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ORDER NO. 1310

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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

UNITED STATES OF AMERICA
POSTAL RATE COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners:

George A. Omas, Vice Chairman;
Dana B. Covington; Ruth Y. Goldway;
and W.H. "Trey" LeBlanc III

Complaint on Priority Mail Rates

Docket No. C2001-2

ORDER DECLINING TO INSTITUTE PROCEEDINGS

(Issued April 27, 2001)

On January 12, 2001, Douglas F. Carlson filed a complaint with the Commission pursuant to 39 U.S.C. § 3662, Rate and Service Complaints.¹ He alleges that the \$3.50 rate for Priority Mail weighing up to one pound (one-pound rate) and the \$3.95 rate for Priority Mail weighing up to two pounds (two-pound rate) do not conform to the requirements of § 3622, Rates and Fees, because the rates are not fair or sufficiently aligned with costs. In the alternative, Carlson alleges that the \$3.95 rate and the classification for the Priority Mail flat-rate envelope do not conform to the requirements of §§ 3622, Rates and Fees, and 3623, Mail Classification, because the rate and classification is not fair, equitable, or sufficiently aligned with costs, and may have a negative affect on users of the mail. Complaint at 3.

Carlson requests that the Commission issue a recommended decision that recommends a \$3.45 Priority Mail one-pound rate and a \$3.85 Priority Mail two-pound rate. In the alternative, he requests that the Commission hold a hearing followed by a recommended decision recommending a classification change that applies the \$3.50 one-pound rate to the Priority Mail flat-rate envelope. Complaint at 4.

¹ Douglas F. Carlson Complaint on Priority Mail Rates, filed January 12, 2001 (Complaint).

The Postal Service has interposed six separate grounds for arguing the Complaint should be dismissed. After reviewing the extensive legal pleadings provided by both Carlson and the Postal Service, the Commission shall exercise its discretion to not entertain the Complaint at this time, and dismiss the Complaint without prejudice to its possible resubmission after experience with the rates in question has been developed.

Factual Background. In Docket No. R2000-1, the Postal Service proposed a \$3.45 Priority Mail one-pound rate and a \$3.85 Priority Mail two-pound rate.² The Service proposed no change in the applicability of the two-pound rate to the Priority Mail flat-rate envelope.³ After consideration of the record evidence, the Commission recommended a \$3.50 Priority Mail one-pound rate and a \$3.95 Priority Mail two-pound rate.⁴ The Commission also recommended a classification change to apply the one-pound Priority Mail rate, in place of the two-pound rate, to the Priority Mail flat-rate envelope.⁵

The Governors issued two decisions concerning the Commission's Recommended Decision. The first decision rejects the recommended classification change to apply the Priority Mail one-pound rate to the Priority Mail flat-rate envelope.⁶ In the Governors' opinion, key underlying conclusions concerning the classification change "lack a substantial basis in the evidentiary record of this case." The Governors estimate that the rejection of this classification change has the effect of increasing test year revenues by approximately \$55 million.

² See Docket No. R2000-1, USPS-T-34 at 7-17.

³ Id. at 16 fn. 9.

⁴ See PRC Op. R2000-1 at ¶¶ 5267-5362.

⁵ Id. at ¶¶ 5339-5355.

⁶ Decision of the Governors of the United States Postal Service on the Recommended Decisions of the Postal Rate Commission on Selected Mail Classification Matters, Docket No. R2000-1, filed December 5, 2000, at 1-3. This decision also rejects classification recommendations concerning Information Based Indicia Program mail, Courtesy Envelope Mail, and the Standard A Mail automation letter minimum weight and breakpoint.

The second Governors' decision allows the remainder of the Recommended Decision to take effect, under protest, and returns the Recommended Decision to the Commission for reconsideration of other issues, and a further recommended decision.⁷ The Board of Governors implemented a \$3.50 Priority Mail one-pound rate and a \$3.95 Priority Mail two-pound rate on January 7, 2001. Because the Governors rejected the flat-rate envelope classification change in their concurrent classification decision, the \$3.95 priority Mail two-pound rate automatically is applied to the Priority Mail flat-rate envelope. The Governors did not request reconsideration of the Priority Mail rates.

