

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

Complaint of Time Warner Inc. et al.
Concerning Periodicals Rates

Docket No. C2004-1

ANSWER OF THE UNITED STATES POSTAL SERVICE
(February 11, 2004)

Introduction and Background

On January 12, 2004, the Postal Rate Commission received a pleading styled as a complaint, filed by Time Warner Inc.; Condé Nast Publication, a Division of Advance Magazine Publishers Inc.; Newsweek, Inc.; the Reader's Digest Association, Inc.; and TV Guide Magazine Group, Inc. By letter dated the following day, the Office of the Secretary, Postal Rate Commission, designated the docket number above and advised the General Counsel, United States Postal Service, of the Complaint's filing under Title 39, United States Code § 3662. The complaint is styled as "Complaint of Time Warner Inc., Condé Nast Publication, A Division of Advance Magazine Publishers Inc., Newsweek, Inc., the Reader's Digest Association, Inc., and TV Guide Magazine Group, Inc. Concerning Periodicals Rates" (Complaint). The Complaint requests that

the Commission promptly hold hearings on this Complaint under § 3624 of the Act and then issue a recommended decision under §§ 3622, 3623, and 3625 of the Act, recommending the adoption of cost-based periodicals Outside County rates that more fully reflect differences in operational and cost-causing characteristics within the Periodicals Outside County subclass, that discontinue the policy of maintaining an unzoned editorial pound rate, and that promote more efficient methods of mail preparation and entry by sending mailers better price signals.

Complaint at 21.

As discussed in more detail below, the Postal Service believes that, regardless of any potential merit in the abstract, the concerns raised by the Complaint do not require any substantive response by the Commission at this time. From the outset, the Postal Service wishes to be clear that it does not oppose improved efficiency in Periodicals rate design. As will be discussed later, the Postal Service believes that more can be done to promote efficiency in Periodicals rate design, and is, indeed, exploring, at least in some form, many of the structural changes proposed by the Complainants. Again, as will be discussed later, part of the efforts underway will look to see if the underlying structure can be changed in a way that promotes the improvements in efficiency sought by the complainants, in a manner that achieves consensus within the Periodicals mailing community. The Complaint, however, seeks to initiate now a Commission proceeding leading to the recommendation of new Periodicals rates and classifications. That attempt should be rejected, and the Commission should summarily dispose of the matter without hearings.

- I. The parties have not met the requirements to establish a rate and fee complaint under 39 U.S.C. § 3662 and the Commission's rules of practice and procedure.

Section 3662 of the Act (39 U.S.C. § 3662) explicitly limits the bases on which a party may rest a complaint invoking the Commission's authority to act under the statutory scheme. It states:

Interested parties who believe the Postal Service is charging rates which *do not conform to the policies set out in this title* or who believe that they are not receiving postal service in accordance with the policies of this title may lodge a complaint with the Postal Rate Commission *in such form and in such manner as it may prescribe*.

Id. (emphasis added). Likewise, Commission rules governing complaints clearly specify both the scope and nature of permissible complaints and the contents of filings under

section 3662. Rule 82 states:

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...*

39 C.F.R. § 3001.82 (emphasis added). Rule 83 states:

each complaint shall include the following information...(b) a full and complete statement of the grounds for such complaint, including specific reference to the postal rates or services involved and the policies to which it is claimed *they do not conform...*

39 C.F.R. § 3001.83 (emphasis added).

Complainants have failed, both in substance and form, to meet these requirements. This failure most fundamentally prevents them from establishing the only statutory basis for proceeding under section 3662. Furthermore, their failure to comply with the Commission's rules dictating the contents of a cognizable complaint prevents the Postal Service from meeting its obligations under the Commission's rules. Under those rules, the Commission should reject the Complaint.

Complainants nowhere, in the voluminous documentation filed, specifically allege that the existing rates, fees, or classifications for Periodicals mail do not conform to specific policies in the Act. On the contrary they explicitly indicate that the status quo *conforms* to those policies. They state:

This Complaint concerns fundamental reform of the Periodicals rate structure to achieve *greater conformity* with the ratemaking provisions of the Act.

Complaint at 4 (emphasis added).

