

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

RULES FOR COMPLAINTS

Docket No. RM2008-3

**NOTICE OF ERRATA TO
REPLY COMMENTS OF THE UNITED STATES POSTAL SERVICE [ERRATA]**
(March 23, 2009)

The United States Postal Service hereby files a revised version of its October, 27, 2008 filing of reply comments to Order No. 101, Order and Notice of Proposed Rulemaking Establishing Rules for Complaints. No substantive changes are contained in this revision. The purpose of this revision is only to correct the following typographical errors that were found in the filing:

- Page 2, line 16: "compliant" should read "complaint"
- Page 8, line 17: the ")" after "complaint" should be removed
- Page 12, last line: "compliant" should read "complaint"
- Page 15, line 2: "compliant" should read "complaint"

A revised copy with these corrections follows below.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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REPLY COMMENTS OF THE UNITED STATES POSTAL SERVICE
(October 27, 2008)

Seven sets of comments, in addition to those of the United States Postal Service,¹ were filed in response to Order No. 101, Order and Notice of Proposed Rulemaking Establishing Rules for Complaints, issued by the Postal Regulatory Commission (“Commission”) on August 21, 2008. The Postal Service finds itself in agreement with many of the comments filed by the other parties. The Postal Service’s initial comments address certain issues with sufficient depth that certain parties’ comments taking contrary positions do not warrant a rejoinder. Accordingly, the reply comments below focus on parties’ comments that raise matters not addressed by the Postal Service earlier.

I. The Proposed Procedures for Rate and Service Inquiries Should Be Eliminated from the Rules.

Valpak Direct Marketing Systems, Inc., and Valpak Dealers’ Association Inc. (“Valpak”) argues that the Postal Accountability and Enhancement Act (PAEA) “contains no express authority for the Commission to exercise jurisdiction over rate or service inquiries which are not complaints, or to treat complaints as if

¹ Docket No. RM2008-3, Initial Comments of the United States Postal Service (October 7, 2008). All other comments referenced below were filed in this docket.

they were rate or service inquiries.”² In accordance with the discussion below, the Postal Service strongly recommends eliminating the provisions of the proposed rules establishing a role for the Commission in regulating the handling of ordinary rate and service inquiries.

At the outset, the Postal Service must state that it fully appreciates the intent and spirit of the Commission’s proposed procedures for rate and service inquiries. The Commission is attempting to provide a comprehensive framework for the operation of a modern postal system under the policies embodied in the PAEA. As a companion to the proposed rules implementing the Commission’s authority and statutory procedures for formal complaints, the Commission has proposed parallel procedures for routing and disposing of inquiries that do not rise to the level of complaints within the meaning section 3662. The alternative procedures are intended to create an efficient mechanism for dealing with disputes or problems that arise in the normal course of business, where customers and other third parties might not intend to lodge formal complaints, or where there may be some misunderstanding regarding the proper boundaries of the complaint procedure.

Nevertheless, the Commission noted the following in its Order establishing the instant rulemaking proceeding:

Under the PAEA, the Postal Service has much greater independence and flexibility in managing and setting its rates subject to a limited number of requirements. Subject to these limits, the Postal Service has broad flexibility to balance policies related to rates and services. The PAEA implemented Congress’

² Valpak Direct Marketing Systems, Inc. and Valpak Dealers’ Association, Inc. Comments Regarding Proposed Rules Governing the Disposition of Complaints at 16 (October 6, 2008) [hereinafter Valpak Initial Comments].

goal of allowing the Postal Service to operate more like a business in setting its rates and offering services in order to allow it to more effectively compete with its private sector competitors.³

In this context, nothing is closer to the center of normal business operations in today's competitive environment than a firm's relationships with its customers. These relationships, moreover, encompass the full range of interaction between the customer and the service provider (the Postal Service), including ordinary problems and disputes, as well as many matters involving competitors or other parties involved in the provision of postal services. While establishing the Commission as the primary focus of rate and service inquiries that arise in the normal course of business might have some logic in light of the Commission's new role as a regulator, it will create a overly bureaucratic encumbrance that will interfere with efficient operations within the Postal Service that have evolved over years of managing customer relationships. Procedures establishing response and reporting requirements for handling ordinary inquiries will reduce, rather than enhance the Postal Service's operational and management flexibility in today's economic environment.