The Commission issued an Opinion and Further Recommended Decision on February 9, 2001 (Further Recommended Decision). The Commission accounted for the increase of \$55 million in revenue described in the first Governors' decision that results from the Governors' decision to reject the flat-rate envelope classification change. The Commission did not discuss any further modifications to Priority Mail rates or classifications in this decision.

Postal Service Motions. The Postal Service filed an answer together with a motion to dismiss, a motion to supplement pleadings, and a motion to suspend, on February 12, 2001.⁸ The Service subsequently filed a pleading to supplement its motion to dismiss on February 20, 2001, which discussed the affect of the Further Recommended Decision issued after the filing of its Answer.⁹

⁷ Decision of the Governors of the United States Postal Service on the Recommended Decision of the Postal Rate Commission on Postal Rate and Fee Changes, Docket No. R2000-1, filed December 5, 2000.

⁸ Answer of the United States Postal Service and Motion to Dismiss or, in the Alternative, to Suspend Proceedings, filed February 12, 2001 (Answer).

PRC Order No. 1304, Order Granting Motion of the United States Postal Service for Additional Time to Supplement Pleading, filed February 14, 2001, granted the Postal Service's request for additional time to provide a supplemental pleading. This same order also provided additional time for participants to answer the Postal Service's motions.

⁹ Supplement to Motion of the United States Postal Service to Dismiss Complaint, filed February 20, 2001 (Supplemental Answer).

The Postal Service motion to dismiss contains six identifiable arguments for dismissing the Complaint. In the first argument, the Postal Service alleges that the Commission lacks jurisdiction to review a classification change that was rejected by the Governors. The argument is based on the judicial review requirements of § 3628, Appellate Review. The Service argues that the Commission should not be able to review the Governors' decision to reject a classification change because Congress has not even granted the courts the authority to review this type of decision.

The second argument is also based on the judicial review requirements of § 3628. The Postal Service alleges that a § 3662 complaint proceeding is not the proper vehicle for review of rates allowed under protest because the Complainant was permitted to seek judicial review pursuant to § 3628. Having failed to seek judicial review under § 3628, the Service asserts that the Complainant should not now be allowed to substitute a § 3662 complaint proceeding to review a matter that could have been reviewed under § 3628.

The third argument alleges that a § 3662 complaint is limited to rate or service issues. The Postal Service argues that the classification issues raised in the Complaint should be dismissed. As further support for this argument, the Postal Service asserts that § 3662 was not conceived as a vehicle for "re-litigation" of classification proposals that have been rejected. The Postal Service also states that the primary basis for the Governors rejecting the classification change was the "absence of an adequate record basis" for the recommendation.¹⁰

The Postal Service's fourth argument compares the facts of the instant Complaint with the facts of PRC Docket No. C96-2, Complaint of AMMA, DMA and MASA Concerning Eligibility for Standard Regular Letter Automation 5-Digit Presort. The Commission dismissed the Docket No. C96-2 complaint because the issue had just been litigated thoroughly in Docket No. MC95-1. See Order No. 1221 at 8-9. The

¹⁰ The absence of an adequate record implies that the issue was not adequately litigated in the first instance. This would appear to diminish the significance of having to re-litigate, if the issue was either not litigated or inadequately litigated.

Service alleges that in this case the Complainant had the opportunity to pursue a classification change on the record in Docket No. R2000-1, but did not. The Complainant only pursued a change after the record closed. The Service characterizes the Complainant's request for a classification change as a belated attempt to reopen the record for the purpose of litigating a proposal that was never initially a matter of record. The Postal Service argues that the Commission's reasoning contained in Order No. 1121 should control, and the instant Complaint should likewise be dismissed. The Postal Service concludes by noting that there is nothing to prevent any party from reviving the flat-rate classification change during the evidentiary phase of the next omnibus proceeding.