Under the clear meaning of the language of section 3662, and the Commission's rules, the threshold issue in any rate complaint case must be whether the existing rates are unlawful, and not whether some *alternative* set of rates would constitute an

improvement over the existing rates. Indeed, the ability under section 3662 to lodge a complaint with the Commission is limited to interested parties who believe that the rates being charged contravene to the policies set out in title 39. Rule 83 requires prospective complainants to identify, affirmatively and specifically, the policies of the Act to which it is claimed the rates at issue do not conform. Rule 83(b). Consequently, attempting to address the relative merits of the new rates that Complainants have proposed, without first firmly establishing the legal status of the current rates, is a prototypical example of putting the cart before the horse.¹ Such a purported complaint complies with neither the letter nor the spirit of section 3662 and the Commission's rules.

Yet such an approach seems to be exactly the one embraced by the complainants in this instance. Complainants' filing appears premised on the supposition that adoption of their proposed changes would constitute an improvement over the current rates, rather than any well-grounded allegation that the current rate structure is unlawful. Support for this conclusion comes immediately in the first paragraph of the Complaint, which asks the Commission to "investigate the conformity" of existing Periodicals rates with the policies of the Act, and to recommend "adoption of the alternative Periodicals rate schedule proposed herein...."² As noted above, in stating

¹ In the context of a criminal trial, the pertinent analogy would be arguing, before anyone has proven that the accused actually committed a crime, whether he should be hung or shot.

² In a footnote appended to that first section, Complainants embrace the incorrect position stated by the Commission in Docket No. C99-4 that the lawfulness or unlawfulness of the existing rates constitutes no constraint on the Commission's ability to grant relief in a rate complaint case. As discussed below, the expansive views expressed by the Commission in Docket No. C99-4 regarding the scope of its authority under section 3662 cannot be reconciled with the language of either that section in particular, or the other components of the broader statutory ratemaking structure.

the “Basis of the Complaint,” Complainants refer simply to the need for “greater conformity” with the Act.

Many other portions of the Complaint, furthermore, support the conclusion that the complainants do not wish to have consideration of their proposed new rate structure conditioned upon any preliminary determination of the legal status of the current rates.

For example, they state:

Complainants are prepared to present evidence that pertinent improvements in rate elements would bring about efficient changes on the part of mailers and would bring rates into closer conformity with the Act.

Complaint at 6. In a similar vein, they state:

What may not have been apparent in 1990 but became so over the ensuing decade is that the Periodicals rate structure does not send proper, cost-based rate signals to mailers. Rates that would induce them to prepare their mail in a more efficient manner and would reduce total Periodicals costs would better conform to the policies and ratemaking criteria of the Act.

Complaint at 18-19. The complainants’ view of the truncated fashion in which a section 3662 complaint case may be structured is perhaps best exemplified by the following:

Pursuant to the Commission's rules of practice and the requirements of sections 3622, 3623, and 3624 of the Act, Complainants are prepared to carry the burden of presenting substantial record evidence in support of the legality of the proposed alternative rates and the conclusion that a more cost-based rate structure using the proposed rates would be substantially more consistent with the policies of the Act than are existing Periodicals rates.

Complaint at 20-21.

Just as the Complaint’s statement of relief requested (Complaint at 21, reproduced on the first page of this document) fails to seek any request for a finding that the current Periodicals rates do not conform to the policies of the Act, the above

passage manifests a clear intent to proceed directly to consideration of the proposed alternative rates. Within this process, the legal status of the existing rates is apparently relevant only to the extent that complainants can show that their proposed rates are relatively *more* consistent with the Act's policies. The Complaint in this case thus fails to establish the necessary foundation for the conduct of a section 3662 rate complaint proceeding – specific and colorable allegations that the existing rates fail to conform to specific policies of the Act.