Although the Commission begins its Order by stating that the "proposed rules seek to implement title 39 Section 3662 [by] setting forth the procedures governing the disposition of complaints filed with the Commission,"⁴ the Commission itself admits that the "proposed rate or service inquiry procedures apply to written communications directed to the Commission that are not filed as

³ Docket No. RM2008-3, Order No. 101, Order and Notice of Proposed Rulemaking Establishing Rules for Complaints at 4 (August 21, 2008).

⁴ Order No. 101 at 1.

complaints.”⁵ According to the Commission, it created rate or service inquiry procedures so that it could (1) “be informed concerning matters that may bear on future complaints or its other responsibilities under the PAEA,” (2) help “facilitate public communication with the Postal Service ... [in order to further] the PAEA goal of increased accountability and transparency of the Postal Service,” (3) “provide the mailing public with an avenue for bringing their concerns to appropriate Postal Service personnel,” and (4) “ensure that issues raised and resolved under these rules remain isolated incidents.”⁶ Although these are admirable goals, none of these goals seem to be authorized by 39 U.S.C. 3662.

39 U.S.C. Section 3662, entitled “Rate and service *complaints*” (emphasis added), grants the Commission complaint jurisdiction that allows the Commission to consider allegations that the Postal Service is not operating in conformance with the requirements of the provisions of sections 101(d), 401(2), 403(c), 404a, 601, or Chapter 36 (or regulations promulgated under any of those provisions). Section 3662 gives the Commission the authority to prescribe the *form* and *manner* in which it would like to receive complaints. If a complaint is found to be justified, the section gives the Commission the authority to order the Postal Service to take such action as the Commission considers appropriate in order to achieve compliance with the applicable statutory or regulatory requirements, and to remedy the effects of any noncompliance. The section also grants the Commission authority to order fines in cases of deliberate noncompliance with title 39.

⁵ *Id.* at 10.

⁶ *Id.* at 10-11.

Section 3662 does not give the Commission the authority to create procedures for written communications that are not complaints, in that they cannot reasonably be described as allegation a violation of one of the statutory provisions (or regulations promulgated thereunder) enumerated in section 3662. Thus, while the Commission can create more informal procedures for certain categories of complaints, every complaint must meet the statutory requirement of section 3662(a) (i.e., it must logically allege a violation of the legal requirements enumerated therein). A written communication that can be reasonably viewed in this manner does not fall within the scope of section 3662. Most individualized service complaints would not logically rise to the level of an allegation that the Postal Service has in fact violated the standards of the statute.⁷

The Postal Service believes that the rate and service inquiry procedures might also in practice act against the interest of individual members of the mailing public by preventing the Postal Service from addressing their rate or service inquiries as quickly, effectively, and efficiently as possible. For some time, the Postal Service has had in place a variety of channels through which customers can submit inquiries, comments, grievances, questions, and suggestions regarding postal services, transactions, and experiences. Customers routinely contact their local post office, call 1-800-ASK-USPS, visit www.usps.com

⁷ As noted by the Public Representative, the rules for rate or service inquiries “appear intended to apply to situations that involve *problems or comments* regarding rates or services which do not rise to the level of a complaint” (emphasis in original). Public Representative Comments on Proposed Rulemaking Establishing Rules for Complaints at 5 (October 6, 2008). Indeed, the wording of proposed section 3030.13, “Conditions for application of rate or service inquiry procedures”, is so broad that it appears to apply to any and all rate or service inquiries that do not meet the criteria stated in section 3030.13(a)(1-4), whether or not they concern any of the provisions stated in 39 U.S.C. Section 3662(a).