Fifth, the Postal Service contends that the Complainant reads too much into the Recommended Opinion. Complainant relies on the section that states: "application of the one-pound rate to the flat-rate envelope leads to the development of recommended one-pound and two-pound rates that are slightly higher than they might be if the two pound rate were retained." PRC Op. R2000-1, para. 5355. The Postal Service considers it unreasonable to conclude that the classification and rates recommended by the Commission are the only combination consistent with the policies of the Act, based on that language. The Service presumes that the Commission was aware of the Governors option to reject a recommended classification separately from its decision on the recommended rates. Therefore, the Postal Service considers it unreasonable to conclude that the rates as implemented are undesirable, unfair or inequitable simply because of the rejection of the classification change. It argues that the possibility of the Commission recommending different rates if it had recommended different classifications is not sufficient to sustain a complaint that the rates implemented are contrary to the policies of the Act.

The Postal Service also contends that the purpose of § 3662 is not to provide a venue to "re-do" aspects of a rate case each time a Complainant is dissatisfied with the exercise of the Governors' authority. The Postal Service concludes the "Complainant's

attempt to re-litigate the flat-rate classification change should be denied.” Answer at 15. Separately, the Service notes that the Complainant has not proffered any evidence or testimony to prove allegations of customer confusion, negative effects on users of the mail, and unfairness and inequity.

The sixth and final argument is based on the Postal Service’s review of the Commission’s Further Recommended Decision. The Postal Service notes that the Further Recommended Decision adjusted Priority Mail revenues to account for the rejection of the classification change. The Service argues that the Commission thereby acknowledged rejection of the classification change. At the same time, the Further Recommended Decision did not recommend changes to Priority Mail rates. From these actions, the Postal Service concludes that the Commission considers the Priority Mail rates in effect to be fair, equitable, supported by substantial evidence, cost-based, and otherwise in compliance with the requirements of the Act.

The Postal Service separately requests that the Commission suspend this Complaint until the conclusion of the Docket No. R2000-1 reconsideration process. The reasons cited are the possibility of further Priority Mail rate changes that could alter the basis of this complaint, or render it moot, and the possibility of other grounds for dismissal that would be dependant on rate changes that may occur.

Carlson Response. On February 27, 2001, Carlson filed in opposition to the Postal Service’s motion to dismiss and motion to suspend.¹¹ The Response discusses the interrelationship and applicability of §§ 3628, Appellate Review, and 3662, Rate and Service Complaints. It then examines the precedent set by Order No. 1121, which

¹¹ Douglas F. Carlson Answer to Postal Service Motion to Dismiss and Answer to Postal Service Motion to Suspend Proceedings, filed February 27, 2001 (Response).

In Douglas F. Carlson Preliminary Answer to Postal Service Motion to Dismiss or Suspend Proceedings and Motion for Extension of Time to Respond to Postal Service Motion to Dismiss or Suspend Proceedings, filed February 15, 2001, Carlson asks for additional time to file an answer if the Postal Service’s motion for additional time to supplement its pleadings is granted. When the Commission granted the Postal Service request for the opportunity to supplement its pleadings, the Commission also delayed the date for Carlson’s answer. Order No. 1304.

dismissed the Docket No. C96-2 complaint. Finally, it examines the influence of the Recommended Decision and Further Recommended Decision on this Complaint.

Carlson interprets §§ 3628, Appellate Review, and 3662, Rate and Service Complaints, as granting different rights and providing different remedies. He states that § 3628 is available to aggrieved parties that appear in a rate or classification proceeding before the Commission, whereas § 3662 is available to an interested party that may or may not have participated in any rate or classification proceeding. Carlson disagrees with the Postal Service's contention that a participant in a rate or classification proceeding is denied the right to pursue a § 3662 complaint on an issue litigated in that case, that § 3628 bars a § 3662 complaint, and that a rate case participant's only remedy is provided by § 3628, Appellate Review.

Carlson also contends that the Postal Service's interpretation of § 3662 is not reasonable where the Service argues that the Complaint should be dismissed in as far as it raises classification issues. He states that the issues in his complaint, the Priority Mail one-pound rate, two-pound rate, and flat-rate envelope rate are all rate issues. He recognizes that a classification issue caused the alleged problems with the rates identified above, and that the Commission could initiate a classification proceeding as one possible method of rectifying these rate issues. Nevertheless, he states that a complaint proceeding provides an appropriate opportunity to examine issues that supposedly were not examined before on the record. In conclusion, Carlson asserts that this Complaint does not seek to review the legality of the Governors' Decision as the Postal Service contends. Rather the Complaint will examine a classification issue on the record, as part of a rate complaint.