One result of these critical failures under the Commission's rules is to make it impossible, or, at best, substantially impractical for the Postal Service to meet its own responsibilities under the Commission's rules. Those rules dictate that the Postal Service's answer must include:

- (a) Specific admission, denial or explanation of each fact alleged in the complaint or, if the Postal Service is without knowledge thereof, a statement to that effect...
- (b) A statement as to the position of the Postal Service on the allegations in the complaint that the rates or service involved are not in accord with the policies of the Act, and the facts and reasons in support of such position;
- (c) The position of the Postal Service on the specific relief or redress requested by the complainant, the disposition of the complaint recommended by the Postal Service, including whether or not a hearing should be held, and a statement of any facts and reasons in support of such position.

39 C.F. R. § 3001.84.

The complainants, however, have chosen to structure the material submitted with their filing in such a way that any critical factual allegations are never clearly articulated in a format to which the Postal Service can directly respond. Both in the Complaint and in the appended testimony, the factual foundations for the Complaint consist of broad discussions of complex and interrelated histories of operations and finances, as well as

convoluted technical analyses and quantitative derivations forming the bases for alternative rate proposals. Such presentations might be susceptible to development of equally complex rebuttal testimony over time, but they do not lend themselves to the type of answer typically expected in section 3662 proceedings, or contemplated by the Commission's rules. Indeed, responding comprehensively to the complaint would only make sense in the context of Commission hearings. Thus, rather than give the Commission and the Postal Service the information needed to determine whether the Commission should exercise its discretion to hold hearings, complainants have filed documents which seem to presume that a hearing will be conducted.

Similarly, Complainants have not referred specifically to all of the policies that are contravened by existing rates. This critical omission makes it impossible for the Postal Service to state a discrete position on each allegation of legal insufficiency that may or may not be embodied in the Complaint. So, while the complainants and their witnesses discuss the purported tendencies of the existing rate structure to interfere with operational and economic goals inferred from the Postal Service's and the Commission's general obligations under the Act, they do not identify specific legal deficiencies that may be discussed and reviewed in the context of existing law and Commission precedent.

The Commission's rules guiding procedures in complaint cases are functionally related to the representations that must be made to enable the Postal Service and the Commission to make the determinations required to sustain complaints under the Act.³

³ Another procedural anomaly that would be created by treating the filing as a complaint case involves discovery. In a complaint case, complainants typically request the opportunity to conduct discovery on the Postal Service, in order to buttress support for their claims that the current rates fail to conform to the policies of the Act. Because this

By avoiding compliance with these strict guidelines, complainants have failed to perfect their attempts to lawfully invoke the complaint procedures, and have failed to carry even the minimal burden of justifying the complaint in the first instance. The Commission should reject these attempts as facially deficient under its rules, and should dismiss the Complaint.

II. Section 3662 does not authorize the hearings or the relief requested by the Complaint.

While the complainants have purported to initiate this proceeding as a rate complaint case under section 3662, by its form and content, it clearly is not such a case. It is, rather, an attempt to initiate broad-based rate and classification changes across the Outside County Periodicals Subclass. It falls conspicuously outside the range of cases contemplated to be entertained pursuant to section 3662. Treatment of the parties' filing as an appropriately-initiated complaint under section 3662 would violate both sections 3622(a) and 3628 of the Act.

A. Section 3662 is not intended to allow parties to initiate rate cases, or mail classification cases with rate consequences.

The structure of the Act clearly contemplates that only the Postal Service is intended to initiate rate cases. Section 3622(a) states that:

From time to time, the Postal Service shall request the Postal Rate Commission to submit a recommended decision on changes in a rate or rates of postage or in a fee or fees for postal services if the Postal Service determines that such changes would be in the public interest and in accordance with the policies of this title. The Postal Service may submit such suggestions for rate adjustments as it deems suitable.

case is not intended to be focused on specific deficiencies of the current rates, however, the parties have already provided the core of the testimony to support their own alternative proposals. Clearly, the most logical first procedural step under these circumstances would be to allow those intending to challenge the proposed alternative rate structure to conduct discovery on the complainants' proposal.

The importance of this responsibility within the Act's ratemaking scheme is manifest:

In 39 U.S.C. § 3622(a) of the Act, Congress made the deliberate decision to confer rate origination authority solely upon the Postal Service.