“Contact Us”), or send letters to the Consumer Affairs function of the Postal Service. These long standing channels of direct communication between the customer and the Postal Service are designed to facilitate the resolution of customer issues in a quick, effective, and efficient manner, and reflect the fact that interfacing with customers and handling their service issues is a vital management function.

In contrast, if adopted, the proposed rate or service inquiry procedures would encourage customers to bypass these direct avenues of communication, and to take their issues to the Commission. However, the Commission itself acknowledges that the “Postal Service is typically best suited to address these matters and should deal with such issues in the first instance in accordance with the PAEA goal of greater management responsibility and flexibility.”⁸ Consistent with this observation, the Commission’s main action with regards to each individual rate or service inquiry under proposed section 3030.13 would be merely to forward the inquiry to the Postal Service.⁹ In this regard, an individual customer would only lose time on the resolution of its inquiry because, under the propose procedures, the inquiry must subsequently be forwarded to the Postal Service anyway.

⁸ Order No. 101 at 10.

⁹ *Id.* at 27. Although, as noted by the Public Representative, by establishing rate or service inquiry procedures:

the Commission implies it will exert its influence to obtain a resolution of customer problems and it builds an expectation that the Commission will seek to work with the Postal Service to resolve each of the rate or service inquiries, when, in fact, the Commission has noted in the discussion of the proposed rules that it will focus less of its resources on ‘issues that can more easily be remedied by postal management on a local level.’

Public Representative Comments on Proposed Rulemaking Establishing Rules for Complaints at 6 (October 6, 2008) (quoting Order No. 101 at 5).

The Commission states that it will monitor rate or service inquiries in order to determine if a group of similar inquiries, problems, or comments warrant investigation or the filing of a Commission initiated complaint.¹⁰ In this regard, the Commission's interest in patterns of inquiries and problems is understandable. However, by only monitoring the rate or service inquiries it receives, the Commission would have no basis for knowing whether the inquiries that were directed to it were substantively representative of the inquiries routinely handled directly by the Postal Service, or what proportion of the total universe such inquiries represented. The Commission might be better served by proposing the establishment of a periodic reporting requirement related to customer satisfaction. A rulemaking for that purpose could be initiated after further consultation regarding existing records and classifications of inquiries maintained by the Postal Service. Ultimately, while knowing whether an individual inquiry is the same or similar to other inquiries may be of some interest to a customer, that customer's main concern will normally be the resolution of his or her individual complaint, and these procedures would do nothing to bring about that resolution faster or more efficiently.

In addition, a requirement that the Postal Service file a report with the Commission regarding the disposition of each inquiry relayed by the Commission to the Postal Service contradicts the PAEA's goal of greater management responsibility and flexibility. Such a rule would force the Postal Service to divert valuable time and resources into developing different procedures for handling inquiries relayed by the Commission -- inquiries which ostensibly would be no

¹⁰ Order No. 101 at 27.

different than those received through the other avenues for which the Postal Service already has procedures in place. The PAEA grants the Commission authority to develop procedures for complaints, within the scope of its jurisdiction, if they allege violations of specific provisions and/or regulations developed under those provisions. The PAEA grants the Postal Service the authority to develop procedures for the resolution of all other types of issues. With all due respect, the Postal Service submits that, by forcing it to develop procedures other than the ones it already considers to be appropriate for the resolution of customer inquiries outside of the Commission's complaint jurisdiction, the Commission would exceed the authority and expectations established for the postal system under the PAEA.

II. The Postal Service Supports the Language of Section 3030.10 Regarding the Enhanced Content Requirements as Proposed

In its comments about Section 3030.10 ("Complaint contents"), Valpak questions the need for the subsection (a)(5) requirement for the complainant to "state the nature of the evidentiary support that the complainant has or expects to obtain during discovery to support the facts alleged in the complaint", and the subsection (a)(6) requirement for the complainant to "include an explanation as to why such facts could not reasonably be ascertained by the complainant where claims are premised on information and belief."¹¹ Both Valpak and commenter David Popkin suggest that the complaint requirements are too burdensome.¹² Time Warner Inc. ("Time Warner"), meanwhile, believes that the certification requirement of subsection (a)(9) "should make allowance for cases in which an

¹¹ Valpak Initial Comments at 5-6 (quoting Order No. 101 at 21).