Carlson distinguishes the facts that led to the decision to dismiss Docket No. C96-2 from the facts of the instant Complaint. Carlson states that the Docket No. C96-2 issues were fully litigated in the immediately preceding classification case, Docket No. MC95-1, while the issues in the instant Complaint were not previously litigated in Docket No. R2000-1. He notes that the Complainants in Docket No. C96-2

argued against the implementation of Commission recommendations that had been accepted by the Governors. In the instant Complaint, Carlson argues for implementation of the Commission's recommendation and in opposition to the decision of the Governors. Because of the factual differences, he concludes that the decision in Docket No. C96-2 at best may offer guidance, but does not control the outcome of this Complaint.

Alternatively, if the Postal Service is contending that the issues of the Complaint were previously litigated, Carlson questions whether the Governors may have been mistaken in their primary basis for rejecting the classification change—that the classification change was not examined on the record. Carlson also discusses the inconsistencies in the Postal Service motion where the Service uses the term “revisit the issue,” and at the same time, asserts that the issue was not examined on the record.

Carlson next addresses the Postal Service position on the Recommended Decision as it relates to the Complaint. He views the Postal Service contention that the rates recommended by the Commission are not the only rates that are consistent with the Act as speculation. He does not contest that the Commission may have understood that the Governors might not approve the classification change. Nevertheless, Carlson contends that the Commission may have expected a “flicker of good faith” to prevent a result that ran counter the Commission's articulated goal of protecting consumers. Response at 11.

Carlson asserts that the Postal Service also relies too heavily on the speculative implications of the Commission's Further Recommended Decision. He views the adjustment of Priority Mail revenue as a mechanical action that acknowledges the fact that the Governors did not accept a classification change. He does not view this as a ruling on the legality of Priority Mail rates. Furthermore, considering that the Governors did not ask for reconsideration of Priority Mail rates, the Commission did not request

participants to comment on the rates. Therefore, Carlson argues that it should not be a surprise that the Commission did not recommend changes to the rates.

If the Commission happened to rule that rates were in accordance with the policies of the Act in the Further Recommended Decision, Carlson argues it did so without hearing the legal arguments of his Complaint. Carlson contends that § 3662 would allow a Complainant the opportunity to persuade the Commission especially where the issues were not fully litigated. Therefore, Carlson reasons that the Further Recommended Decision does not dispose of the Complaint.

Carlson asserts that he has provided all the information required by Rule 83 in his Complaint. Thus, he argues that the Postal Service's attack on the Complaint for not proffering any evidence or testimony concerning customer confusion, unfairness, or negative effects on users of the mail is without basis under the Commission's Rules of Practice.

In concluding the arguments in opposition to the motion to dismiss, Carlson suggests that if the Commission finds that instituting a proceeding under § 3662 is inappropriate, then the Commission should institute a § 3623(b) classification proceeding on its own initiative. The purpose of the classification proceeding would be to examine the proper classification for the flat-rate envelope.

Separately, Carlson opposes the Postal Service motion to suspend. He argues that the motion to suspend should only be considered when it is virtually certain that the reconsideration process would render his complaint moot, or that continuing the complaint proceeding would be imprudent. Because no identifiable reasons now exist, he argues that his complaint should be allowed to continue.

Commission Analysis. This Complaint is brought pursuant to Rate and Service Complaints, 39 U.S.C. § 3662. The subject of the Complaint is Priority Mail, specifically the one-pound rate, two-pound rate, and the rate and classification for the flat-rate envelope. These are subchapter II, Permanent Rates and Classes of Mail, issues. The applicable part of § 3662 states:

Interested parties who believe the Postal Service is charging rates which do not conform to the policies set out in this title . . . may lodge a complaint with the Postal Rate Commission in such form and in such manner as it may prescribe.

39 U.S.C. § 3662. Thus, for a Complainant to have standing, he must be an “interested party,” and to sustain a complaint, the Complainant must demonstrate a belief that the rates in question are not in accordance with the policies of the Act.

