

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

COMPLAINT OF TIME WARNER INC. et al.
CONCERNING PERIODICALS RATES

Docket No. C2004-1

STATEMENT OF THE MCGRAW-HILL COMPANIES IN SUPPORT OF ANSWER OF
AMERICAN BUSINESS MEDIA TO MOTION OF TIME WARNER et al. TO COMPEL
PRODUCTION OF DOCUMENTS RESPONSIVE TO TW et al./ABM – T1 – 3
(October 15, 2004)

The McGraw-Hill Companies, Inc. (“McGraw-Hill”), through its undersigned counsel, submits this Statement in support of American Business Media (“ABM”)’s opposition to Complainants’ pending motions to compel discovery of commercially sensitive information such as mail.dat files from ABM and its witnesses.¹ McGraw-Hill submits in this regard that Complainants have by no means met the strict “exceptional circumstances” test that the Commission has long applied in denying nearly all motions to compel discovery of commercially sensitive information from intervenors, even under protective conditions. McGraw-Hill further submits that it is important to adhere rigorously to this test in order to avoid discouraging broad participation by intervenors in proceedings before the Commission.

Complainants are plainly wrong in suggesting that under the Commission’s precedent, an intervenor should be required to disclose commercially sensitive mail.dat

¹ While the caption above refers only to ABM’s answer to Complainants’ pending motion to compel discovery from ABM witness Cavnar, McGraw-Hill likewise supports hereby ABM’s opposition to Complainants’ pending motions to compel discovery from ABM witnesses Bradford and McGarvy as well as from ABM itself.

files to actual and potential competitors so long as merely a “relevance standard” has been met² and the competitors agree to protective conditions. Motion of Time Warner Inc. et al. to Compel Production of Documents Responsive to TW et al./ABM –T1 -3, filed October 6, 2004, at 11 & n. 13. The Commission has expressly and repeatedly rejected a mere “relevance standard” in this regard.

Motions to compel such discovery are denied “*not* because the data requested were not relevant, but because [movant] failed to demonstrate *exceptional* circumstances that would warrant the production of an intervenor’s commercially sensitive information,” such that “the data are *essential* for the Commission’s deliberations.” *Presiding Officer’s Ruling No. R2000-1/102*, July 31, 2000, at 3 (denying discovery where “the Commission can resolve the[] ... [material] issues ... without recourse to the [commercially sensitive] data” of an intervenor) (emphasis added). See also *Presiding Officer’s Ruling No. R87-1/148*, November 10, 1987, at 3 (“While the information is relevant to the issues in this proceeding, those issues can be considered and resolved without recourse to what UPS has determined to be commercially sensitive material”); *Presiding Officer’s Ruling No. R94-1/64*, August 19, 1994, at 5-6 (“Even if all [movants’] arguments regarding relevance were accepted without rebuttal, nothing in those claims would rise to the status of ‘exceptional circumstances’”); *Presiding Officer’s Ruling No. R2000-1/112*, August 10, 2000, at 3-4 (“the central concern is not the relevance of the information requested, ... but rather the Commission’s policy regarding disclosure of intervenors’ commercially sensitive information ... --absent exceptional circumstances, such data need not be produced”)

² McGraw-Hill does not intend to suggest that Complainants have met even a relevance standard in this regard.

(distinguishing requests for confidential information “directly related to [intervenors’] affirmative proposals to implement classification changes,” where the information is “available only from the intervenors and, critically, [is] necessary to evaluate ... their proposals”).

