

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

Postal Rate and Fee Changes, 1997

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Docket No. R97-1

**NEWSPAPER ASSOCIATION OF AMERICA
OPPOSITION TO UNITED STATES POSTAL SERVICE REQUEST FOR
CERTIFICATION OF PRESIDING OFFICER'S RULING AT TR. 33/17361-62
March 24, 1998**

The Newspaper Association of America ("NAA") hereby opposes the Postal Service's March 20, 1998 Request For Certification of the Presiding Officer's ruling compelling it to authenticate the document entitled "United States Postal Service 1998 Marketing Plans" previously filed in this proceeding as NAA Library Reference NAA/R97-1 LR 2 and identified as NAA cross-examination exhibit 1 of Saturation Mail Coalition rebuttal witness Buckel.¹

On March 17, 1998, the Presiding Officer granted an NAA motion to compel and directed the USPS to authenticate the USPS Marketing Document, or dispute its authenticity, by March 18, 1998. Tr. 33/17362. In flagrant violation of this ruling, the Postal Service filed nothing by the March 18 deadline, nor did it request an extension. Instead, two days later, it untimely filed the instant Request For Certification. Given the

¹ *United States Postal Service Request for Certification Of Presiding Officer's Ruling At Tr. 33/17361-62 Granting Newspaper Association of America's Motion To Compel Admission From The United States Postal Service (NAA/USPS-RFA-1)* (filed March 20, 1998). The Postal Service served a copy of its Request on counsel for NAA by fax.

lateness of the proceeding, it is conceivable – perhaps even likely -- that the USPS is hoping to stall until after the record closes.²

The Presiding Officer should deny the requested certification either as untimely or on the merits. In the event the ruling is certified, the Commission should affirm the Presiding Officer's ruling and allow the record to remain open pending authentication of the document. Such actions are necessary to provide a balanced evidentiary record as the USPS Marketing Document is "relevant and material evidence which is not unduly repetitious or cumulative" pursuant to Section 3001.31 of the Commission's Rules of Practice and Procedure.

I. WHY THE USPS IS SO ANXIOUS TO KEEP THE MARKETING PLANS SECRET

The Commission is well aware that at various times in this proceeding, it has become evident that the USPS has strategically withheld material documents from its own witnesses and this Commission, some of which have subsequently appeared "through the back door." The Marketing Document is but one example in a line that includes the SAI research on alternate delivery and information regarding non-profit costs. As a government agency, the Postal Service seems to have forgotten that it is under a duty to act forthrightly in the public interest.

In its Request For Certification, the USPS argues that "it is imperative that the document not be entered into the evidentiary record." USPS Request For Certification

² See *USPS Request for Certification* at 10-11. The USPS contends that it needs time to explain away the contents of this document. This is nonsense. The document speaks for itself.

at 3. Why? The document has been widely distributed in Washington and apparently at least one of the witnesses sponsored by a party to this case may have contributed to its preparation. Tr. 32/17266 (Buckel).

First, the USPS Marketing Document reveals a concerted effort by the USPS to use this rate proceeding (and the Commission) to accomplish the Postal Service's objective of forcing captive First Class mailers to underwrite unduly low or even reduced commercial mail rates (such as the Standard (A) pound rate) in order to capture a larger share of the advertising market from newspapers and other private sector companies. Thus, according to the USPS Marketing Document, the USPS views this Docket No. R97-1 rate case as a marketing opportunity to reach its target audience, advertisers, which it will reach "through the PRC." NAA/R97-1 LR2 at AD33. Thus, as described further below, the USPS has an interest in keeping the USPS Marketing Document secret because it contains evidence of USPS bias as well as party admissions.

The document plainly demonstrates that the USPS targets newspaper advertising business:

- Newspapers are the major, direct competitors for advertising mail dollars. Newspapers derive about 80 percent of their total revenue from advertising, the majority of which is local (retail) advertising. This segment of newspaper advertising is highly adaptable to mail. . . . Pre-printed inserts have been and will continue to be the single newspaper application which is most vulnerable to diversion to Ad Mail. *USPS Marketing Document* at AD11.
- An indication of the potential opportunity in this [Retail] segment comes from auto dealers, which as a category grew 68 percent, mostly in newspapers. . . . Ad Mail could shift a substantial portion of this mail from newspapers *Id.* at AD16.
- **Ad Mail Vision** USPS Ad Mail Service will make direct mail the advertising medium of choice, overtaking both newspaper and TV advertising by 2005. *Id.* at AD26.

NAA has contended consistently throughout this proceeding that the Postal Service fundamentally has lost sight of its public service mission and has instead tried to reshape itself into a competitive business without any Congressional authorization. The Marketing Document is clear evidence that such is in fact the case.

This Commission plays an essential role in protecting captive mailers and those private enterprises which the USPS views as its "competition" from abusive USPS proposals. What is especially troubling to the NAA, however, and dangerous to the integrity of the Commission's mandate to recommend reasonable postal rates, is the Postal Service's seeming willingness to withhold relevant evidence from this agency and even its own witnesses as well as interested parties. The Commission must take strong action to preserve the integrity of the rate case process.