By filing a Complaint, Carlson has met the minimal standing requirement that he is an interested party. In addition, he avers to be a postal customer that uses the Priority Mail services in question. Carlson then demonstrates a belief that the Priority Mail rates and classification in question are not in accordance with the policies of the Act. He accomplishes this by providing an interpretation of the Recommended Decision and Further Recommended Decision in relation to the underlying rate case litigation and the rates and classifications that were actually put into effect, that brings into question the fairness of the Priority Mail rates and classifications. Thus, Carlson has met the initial requirements to sustain a § 3662 complaint.

The Postal Service challenges the applicability of § 3662 to the Carlson Complaint. The Service contends that § 3662 is limited to rate and service issues, and insofar as the Carlson Complaint raises classification issues, the Complaint should be dismissed.

The Commission finds that Carlson’s primary concern appears to be the Priority Mail one-pound, two-pound, and flat-rate envelope rates, and not the classification of the flat-rate envelope *per se*. Thus, a § 3662 complaint is appropriate. Rate and classification issues often are interrelated. Although Carlson’s concerns arose as a result of a classification decision by the Governors, in many cases, such as this one, an issue can have both rate and classification implications.

As a practical matter, the most appropriate remedy to resolve a rate or service issue may be a recommendation to modify a classification. It would be illogical to limit

the Commission's recommendation of an appropriate remedy to only a rate recommendation, when a recommendation on a classification is more appropriate.

Beyond that, the Commission believes that it can consider classification issues as part of a § 3662 complaint. The Commission has the statutory authority to institute a classification proceeding on its own initiative. Section 3623(b) states:

(b) Following the establishment of the mail classification schedule requested under subsection (a) of this section, the Postal Service may from time to time request that the Commission submit, or the Commission may submit to the Governors on its own initiative, a recommended decision on changes in the mail classification schedule.

§ 3623(b). If a classification issue is raised in a complaint case setting, it is *pro forma* for the Commission to initiate a classification case to resolve the issue. For this reason, the Commission concludes it may resolve classification issues within the context of a complaint proceeding.

The text of § 3662 provides further support for this position. The third sentence of § 3662 states:

If the Commission, in a matter covered by subchapter II of this chapter, determines the complaint to be justified, it shall, after proceedings in conformity with section 3624 of this title, issue a recommended decision which shall be acted upon in accordance with the provisions of section 3625 of this title and subject to review in accordance with the provisions of section 3628 of this title.

Subchapter II governs Permanent Rates and Classes of Mail. This includes § 3623, Mail Classification. It would be inconsistent to discuss "a matter covered by subchapter II of this chapter," which includes a section on mail classification, if § 3662 did not contemplate that a rate and service complaint may include classification issues. For the above reasons, the Commission finds it appropriate to resolve classification issues within the context of a rate or service complaint.

The Postal Service challenges both the propriety of proceeding under § 3662, Rates and Service Complaints, and the jurisdiction of the Commission, in light of the requirements of § 3628, Appellate Review. Analysis of these challenges requires a brief review of § 3628. The first sentence of § 3628 states:

A decision of the Governors to approve, allow under protest, or modify the recommended decision of the Postal Rate Commission may be appealed to any court of appeals of the United States, within 15 days after its publication by the Public Printer, by an aggrieved party who appeared in the proceedings under section 3624(a) of this title.

The initial event that must occur for § 3628 to be applicable is for the Commission to issue a recommended decision. The recommended decision must then be followed by a decision of the Governors. If the Governors chose to approve, allow under protest, or modify the recommended decision of the Commission, § 3628 is applicable. Standing to file an appeal is granted to aggrieved parties who appeared in the proceeding under § 3624(a) that produced the recommended decision.

The Postal Service challenge of the propriety of allowing Carlson to proceed with a § 3662 rate complaint when he could have proceeded pursuant to § 3628 is facilitated by comparing selected provisions of both statutes. Application for § 3628 appellate review must be made within 15 days of publication of the Governors' decision, whereas § 3662 does not contain a time limit for filing a complaint. One consequence of the statutory language is that a § 3662 complaint may be filed at any time.¹² A reasonable interpretation of the statutes is, as Carlson suggests, that aggrieved persons have the option to seek relief either from the courts within 15 days of publication (§ 3628), or from the Commission at any time (§ 3662).

