regard to the Excel worksheets are equally inappropriate. “Less brazen,” according to Time Warner (motion at 4), but allegedly specious obfuscation nonetheless (motion at 6), was American Business Media’s response to the request for the Excel worksheets that were produced by its members.

What we have here is a failure to communicate. As stated in the motion, there had been a discussion among counsel, followed by an agreement by American Business Media to provide “electronic spreadsheets (covering all 141 publications) in the custody and control of American Business Media . . . that show certain billing determinants along with postage at present and proposed rates.” Undersigned counsel, who took part in the discussions as the sole American Business Media representative, would not have and did not represent

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<sup>5</sup> Time Warner should not be complaining about timing issues it created by taking the most unusual step in Commission proceedings of seeking substantial discovery from a party prior to the submission of that party’s testimony.

that American Business Media ever had custody or control of, or would provide, the individual Excel spreadsheets produced by the members performing the calculations. While the details of the discussions are not recalled, at that time counsel was not aware that most no longer existed, but all that counsel had, and all counsel could possibly have offered, were spreadsheets prepared by the ABM members showing for the particular group of publications covered by the analysis the “before and after” postage and various billing determinants.

American Business Media invites the Commission to examine the description quoted above. The general reference to “certain billing determinants” as well as the statement that the spreadsheets would be “covering all 141 publications” indicate that American Business Media would not be producing 141 separate spreadsheets that were the output of applying Time Warner’s Access file to the mailers’ mail.dat files. But neither the American Business Media response nor any statement made with respect to this request was intended to obfuscate or trick Time Warner. It appears that, while American Business Media’s counsel had in mind and was referring to the four group spreadsheets actually turned over to Time Warner, Time Warner’s counsel had in mind, and assumed American Business Media was referring to, 141 separate spreadsheets, most of which it turns out had not been saved after the calculations were performed months earlier for a limited purpose of estimating

the possible impact of the proposed rates for the purpose of an overall assessment by American Business Media.<sup>6</sup>

As stated above, American Business Media recognizes that the data in exhibit LB-1 cannot be replicated. But Time Warner cries wolf in describing the allegedly unfair situation in which it is thus placed. Its ultimate harm, it claims (motion at 12), is that while the complainants “are confident that, given the necessary data, they can demonstrate for any representative sample of publications that the methodology underlying ABM’s exhibit does not produce realistic estimations of impact,” American Business Media has deprived them of the necessary data.

This claim is simply false. First, the complainants have all the data they could possibly want for about one hundred publications that they produce. While those publications are not a representative sample of the class, they do produce some publications with circulations of less than 100,000 and even less than 25,000. Small supplemental mailings of larger-circulation titles provide many more opportunities to perform the calculations that Time Warner now says are essential but that it failed to perform, or at least to produce, in its direct testimony.

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<sup>6</sup> In this regard, American Business Media takes strong exception to Time Warner’s statement (motion at 6-7) that “[w]hether through inadvertence or calculation,” four of the five participating American Business Media members have destroyed the mail.dat files and three have destroyed the Excel files. American Business Media’s broadly-distributed request, transmitted in January, simply asked members to try to calculate the impact. A few did so. They were not told to save or not to save anything, and in their normal course of business they do not save mail.dat files and, apparently, three of the five saw no reason to save the Excel files. At the time they did the calculations, each moved much of the Excel file data to a spreadsheet and sent that spreadsheet to American Business Media’s counsel, who later turned them over to Time Warner in accordance of his understanding of their discussion. Had there been a plot, or in Time Warner’s word a “calculation,” to “destroy” the underpinnings of exhibit LB-1, Time Warner can be confident that they would have been destroyed and that we would not now have a situation where one of the five saved the mail.dat files and two saved the Excel files.

Far more importantly, as stressed in American Business Media's objections but totally ignored in Time Warner's strident motion, American Business Media provided to Time Warner 155 mail.dat files from member publications, and Time Warner can determine from interrogatory response TW/ABM-T2-8(g) and the information on those 155 mail.dat files that it has in its possession mail.dat files for more than 75% of the titles included in exhibit LB-1.

In addition, of course, Time Warner is seeking information from Postal Service witness Tang, the appropriate source for industry wide data, that will further allow it to examine the "range of impacts" and "where in the range of impacts various types of publications would fall" (Motion at 10).

Time Warner and its consultants can manipulate those data to their hearts' content in order to demonstrate the effect of the proposed rates on publications with the characteristics of those in the mail.dat sample and others and how the rate effect can be changed by changes in mailing practices. It already has the "representative sample" it seeks, a fact that would escape anyone reading its motion. Although the mail.dat files provided by American Business Media are several years old and may not in all cases be representative of the way every one of those publications now mails, they are no doubt representative as a general matter of publications like those included. And just to assure that Time Warner is not prejudiced by use of the mail.dat files provided, American Business Media pledged in its objection—a pledge that, like the mail.dat files, is ignored in the motion—not to assert that the age of the data make them non-representative.