¹² See Valpak Initial Comments at 5; Initial Comments of David B. Popkin at 2 (October 6, 2008).

attempt [to meet or confer with the Postal Service to resolve or settle the complaint] would have no prospect or only a negligible prospect of being productive.”¹³ The Newspaper Association of America (“NAA”) fears that the certification itself may become a matter of dispute.¹⁴

The Postal Service supports the language of section 3030.10 (“Complaint contents”) as proposed, because the enhanced requirements provide specificity as to the legal and factual basis for the complaint, thereby allowing the Postal Service to respond more completely in the proposed shortened time-frame for answers. As the Commission states in its section-by-section analysis, the intent of this rule is “to apprise the Postal Service of the key elements of the complaint, and in concert with the Postal Service’s answer, to enable the Commission to determine whether the complaint raises a material issue of fact or law.”¹⁵ The enhanced requirements will better enable the Postal Service to craft a detailed answer, helpful to both the complainant and the Commission, within the proposed shortened time-frame for filing answers.¹⁶

The Postal Service also supports section 3030.10 as proposed because the enhanced requirements promote settlement over litigation. Subsection (a)(5)’s requirement to state the nature of evidentiary support that the complainant has or expects to obtain does not limit discovery – it simply requires the complainant to suggest a framework for discovery. Supplying a framework

¹³ Initial Comments of Time Warner Inc. in Response to Order No. 101 at 2 (October 6, 2008).

¹⁴ Comments of the Newspaper Association of America on Notice and Order of Proposed Rulemaking Establishing Rules for Complaints at 12 (October 6, 2008) [hereinafter Initial Comments of NAA].

¹⁵ Order No. 101 at 13.

¹⁶ Proposed section 3030.12 directs the Postal Service to file its answer to a complaint within 20 days after the complaint is filed, whereas current section 3000.84 allows the Postal Service 30 days to file its answer.

would allow the Postal Service to better understand the complaint, see if information the complainant is seeking actually exists, identify the appropriate postal employees to provide such information, and generally encourage informal resolution of complaints. Requiring an explanation as to why such facts could not reasonably be ascertained by the complainant where claims are premised on information and belief performs a similar function – the more reasons and explanations provided for supporting why a complainant believes the Postal Service is not acting in conformance with the provisions (or regulations promulgated under such provisions) named in 39 U.S.C. 3662(a), the better understanding the Postal Service will have of the substance of the complaint, and the higher the chance of coming to a swift resolution or settlement using informal procedures.

The Postal Service does not support Time Warner's suggestion that a complainant be allowed to avoid the certification requirement. It is hard to envision a scenario where simply making an attempt to meet or confer with the Postal Service is so "futile or unduly burdensome" that it not worthwhile. Time Warner's position favors litigation of issues, and goes against the Commission's long-standing policy favoring settlement – a policy so important that the Commission has proposed a codifying it in a separate rule for emphasis. To the extent that Time Warner's suggestion to remove the certification requirement has any merit, it would apply equally to the requirement for "meet and confer" certification in an Answer pursuant to draft Rule 3030.14(a)(6). The Postal Service also finds NAA's fear that the certification itself will become a matter of

dispute to be excessively pessimistic. The Postal Service hopes that NAA, as well as other complainants, will make the attempt to meet or confer with the Postal Service in good faith, as the Postal Service will make the attempt to meet or confer with the complainant.