II. THE POSTAL SERVICE'S REQUEST FOR CERTIFICATION IS UNTIMELY

The Presiding Officer directed the USPS to admit the authenticity of the Marketing Document by March 18. This could have been accomplished in a simple filing of less than a page – hardly a burdensome task. However, instead of responding in a timely manner, the USPS – without first seeking an extension of time – filed the instant Request for Certification.

The Request for Certification is untimely. Accordingly, the Commission should reject the Request on procedural grounds.

III. THE REQUEST FOR CERTIFICATION SHOULD BE DENIED BECAUSE THE USPS's EQUITABLE AND LEGAL ARGUMENTS HAVE NO MERIT

A. The USPS Commercial Privilege Argument Is Not Apt

The USPS also argues in its Request For Certification that it should not be required to authenticate the USPS Marketing Document because the document is commercially sensitive. USPS Request For Certification at 2-3. This contention completely lacks merit.

First, it is completely irrelevant for purposes of authentication whether a document is commercially sensitive or not. That is a question of whether the document should be afforded confidential status.

Second, to the degree that issue is relevant, the USPS has waived any objection as to commercial sensitivity. According to Commission Rule 27(c), the bases for a party's objections to requests for admissions must "be clearly and fully stated." The Postal Service objected to the RFA only on the grounds of timeliness. USPS RFA Objection at 1. Nor did it even raise such an objection in its March 16, 1998 Opposition to NAA's Motion to Compel. Nor did it raise such an objection when the document was marked as a cross-examination exhibit.

Third, the Postal Service has already lost the privilege by disclosing the document to entities outside of the agency. NAA obtained the USPS Marketing Document from a third party that itself had received the document from the USPS. The Postal Service's commercial sensitivity argument fails.

B. The USPS Must Supplement Interrogatory Responses Even After The End of The Initial Discovery Period

In granting NAA's motion to compel, the Presiding Officer noted that the Postal Service has a continuing obligation to answer and supplement discovery requests. Tr. 33/17361. The USPS does not dispute that it failed to answer NAA interrogatory NAA/USPS 10 at all, much less in a timely manner. Given that, the USPS can hardly now argue that it had no duty to supplement its initial "response" after the end of the initial discovery period. USPS Request For Certification at 4-7.

This argument is contrary to Commission Rule 25(e), which contains no deadline for supplementing interrogatory responses. This argument is also directly contrary to the Presiding Officer's Ruling MC96-3/21 (*see NAA Motion To Compel*) where the Presiding Officer ordered the USPS to *supplement* its interrogatory response *after the end of the initial discovery period*.

C. The Requested Discovery Is Proper Under Rule 2(E)

The USPS contends that NAA's discovery request is improper under Rule 2(E). This is incorrect.

First, NAA's requests for admission were timely filed on February 17, 1998, the deadline for discovery from the USPS. Only the USPS's intransigence has delayed matters since that time.

Second, even under the test cited by the USPS,³ the discovery is proper. The request for authentication is a request for information obtainable solely from the Postal

³ See USPS Request for Certification, citing Presiding Officer's Ruling No. R87-
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Service. The Marketing Document certainly seems to "address areas not explained in the Postal Service's direct case." And there is no reason to think that the Marketing Document may not have been of use to parties in preparing their rebuttal cases.⁴ A timely admission may have been of use to parties preparing their rebuttal testimony (indeed, SMC witness Buckel alluded to it in his testimony even without awaiting USPS authentication).

The document could also be useful to the Commission in preparing its recommendations in this proceeding even in the absence of being included in any party's rebuttal testimony. Thus, Rule 2(E) does not prohibit NAA's requested discovery.

D. The USPS Has Unclean Hands

The USPS Request For Certification is without merit and misapplies precedent. The USPS attempts to turn the facts on their heads by claiming that it was prejudiced by the Presiding Officer's order to respond the NAA's Motion To Compel in "less than 32 hours" and that it would similarly be prejudiced if it had to explain the contents of the USPS Marketing Document "at this late stage of the proceeding." USPS Request For Certification at 3-4, 10-11. It is an elemental legal concept, however, that a request for

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1/138 at 2.

⁴ If properly produced in response to Interrogatory NAA/USPS 10, the Marketing Document may have been useful to parties preparing their direct testimonies. For example, the testimony of AAPS witness Bradstreet referred to USPS documents that tend to show favoritism towards saturation mailers; who is to say that he might not have testified regarding this document as well.


equity demands clean hands. See, e.g., *Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co.*, 324 U.S. 806, 814 (1945). The *only* reason the USPS is under pressure to respond at a late stage of the proceeding is its own recalcitrance. Because of the Postal Service's "unclean hands," the Postal Service's equity argument fails. See *NAA's Motion To Compel*.

IV. CONCLUSION

For all these reasons, the Request For Certification should be denied. The Commission should receive the USPS Marketing Document into evidence once it is authenticated.

Respectfully submitted,

NEWSPAPER ASSOCIATION OF AMERICA

By: 

William B. Baker
Alan R. Jenkins

Robert J. Brinkmann
NEWSPAPER ASSOCIATION OF AMERICA
529 14th Street, N.W.
Suite 440
Washington, D.C.
(202) 638-4792

WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, DC 20006-2304
(202) 429-7255

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the instant document on all participants of record in this proceeding in accordance with section 12 of the Rules of Practice.

March 24, 1998



Alan R. Jenkins