We stated:

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.

Time Warner is therefore not substantially prejudiced by American Business Media's inability to provide all of the data underlying exhibit LB-1.<sup>7</sup> It has more than enough data in a usable form—from complainants' own and from 155 American Business Media-member publications and arriving from the Postal Service pursuant to a protective order just agreed to—to seek to prove whatever it wishes to prove. It also has the spreadsheet impact data provided to Time Warner on August 31<sup>st</sup>, data that are more extensive than those in the exhibit.<sup>8</sup>

Clearly, with all of these sources available, Time Warner fails to meet the Commission's standard that absent "exceptional circumstances" an intervenor (as opposed to the Postal Service) will not be ordered to produce confidential data.<sup>9</sup>

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<sup>7</sup> While Time Warner never so recognizes, the spreadsheets turned over contain a significant amount of information about the publications in exhibit LB-1. For example, as shown in its recent interrogatory *Time Warner et al./ABM-T2-4*, the backup provided includes data such as presort levels and sack minimums.

<sup>8</sup> We again remind the Commission that due to its insistence upon pre-testimony discovery, Time Warner sought and received this impact data before American Business Media's testimony was filed. Once the only impact data that American Business Media or its members had were provided to Time Warner, it became apparent that they should be boiled down to an exhibit, notwithstanding what was an unwillingness to provide confidential mail.dat files not in American Business Media's possession that, it was later learned by American Business Media, could not in fact be provided, since most had not been retained by the members.

<sup>9</sup> See *Presiding Officer's Ruling No. R2000-1/02* (July 31, 2000), addressed in American Business Media's Objections. See also *Presiding Officer's Ruling No. R2000-1/97* (July 25, 2000), at 8, where the Presiding Officer ruled that the proponent of a new rate or classification sometimes has a higher burden for disclosure and *Presiding Officer's Ruling No. R97-1/104* (February 27, 1998) at 1-2, confirming that "a

### Relief requested

For these reasons, the Presiding Officer should not as requested direct American Business Media to produce the single set of extant, confidential mail.dat files and the two sets of extant Excel files underlying the data in exhibit LB-1. Most of the supporting material no longer exists.<sup>10</sup> While the Commission may wish to direct American Business Media, as further requested, to inquire of the relevant members about whether they possess, can possess or can reconstruct the missing files, American Business Media has already undertaken that task. The results of the inquiry were, as stated above, that one member retained the mail.dat file, two retained the Excel file and three retained neither. Those who no longer have the mail.dat files have stated that it is not possible to obtain or recreate them.<sup>11</sup>

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strong interest in protecting” commercially sensitive information prevails, “regardless of the availability of protective conditions.” The Time Warner citations at page 11, note 13, of its October 6<sup>th</sup> Motion to Compel offered in support of its assertion that once relevance is established, disclosure with protective conditions is mandatory all deal with discovery from the Postal Service, and, as shown here, the Commission has sharply distinguished between the Postal Service and intervenors.

<sup>10</sup> At page 12, Time Warner cobbles together various phrases from several subsections of Section 31(k) of the rules of practice, omitting however the phrase “unless the presumption” that input and other data are necessary is “overcome by an affirmative showing.” Rule 31(k)(3). Here such a showing has been made.

<sup>11</sup> Here is the verbatim response to the inquiry from one member:

It is not possible to recreate the mail.dat files without the original list of subscribers. In order to recreate exact same mail.dat for an old mailing, we have to get the exact label file and run it through the presort like Group 1 using the exact same configurations at the time of the mailing (i.e. November 2003 issue). However, mail.dat files will most likely not come out exactly the same today because the presort mailing software gets upgraded almost on a quarterly basis which will change some of the configurations.

Besides, our fulfillment house does not archive the mailing files. They keep it for about a month before discarding it. So, we don't have the original mailing file.

As for the second prong of the requested relief—a declaratory order to the effect that the Commission will take into consideration whether American Business Media’s inability to provide the foundational data for the exhibit warrants an adverse inference regarding the weight that should be given to exhibit LB-1 and associated testimony—American Business believes that this relief is unnecessary. First, the Commission is of course always free to make a determination as to the appropriate weight to be accorded any evidence under all the circumstances, including American Business Media’s inability to provide all of the supporting data to exhibit LB-1, regardless of whether or not the Presiding Officer issues a declaratory order to that effect. Second, American Business Media has already acknowledged through the testimony and interrogatory responses of its witnesses that there are limitations to exhibit LB-1, which does not reflect any changes in mailing practices to mitigate the adverse impact of the proposed rates.

Respectfully submitted,

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