

# DOCKET SECTION

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

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POSTAL RATE COMMISSION  
OFFICE OF THE SECRETARY

POSTAL RATE AND FEE CHANGES, 1997

Docket No. R97-1

**ANSWER IN OPPOSITION OF UNITED STATES POSTAL SERVICE TO  
MOTION OF ASSOCIATION OF ALTERNATE POSTAL SYSTEMS TO COMPEL  
PRODUCTION BY THE UNITED STATES POSTAL SERVICE OF REPORT ON  
ALTERNATE DELIVERY  
(AAPS/USPS-6)**

The Postal Service hereby responds to the Motion of Association of Alternate Postal Systems (AAPS) To Compel Production by the United States Postal Service of Report on Alternate Delivery, (hereinafter "Motion"), filed on September 25, 1997.

On September 5, 1997, AAPS filed interrogatories AAPS/USPS-1-6, directed to the Postal Service for institutional response. Interrogatory 6 asks whether the Postal Service conducted or commissioned a study or report on alternative delivery since the Strategic Analysis, Inc., (SAI) report "revealed during the course of Docket No. MC95-1" and for the production of "any completed study or report or a description of any work in process." On September 15, 1997, the Postal Service filed a lengthy and detailed objection to interrogatory AAPS/USPS-6 (hereinafter "Objection"). The Objection amply demonstrates that AAPS' discovery request is objectionable on grounds of relevance and commercial sensitivity, and is incorporated in the instant Response by reference and in accordance with Special Rule of Practice 2B. By motion filed September 25, 1997, AAPS filed the Motion at issue here. For the reasons stated below, the Postal Service submits that AAPS's Motion must be denied.

As explained in the Objection, the Postal Service has identified subsequent

research conducted by SAI as responsive to interrogatory 6. The contents of this research include:<sup>1</sup>

- definition of alternate delivery and categorization of alternative delivery providers;
- identification of alternative delivery providers by name, location, size, areas served, business practices and strategies, pricing, etc.;
- methods of collection of information;
- a summary of changes in the alternative delivery industry, including failures, consolidations, mergers and acquisitions, and public offerings;
- annual volume by market segment (e.g., catalog or magazine) and by provider type from 1993 to 1996 and forecast of growth to 2005;
- revenue trends and profitability potential of alternative delivery;
- *market delivery rates offered by alternative delivery*;
- analysis of factors influencing the success of alternative delivery;
- researchers' recommendations to the Postal Service regarding alternative delivery; and
- reaction to price change.

AAPS concedes that there may be "some legitimacy" to the Postal Service's claims of confidentiality and competitive harm asserted in its Objection, but asserts that the material is germane to the matters at issue in this docket. AAPS contends that the information it requests becomes relevant by virtue of the applicability of 3622(b)(4), which directs the Commission to evaluate the effect of "rate increases" upon "enterprises in the private sector of the economy engaged in the delivery of mail matter other than letters." This argument fails.

First, as stated in the Postal Service's objection, unlike Docket No. MC95-1, the

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<sup>1</sup> Some, if not all, of the SAI research conducted since Docket No. MC95-1 is still in draft form, and until this information becomes final, it is still a "work in progress." If AAPS successfully moves to compel, depending upon when the SAI research is completed, the Postal Service may not have a "completed study" to share with AAPS in response to AAPS/USPS-6, in which case it would simply provide a "description of any work in progress" as requested by interrogatory 6. Of course, the Postal Service acknowledges its duty to supplement its responses as provided in Special Rule 2.C.

Postal Service has not proposed new subclasses or classification changes to respond to a competitive threat in the markets served by Periodicals and Standard (A) services. The Postal Service accordingly has not placed the alternative delivery “in issue,” as was the case in Docket No. MC95–1, and has therefore distinguished P.O. Ruling No. MC95–1/11 in its Objection.

In its Motion, AAPS fails to tie the contents of the SAI research with the testimony of Postal Service witnesses, or with the Postal Service’s direct case. Nowhere in the Postal Service’s testimony is there a claim that the existence of a “competitive threat” from alternative delivery forms the basis for any of the rate and classification proposals in this docket. Moreover, the examples AAPS offers in its Motion do not show a nexus between the contents of the SAI research and the proposals at issue in this docket. SAI claims that responses by witnesses Tolley and O’Hara<sup>2</sup> demonstrate the relevance of the SAI research. Motion at 2. Yet in these responses, which incidentally do not even form part of the Postal Service’s direct case, the witnesses merely state their unfamiliarity with information on alternative delivery. Neither witness indicates that the existence of a competitive threat informed the pricing and classification proposals in this docket. AAPS’ reference to witness O’Hara’s testimony<sup>3</sup> at page 35 is equally unavailing. In his testimony, Dr. O’Hara

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<sup>2</sup> AAPS incorrectly identified the respondent to interrogatory AAPS/USPS-T30-1(d) as witness Moeller. In fact, Dr. O’Hara provided a response to that interrogatory.