III. The Commission Should Not Accept NAA's Arguments Concerning Allocation of the Burden of Proof

NAA recommends that the Commission address burdens of proof in the following manner in its rules:

1. In a complaint proceeding commenced pursuant to Section 3030.30(b) regarding a rate or service standard issue that has not been the subject of an annual compliance review, and after appropriate discovery and, if necessary, a hearing, the Postal Service should bear the burden of proving the lawfulness of its rate or services.
2. In a complaint proceeding commenced pursuant to Section 3030.30(b) alleging violations of Sections 101(d), 401(2), 403(c), 404a, or 601 of the PAEA, and after appropriate discovery and hearings, the Postal Service should bear the burden of proving the lawfulness of the challenged conduct or practice.
3. In a complaint proceeding commenced pursuant to Section 3030.30(b) regarding a rate or service standard issue that has been found compliant in an annual compliance review and thus enjoys a rebuttable presumption of lawfulness, and after appropriate discovery and hearings, the complainant shall have the burden of

articulating facts and arguments making a *prima facie* case of unlawfulness. If the complainant is able to establish a *prima facie* case of unlawfulness, the presumption is rebutted and the burden or persuasion returns to the Postal Service.¹⁷

Thus, NAA argues that complainants should not be required to establish a *prima facie* case that the Postal Service has violated one of the sections enumerated in section 3662, unless the presumption of section 3653(e) applies. This runs afoul of the normal rules concerning adjudications before agencies, which generally require a proponent of an order to allege facts sufficient to support the promulgation of that order, in the absence of countervailing facts. In this circumstance, complainants will be able to take advantage of the full panoply of discovery procedures available under the Commission's Rules in order to construct its *prima facie* case. In addition, complainants have access to the wide-range of periodic reports required to be filed by the Postal Service. Thus, complainants will have ample opportunity to construct a *prima facie* case. Furthermore, at all times the burden of persuasion should stay with the complainant.

While the statute may not explicitly require "formal adjudication" under the Administrative Procedure Act, the Commission seems to have interpreted its authority under section 3662 as requiring trial-type, on the record, proceedings for complaints, at least for complaints not involving localized service issues. This is evident from the Commission's decision to generally carry forward in its proposed rules the trial-type aspects of its previous complaint rules, with rights to

¹⁷ Initial Comments of NAA at 8-9.

undertake discovery, cross-examine witnesses, etc. In formal adjudications, the general rule is that “the proponent of a rule or order has the burden of proof.”¹⁸

There is nothing in the law or legislative history to indicate that Congress intended the historical practice of the Commission regarding its complaint procedures to change in this regard.

In particular, there is no indication in the structure or history of the PAEA that Congress wanted the Commission to apply a rule that Postal Service actions are to be presumed unlawful, based upon mere allegation by a complainant, in the absence of evidence produced by the Postal Service demonstrating otherwise. The mere fact that the Commission’s initial review of Postal Service rate changes under section 3622 does not affirmatively dispose of the legality of those rates is not a sufficient basis to conclude that those rates should be deemed presumptively illegal simply because someone complains about them. Nor is there any indication that Postal Service decisions should be deemed presumptively illegal under sections 403(c), 404a, etc. simply when complained about; otherwise, the Postal Service would be constantly required to defend its management decisions by proving a negative, without the complainant first establishing any basis to conclude that any illegality actually exists. NAA would thus essentially make section 3662 equivalent with section 3652, when it is clear that they are wholly different procedures.

In the end, the Postal Service does not believe that this complex issue

¹⁸ See 5 U.S.C. 554(d), See also S. Rep. No. 752, 79th Cong., 1st Sess., 22 (1945) (“That the proponent of a rule or order has the burden of proof means not only that the party initiating the proceeding has the general burden of coming forward with a prima facie case, but that other parties, who are proponents of some different result, also for that propose have a burden to maintain.”).

should be set forth in the Commission's rules. Whether burden-shifting in a manner that diverges from the normal rules of adjudication is appropriate may depend fundamentally on the nature and type of complaint being heard. The Postal Service suggests that the Commission gain experience under the new complaint provision of section 3662 before making any final determinations in this regard, on a case-by-case basis. Thus, just as the draft rules did not formally specify a burden of proof upon any specific party, the final rules should not do so either.