¹² A not as obvious consequence is that § 3662 has the additional benefit of allowing the Commission to hear issues that are not "ripe" for consideration at the time of a Governors' decision, but may be ripe at a future date due to intervening events. There is no reason to believe Congress intended to limit rate complaints to issues that are ripe only at the time of a Governors' decision, which would be the affect of only allowing this Complainant to proceed under § 3628 as suggested by the Postal Service.

For a party to proceed under § 3628, the participant must be an aggrieved party who appeared in a related proceeding under § 3624(a). Section 3662 does not contain a “standing” requirement for filing a rate complaint other than being an “interested” party with the prerequisite belief. Prior, current, or possible future participation in a § 3624(a) proceeding has no bearing on a Complainant’s right to file a § 3662 complaint. Carlson meets the requirement for standing under both sections of the Act.

Section 3662 does not contain a statutory requirement that limits or prohibits a Complainant from seeking other forms of relief. From the opposite perspective, there are no other statutory provision of the Act that limit or prohibit a Complainant from seeking remedial action under § 3662. In addition, §§ 3628 and 3662 provide for different forms of relief. Section 3628 seeks judicial review of an issue, whereas § 3662 seeks Commission review of an issue. In conclusion, the Commission finds that each section is independent from the other, and each provides for a different form of relief. Therefore, there is nothing improper about Carlson requesting § 3662 relief, even though he had an opportunity to request relief under § 3628.

The Postal Service motion to dismiss also challenges the jurisdiction of the Commission to review a classification change that was rejected by the Governors, in light of the requirements of § 3628. The Service argues that the Commission should not be able to review a Governors’ decision to reject a classification change because Congress has not even granted the courts the authority to review this type of decision.

The Commission does not interpret the Complaint to suggest that the Commission is being asked to review the legality of a Governors decision to reject a classification change. Rather, the Commission is requested to review existing Priority Mail rates. The Complaint is brought under § 3662, which provides for an alternate and independent form of relief from § 3628. Section 3662 provides that a new Commission recommended decision may be forwarded to the Governors. In contrast, relief under § 3628 is limited to a remand of a Governors’ decision for further action. The

Commission concludes that § 3628 does not preclude the Commission from reviewing rate and related classification issues, at any time, within a complaint proceeding.¹³

What remains of the motion to dismiss are the Postal Service arguments that would affect the Commission's discretion to hear the instant complaint. Once a complainant has raised a rate or service issue, the Commission has discretion on how to proceed. The statute simply states: "The Commission may in its discretion hold hearings on such complaint." 39 U.S.C. § 3662.

The Commission adopted a rule to guide it in determining when to apply its discretion to hold hearings, as granted in § 3662, which states in part:

The Commission shall entertain only those complaints which clearly raise an issue concerning whether or not rates or services contravene the policies of the Act; thus, complaints raising a question as to whether the Postal Service has properly applied its existing rates and fees or mail classification schedule to a particular mail user or with regard to an individual, localized, or temporary service issue not on a substantially nationwide basis shall generally not be considered as properly raising a matter of policy to be considered by the Commission.

39 C.F.R. § 3001.82. This empowers the Commission to entertain complaints raising rate and service issues that contravene the policies of title 39 and that have nationwide implications.

Carlson's allegations, if proven, certainly may rise to the level of clearly contravening the policies of title 39. Priority Mail rates have substantially nationwide implications. Rule 82 does not provide sufficient cause to dismiss this complaint.

¹³ The Governors, in rejecting the flat-rate envelope classification change, expressed the view that the evidentiary record on the issue was inadequate to support a decision. A possible benefit to going forward with a complaint proceeding could be to cure the type of defect alleged by the Governors. A complaint proceeding could provide an opportunity to fully explore issues that were not sufficiently explored on the record. This would allow the Governors the opportunity to make a fully informed decision on a classification change that was previously not fully litigated.

However, the Commission will exercise its prerogative and examine other factors to determine whether to exercise discretion to hear the instant Complaint.

Discretion is applied on a case by case basis. The Commission strives to apply discretion consistently based on available precedent. However, the specific facts of a docket tend to control the outcome more than any possible precedent set in a previous docket that will have concerned a different fact pattern. Frequently, timing and ripeness issues come into play. Thus, different dockets with somewhat similar sets of basic facts will be heard, delayed, or dismissed depending on the timing and ripeness of the issues and other factors.