Under the Commission’s precedent, therefore, the question of possible protective conditions on the discovery of an intervenor’s commercially sensitive information does not arise unless and until the party seeking discovery has first met the Commission’s “exceptional circumstances” test for obtaining such discovery. The Commission has not dispensed with the “exceptional circumstances” test simply if the party seeking discovery of an intervenor’s commercially sensitive information may be amenable to protective conditions, as is invariably the case. See *Presiding Officer’s Ruling No. R87-1/148, supra*, at 1, 2-3 (rejecting argument by Postal Service that “exceptional circumstances” test could be obviated by “protective conditions ... for [an intervenor’s] commercially sensitive information”); *Presiding Officer’s Ruling No. R2000-1/97*, July 25, 2000, at 11-12 (accepting assertion that motions to compel discovery of intervenors’ commercially sensitive information “should be denied regardless of the possibility of protective conditions,” as in *Presiding Officer’s Ruling No. R97-1/104*, February 27, 1998, so long as intervenors are not “proponents of proposals that change rates and classifications”). The rulings cited by Complainants in their above-referenced footnote 13 are wholly inapposite to the present issue because none of them involved discovery demands upon intervenors. Each of those rulings involved only discovery sought from the Postal Service, which offered to provide it subject to protective conditions. In rulings

cited above, the Commission has sharply distinguished the Postal Service from intervenors in this regard.

Complainants have not met the Commission's "exceptional circumstances" test in order to justify discovery of commercially sensitive information from intervenor ABM and/or its witnesses. The information sought is by no means essential to the Commission's deliberations, as ABM has demonstrated. Among other things, Postal Service witness Tang has provided testimony focusing on the impact of the rates proposed by Complainants, and is in the process of providing an array of additional information in response to Presiding Officer's Information Request No. 2 as well as Complainants' discovery requests. See, e.g., responses of witness Tang to TW et al./USPS - R2 - 13.c-e, 16, filed October 12, 2004. Further, Complainants already have access to numerous mail.dat files, both of their own publications and those of ABM members who consented to the release of non-current mail.dat files.

Even apart from this, it hardly seems essential to the Commission's deliberations that Complainants have access to commercially sensitive mail.dat files in order to "verify the accuracy or faithfulness ... of the ... *transcription* of results" to ABM Exhibit LB-1 or the "accuracy of the computations performed." Motion of Time Warner Inc. et al to Compel Production Responsive to TW et al./ABM – 5(c) and TW et al./ABM – 68(k), filed October 5, 2004, at 3 (emphasis in original). Any material transcription or computational errors are entirely speculative, and the mail.dat files would simply be corroborative. The Commission could instead rely in this regard on the declarations of witnesses that the exhibit is accurate to the best of their knowledge and belief upon reasonable inquiry, just as the Commission has in other proceedings (e.g., MC95-1)

where the impact of proposed rates was estimated and considered in the absence of mail.dat files. The ABM exhibit in question is not akin to a statistical survey or econometric study governed by rule 31(k) where assumptions, input and methodology may truly be in doubt and material.

ABM has not over-claimed the weight that should be given to its Exhibit LB-1, and its inability to provide Complainants with commercially sensitive information of its members should not prevent the Commission from according that exhibit the full weight claimed. The declaratory order sought by Complainants in this regard would not be appropriate where the “exceptional circumstances” test is not met. *See Presiding Officer’s Ruling No. R87-1/148, supra*, at 3.

While mail.dat files may contain commercially sensitive information that could have some relevance to an issue coming before the Commission, they also typically contain a wealth of other commercially sensitive information that is not relevant. Accordingly, even in an exceptional case where (unlike here) some information in mail.dat files might be “essential” to the Commission’s deliberations, we believe that only such essential information should be subject to required disclosure (under protective conditions) -- not entire mail.dat files. Such files are somewhat analogous in this regard to mailing statements, and the Commission “has never previously found it appropriate to order the production of individual postage statements.” *Presiding Officer’s Ruling No. R2000-1/72*, May 30, 2000, at 7-8. More generally, we share the concerns of others that to require intervenors to disclose commercially sensitive

information short of truly “exceptional circumstances” may ultimately deter broad participation in Commission proceedings, even as limited intervenors.³

Respectfully submitted,

/s/

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³ See *Presiding Officer's Ruling No. R2000-1/112, supra*, at 2 (noting statement by United Parcel Service that to require such discovery “would have a chilling effect on intervenors’ participation in proceedings before the Commission”).