Dow Jones v. United States Postal Service, 656 F2d 786, 790 (DC Cir 1981).⁴

Moreover, as also confirmed by the *Dow Jones* opinion, even a proceeding ostensibly initiated to consider mail classification changes would, if encompassing rate as well as classification consequences, run afoul of the provisions of section 3622(a), and be void in its entirety. *Id.* at 791. Thus, mail classification cases with rate consequences cannot be used to circumvent the Postal Service's exclusive authority to initiate rate cases. The court explained why this is so:

Congress had compelling reasons for conferring authority to request rate changes upon the Postal Service alone. The PRC does not possess the Postal Service's command of the cost, revenue, and volume information which is crucial to rate matters, nor is the PRC responsible for operating within a requested budget.

Id. at 790. Those "compelling reasons" operate whether a rate change is considered in conjunction with mail classification changes, or not. *Id.* The grant to the Postal Service within section 3622(a) of exclusive control over the initiation of rate cases (and mail classification cases with rate consequences) is one of the cornerstones of the Act's ratemaking structure.

With respect to rate complaints of the type which complainants now seek to

⁴ Similarly, "[r]equests for rate changes, which are governed by 39 U.S.C. § 3622 of the Act, may be initiated only by the Postal Service." *Id.* at 789. Likewise, "[u]nder the Act only the Board has the authority and the power to make requests for recommended decisions on changes in postal rates and fees, which requests must be based on the determination that such changes would be in the public interest and in accordance with the policies of the Act." *National Assoc. of Greeting Card Publishers v. US Postal Service*, 569 F2d 570, 598 (DC Cir 1976), *vacated on other grounds*, 434 US 884.

initiate, section 3662 only authorizes consideration of claims that particular rates do not conform to the policies of the Act. As indicated by the Governors of the Postal Service in acting on a previous complaint, the grant of relief in section 3662 cases “requires a complaint that existing rates and fees ‘do not conform to the policies set out in [title 39],’ and a finding that the complaint was justified.” Decision of the Governors, Docket No. C99-4 (Complaint of the Continuity Shippers Association), June 5, 2000, at 5. The Governors in that case correctly described the intended role of section 3622 with the statutory ratemaking process:

A complaint procedure is a safety valve. Its function is not a parallel alternative for general updates of rates and fees, but a corrective mechanism for the unusual eventuality in which something goes seriously and unexpectedly wrong between the rate cases initiated under section 3622 – so seriously wrong that the rate or fee no longer “conform[s] to the policies” of the law.

Id. Moreover, they correctly concluded that the “statute contemplates that complainants have a higher burden to meet than asking the Commission to take a fresh look” to see if new recommendations would better align the contested rates with the various ratemaking factors. *Id.*

In reaching those conclusions, the Governors rejected the views of the Commission in that case that, in determining whether relief should be afforded under section 3662, the existing rates need not be found unlawful, and it is sufficient to “determine whether the policies of the Act, on balance, call for the recommendation of a change in the rates.” *Id.*, quoting PRC Op., Docket No. C99-4 (April 14, 2000) at 13. As the Governors noted, the standard implicitly followed in such an analysis fails to comport with the complaint statute, and fails to distinguish situations in which existing rates truly fail to conform to the policies of the Act, from situations in which further consideration merely might support different recommendations than those offered previously. *Id.* The Governors were concerned that this would open the door to

“perpetual tinkering and re-litigating” of rate levels on a routine basis. *Id.* at 6.

More to the point, reliance on such a standard by the Commission would constitute a patent violation of section 3622(a). Section 3622(a) establishes that the Postal Service, and *only* the Postal Service, determines when changes in rates “would be in the public interest and in accordance with the policies of this title.” If the Commission under section 3662 were to seek to “evaluate the relevant facts and circumstances, and determine whether the policies of the Act, on balance, call for a recommendation of a change in rates,” without predicating that action on an explicit finding that the existing rates fail to conform to the policies of the Act, the Commission would be arrogating to itself the authority expressly granted by section 3622(a) to the Postal Service. The Commission would merely be substituting its own views regarding whether “the policies of the Act, on balance, call for a ...change in rates,” for the statute’s intended determination by the Postal Service that rate changes “would be in the public interest and in accordance with the policies of this title.” Such action would constitute a transparent effort by the Commission to, in the earlier words of a court of appeals, “trench upon the functions and prerogatives” of the Postal Service. See, *Governors of the Postal Service v. Postal Rate Commission*, 654 F2d 108, 114-15 (DC Cir 1981). Section 3662 cannot be interpreted to countenance such a result.⁵