The Postal Service asserts that Order No. 1121 dismissing Docket No. C96-2 is "controlling" of the instant Complaint. However, because of differences in the fact pattern and timing of the two complaints, the precedential value of Docket No. C96-2 is limited. Furthermore, Docket No. C96-2 was dismissed "without prejudice." Therefore, the Commission might have entertained a factually similar complaint at some future date. This further limits the value of precedent set by the Docket No. C96-2 decision. Nonetheless, the decision still may be useful as guidance for the Commission in exercising its discretion. This first requires a review of the facts from Docket No. C96-2 and Order No. 1121.

In Complaint of AMA, DMA and MASA Concerning Eligibility for Standard Regular Letter Automation 5-Digit Presort, Docket No. C96-2, the Complainants challenged the Postal Service's adoption of a 150-piece minimum rule for 5-digit automation Standard Mail. The challenge occurred five months after the Commission's MC95-1 decision which, *inter alia*, recommended new Standard Mail rates and classifications, but prior to the date that the 150-piece minimum rule was to go into effect. The Commission dismissed the complaint without prejudice. See PRC Order No. 1121.

The 150-piece requirement was recognized as an important issue in the MC95-1 proceeding from the outset. The requirement could be ascertained from the Postal

Service's direct case. It generated discovery requests. The Postal Service was required to present witnesses and testimony on implementation issues. At least one intervenor provided a direct case that discussed eligibility criteria. In sum, there was a real opportunity for any participant to litigate this issue on the record.

The Commission found no basis for the allegation that the 150-piece rule would produce a substantive change in the mail classification recommended in MC95-1. There was no demonstrated basis that the rule was at odds with §§ 3622 and 3623. The Commission also found that the complaint was premature because it was initiated on the eve of implementation of the rule, and after a reclassification effort that concluded years of planning.

To use Docket No. C96-2 as guidance, the Commission first compares the facts of Docket No. C96-2 with the facts of the instant Complaint. There are many similarities. Both complaints were filed immediately following a rate or classification proceeding. Both Complainants had the opportunity to litigate the issues on the record, but did not do so. The Docket No. C96-2 issues were actually litigated by other participants, while the issues in this Complaint arguably were not litigated but only arose on brief; however, in this instance the Commission finds that the opportunity to litigate is more significant than the actual litigation. It is also significant that both complaints were filed in close time proximity to the underlying proceeding.

There are also several ways in which the two cases are dissimilar. As one example, the implementation of the 150-piece rule in Docket No. C96-2 was consistent with the recommendations of the Commission. The rates and classifications as challenged in this Complaint are not consistent with the recommendations of the Commission. This factual difference is made less significant because the Commission was aware that this was a possible outcome of its decision and discussed that possibility. The Commission finds that the factual similarities outweigh the factual disparities between the two complaints. Although Order No. 1121 is not "controlling,"

because of the similarities it does offer reasonable guidance to resolution of the instant Complaint.

Both Carlson and the Postal Service discuss the significance of the Commission's reasoning in its opinions presented in support of the Docket No. R2000-1 Recommended Decision and Further Recommended Decision. The opinions accurately represent the Commission's position on Priority Mail rates and classifications and do not require further explanation.

The Recommended Decision required the Commission to balance the various factors of the Act before recommending rates and classifications for Priority Mail. In many cases when the Commission is required to undertake this type of review, including this one, there may be a range of acceptable rates and corresponding classifications that may meet the requirements of the Act, but are less than optimal. After examining the factors of the Act and making the necessary tradeoffs, the Commission recommended rates and classifications that it considered the most optimal under the circumstances. The Commission was aware of the options available to the Governors on review of the Recommended Decision.

In the Further Recommended Decision, the Commission recognized the \$55 million in additional Priority Mail revenue identified by the Governors as resulting from the rejection of the flat-rate envelope classification change. The recognition of the additional revenue was technically mechanical, but the decision to take this action was not made in a vacuum. The Commission would not have remained silent if it had determined that the rates and classification as implemented were outside the bounds of reasonableness.