<sup>3</sup> Witness Moeller’s testimony at page 35 addresses topics unrelated to AAPS’ Motion. Presumably, AAPS intended to refer to Dr. O’Hara’s testimony, USPS-T-30, which addresses the pricing criteria for the Enhanced Carrier Route subclass at page 35.

makes a single passing reference to the effect of the Postal Service's *rate increase* for the Enhanced Carrier Route subclass on competition, by stating that, "[g]iven the very high cost coverage of the ECR subclass, this rate increase does not result in unfair competition for [the Postal Service's] competitors." USPS-T-30 at 35. It is simply unimaginable how AAPS can conclude that detailed research conducted by SAI on the current state of the alternative delivery industry could elucidate this point.<sup>4</sup> In sum, interrogatory 6 is properly objectionable on grounds that it is not reasonably calculated to lead to the discovery of admissible evidence.

Secondly, AAPS' argument rests on the mistaken premise that the (b)(4) criterion invites evaluation on the effect of any price change proposal on alternative delivery. The gist of AAPS' argument is that the SAI research will aid the Commission in evaluating the effect of the proposed reduction in the ECR pound rate on alternative delivery. The statute, however, is much more narrowly worded than AAPS contends. The (b)(4) criterion only requires an evaluation of "rate increases" on alternative delivery; the statute is silent with respect to rate *decreases*. Here, AAPS' Motion does not identify any specific rate increase which would trigger the Commission's evaluation of the effect on competition under (b)(4). Instead, AAPS' Motion appears to be focused on proposed rate reductions for pound rated ECR pieces. AAPS

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<sup>4</sup> As explained above, one of the topics discussed in the SAI research is the effect of a price change. While this topic could be marginally relevant to rate changes in a general sense, it does not open the door to the remaining contents of the research. Moreover, such analysis contains the thoughts and mental impressions of the SAI researchers, and should accordingly be shielded from protection as confidential and sensitive commercial information.

accordingly fails to link the SAI research to the statutory ratemaking criterion.

Even assuming the relevance of the requested information, AAPS' proposal to disclose the contents of the SAI research under protective conditions would not adequately protect the Postal Service from competitive harm. That AAPS would offer to agree to such conditions is not surprising, particularly since the contents of the SAI research contain company-specific information about its members. Yet that AAPS is willing to agree to protective conditions does not resolve the instant controversy. Even under the Federal Rules of Civil Procedure, discovery may be completely resisted under Rule 26(c)(7), which provides that courts may order that "a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way...."

The SAI research clearly qualifies as "confidential research." In determining whether the material is confidential, the courts examine "the nature of the information, the measures taken to protect its secrecy, and the extent of knowledge of the information by both outsiders and insiders." *Brittain v. Stroh Brewery Co.*, 136 F.R.D. 408 (M.D.N.C. 1991). In this case, the SAI research is manifestly commercially sensitive, as it details the SAI researchers' understanding about the alternative delivery industry and contains the researchers' mental impressions and recommendations with regard to that industry. Secondly, the Postal Service undertakes to protect its SAI research, both internally and externally. The information is distributed to responsible employees on a "need to know basis" with the understanding that the information is confidential; copies have been marked as

"confidential;" and the information is not shared with the public. Industry research, moreover, has been held withheld under Rule 26 in other contexts. In *Greater Rockford Energy & Technology Corp. v. Shell Oil Co.*, 138 F.R.D. 530 (C.D. Ill. 1991), pricing and supply and demand studies of oxygenated fuels and gasoline were held to be protected from disclosure notwithstanding their relevance to the issues at stake in that proceeding. The *Greater Rockford* court's ruling was informed in part by the fact that the industry pricing and demand information could be easily purchased from the marketplace. *Id.* at 535. Similarly, here, the Postal Service has commissioned research of the alternative delivery market. The information it has acquired is not unique to the Postal Service, but rather constitutes a compilation of industry information that AAPS could well assemble by itself or with the aid of an industry analyst.

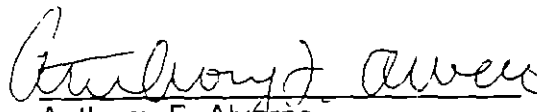
In sum, AAPS can neither show the relevance of, or the need for, the SAI research. Its Motion should accordingly be denied.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

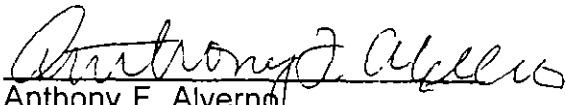
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**CERTIFICATE OF SERVICE**

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.

  
Anthony F. Alverno

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