IV. Other Issues

A. Depositions. NAA notes that current Commission rule authorizing depositions is not contained in Rules 25-27 and thus is available prior to the Section 3030.10 finding of a material issue of fact or law. The Postal Service requests that this point be clarified by the Commission. The information requested from a witness in a deposition would most likely be similar to Rule 27's requests for production of documents or things for purpose of discovery, so if Rule 27 is not available before a Section 3030.10 finding of material issue of fact or law, Rule 33 depositions should not be available before such a finding either. Moreover, Rule 33 permits the testimony of a witness to be taken by deposition "before the hearing is closed." It is unlikely that a hearing would take place before finding of material issue of fact or law, and thus depositions should be unavailable before such a finding.

B. Complaints and Their Relationship with the Annual

Compliance Report. NAA, fearing that the complaint process would be “eviscerated” by the annual compliance review, proposes that the Commission “establish or modify the procedural schedule for the complaint in a way that allows both proceedings to be resolved at the same time,” or, have the “annual compliance determination...reserve judgment on the subject matter of the pending complaint until the latter is resolved.” The Postal Service believes such schedule modifications are unnecessary. The annual compliance review process reviews matters on a macro level. A complaint proceeding presumably would seek relief for a specific problem. It is unlikely that a finding of compliance as part of the annual compliance review would completely eviscerate a complaint.

C. Investigator. Several commentators ask the Commission to clarify the powers of the investigator. The Postal Service commented at length about the concept of an investigator in initial comments, but wishes to reiterate that the proposed rules should provide a framework for establishing the investigator’s authorities and procedures, and guidelines indicating how investigators are to be expected to be deployed. To make sure confidentiality is protected, and that the PAEA goal of greater management responsibility and flexibility is not overly inhibited, as well as to make sure that investigations are brought to a conclusion in a

manner that maximizes the efficient use of both agencies' resources, the Commission investigator and the Postal Service should work together.

D. Commission Discretion Not to Hear a Complaint. Both the Greeting Card Association ("GCA") and NAA suggest that if a complaint raises a material issue, Section 3662(b)(1)(A)(i) would entitle the complaint to be heard.¹⁹ These parties both misread the statute. Section 3662 does not say that the Commission *shall begin a proceeding upon a finding that a complaint raises material issues of fact or law*, as GCA and NAA suggest. Rather, that section states that the Commission "shall" take one of two actions when it receives a complaint: it shall either "begin proceedings on [the] complaint," or it shall "issue an order dismissing the complaint." A finding that a material issue exists is only applicable to the Commission's decision whether to "begin proceedings," acting as a threshold determination that limits the Commission's discretion to accept a complaint for hearing. It does not, however, limit the Commission's discretion to decide not to take action on a complaint. Subsection 3662(b)(1)(A)(ii) gives the Commission the authority to dismiss a complaint even if the complaint may raise a material issue, if the Commission believes such a dismissal would

¹⁹ Initial Comments of the Greeting Card Association at 2 (October 6, 2008); Initial Comments of NAA at 3.

be appropriate.²⁰ The Commission's Rules should be clarified so that the scope of its discretionary authority not to hear a complaint is made clear.

E. Contact Point for subsection 3030.10(a)(9). The Public Representative suggested the designation of a contact point by the Postal Service for those persons seriously considering filing a complaint. The Postal Service suggests that complainants who plan to file a complaint following the procedures set forth in section 3030.10, should, prior to filing, attempt to meet or confer with the General Counsel of the Postal Service to resolve or settle the complaint, at a contact address to be provided.

²⁰ As the Supreme Court has recognized, an agency's decision not to undertake an enforcement action "often involves a complicated balancing of a number of factors that are peculiarly within its expertise," including its allocation of resources, and the costs and benefits of beginning proceedings on a particular complaint. *See Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985). As noted above, there is no indication in the language of section 3662 that Congress intended to limit the Commission's discretion in this regard.

In conclusion, the Postal Service trusts that the Commission will find these reply comments to be constructive.

Respectfully submitted,

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