After reviewing all of the Postal Service's and the Complainant's arguments, the Commission has come to the following conclusions: a § 3662 rate and service complaint may include classification issues; sections 3628 and 3662 provide separate and independent forms of relief; and, the Commission's § 3662 jurisdiction is not limited by § 3628. Thus, the Commission does not dismiss the complaint on what may be

characterized as statutory challenges. However, the Commission will decline to hear this Complaint for the following discretionary reasons using Order No. 1121 as guidance.

The Complaint was filed only days after the Postal Service implemented the new rates and classifications. The Complainant had a real opportunity to litigate these Priority Mail issues on the record, but only did so on brief. Little time has elapsed since the Recommended Decision was issued to allow for a change in circumstances that would warrant reconsideration of these issues at this time. The Commission does not preclude the possibility that the Priority Mail rates and classifications may be shown to be not in accordance with the policies of the Act at some future date. Thus, the Commission will dismiss this Complaint without prejudice so as not to preclude this possibility.

Persuasive argument has not been made to lead the Commission to believe that the rates and classifications as implemented do not meet the requirements of the Act or fall outside the plausible range of acceptable rates that could have been recommended in the Recommended Decision. The Commission could, but chooses not to at this time, implement a classification proceeding on its own initiative to explore this issue further. Until an appropriate amount of time has passed to allow for the affect of the rates and classification to become known, this would be inappropriate. Finally, it would be of questionable usefulness to recommend a classification change to the Governors that would be identical to the one that was rejected only months before without a change in circumstances.

In conclusion, the Commission finds it necessary to address two assertions made by the Postal Service related to this Complaint and complaints in general. The first concerns the timing of filing a complaint, and the second concerns the presentation of evidence at the initial complaint pleading stage.

The Postal Service correctly asserts that the Complainant is not prevented from reviving his preferred Priority Mail flat-rate classification change during the evidentiary

phase of the next omnibus proceeding. Although this is a correct statement, the Commission finds it necessary to make clear that there is no requirement to wait until the next omnibus proceeding to address a legitimate rate or service complaint. Any inference to the contrary is not in accordance with Commission Rules or policy. Section 3662 complaints may be filed with the Commission at any time.

The second issue is the Postal Service's inference regarding the lack of supportive testimony or evidence that the Complaint provides concerning customer confusion, negative effects on users of the mail, or unfairness and inequity. A Complainant is not required to proffer evidence or testimony of this nature at the initial complaint pleading stage. If a decision is made to hear a complaint, an opportunity may be provided at that time for the Complainant to develop any necessary testimony or evidence required in support of that complaint. However, the Commission will evaluate the reasonableness of all allegations made by a Complainant in exercising its discretion on whether to hear a complaint. Therefore, it may benefit a Complainant to provide as much information as possible to allow the Commission the opportunity to fairly evaluate the merits of whether to hear a particular complaint.

Postal Service Motion to Suspend. If the Complaint is not dismissed, the Postal Service requests to suspend the Complaint proceeding until the completion of any potential future action by the Governors or the Commission arising from Docket No. R2000-1. Answer at 15-16. The Commission has exercised its discretion to dismiss this Complaint. Therefore, the motion to suspend is moot.

It is ordered:

1. The motion for additional time contained within Douglas F. Carlson Preliminary Answer to Postal Service Motion to Dismiss or Suspend Proceedings and Motion for Extension of Time to Respond to Postal Service Motion to Dismiss or Suspend Proceedings, filed February 15, 2001, is moot by meeting the filing deadline specified by PRC Order No. 1304.

2. The Postal Service motion to dismiss contained in the Answer of the United States Postal Service and Motion to Dismiss or, in the Alternative, to Suspend Proceedings, filed February 12, 2001, is granted. The Douglas F. Carlson Complaint on Priority Mail Rates, filed January 12, 2001, is dismissed without prejudice.

3. The Postal Service motion to suspend contained in the Answer of the United States Postal Service and Motion to Dismiss or, in the Alternative, to Suspend Proceedings, filed February 12, 2001, is moot by the dismissal of this Complaint.

By the Commission.

(SEAL)



Steven W. Williams
Acting Secretary