In light of the analysis above, it is not surprising that the complainants’ filing is

⁵ It bears noting that, in confirming that *no* relief is available under section 3662 without an explicit finding that the existing rates do not conform to the policies of the Act, the Governors in their Decision in Docket No. C99-4 found it unnecessary to reach the further issue of exactly what form of relief might be available if such a finding had been made and supported. See, *id.* at 7, footnote 4. As the Governors also indicated, however, it has been the Postal Service’s consistent position that a recommended decision may submit rate changes to the Governors only following a Postal Service request under section 3622(a), and not following a complaint case under section 3662. The Postal Service continues to maintain that position, and nothing in this pleading should be interpreted to the contrary. At the moment, however, the more germane issue is the circumstances under which a complaint case may be initiated, rather than the relief that might be available after a complaint case has run its course.

deficient when viewed in terms of the necessary and expected contents of a section 3662 rate complaint. The reason for the observed mismatch is that the manifest intent of the filing is to initiate consideration of broad-based mail classification and rate proposals, rather than focus on alleged factors, of the type discussed by the Governors in their Decision in Docket No. C99-4, which render the existing rates unlawful. Simply stated, the intent is to start a mail classification case, not a rate complaint case. As noted above, complainants essentially acknowledge as much in the opening substantive statement of their filing:

This Complaint concerns fundamental reform of the Periodicals rate structure to achieve greater conformity with the ratemaking provisions of the Act. The need for such reform, and the deficiencies that underlie that need, have grown increasingly evident over the last two decades.

Complaint at 4.

The entire structure of the filing submitted by complainants underscores the intent to initiate a mail classification case. Two pieces of testimony have already been submitted, along with supporting spreadsheet documentation. Two other pieces of testimony have apparently already been prepared (or substantially prepared), as we are told that they could be produced “reasonably quickly” (Complaint at 21). The parties themselves refer to this material as their “direct case” (*id.*), and it clearly constitutes an integrated proposal believed to be sufficient to support recommendation of their proposed rate structure.⁶ Any doubts concerning the true nature of this filing can be

⁶ As quoted above, the Complaint on page 4 states that this case “concerns fundamental reform of the Periodicals rate structure.” For most purposes, the term “rate structure” is indeed the most useful characterization of what is at issue, but, in terms of the statutory language of title 39, the complainants’ proposals can be bifurcated into mail classification changes and rates changes. Historically, when the Postal Service has initiated rate structure cases combining mail classification and rate proposals, such cases have tended to be docketed as mail classification cases, notwithstanding the inclusion of proposed rate changes as well.

put to rest by examination of a simple question: if it were the complainants' avowed intent to initiate a mail classification case, in what respects would their filing have to have been modified, relative to what they have actually provided? The answer is, none. Procedurally, the parties have laid the exact same type of foundation for consideration of their proposed rate structure changes, as the Postal Service would have, were it making its own such proposals within the framework of a typical mail classification case.

Complainants' transparent attempt to launch a mail classification case with rate consequences, rather than a true rate complaint focused on alleged failures of the existing rates to conform to the policies of the Act, precludes the Commission from entertaining their filing pursuant to section 3662. Section 3622(a) reserves to the Postal Service the authority to initiate rate cases, or mail classification cases with rate consequences, and section 3662 has a narrow purpose that is not consistent with back-door attempts to evade the explicit limitations of section 3622(a). The Commission should call a spade a spade, and treat the parties' filing as a petition to initiate mail classifications proceedings under section 3623.⁷ Section 3622(a) requires no less.⁸

⁷ Of course, in light of the holding of the *Dow Jones* case, consideration of actual rate changes in any such mail classification case initiated by the Commission under section 3623 would be precluded. While this constraint presumably would not bar discussion of rate design matters or cost and revenue estimates for purposes of illustrating the approximate magnitude of potential rate consequences likely to be associated with proposed new classification structures, it would prohibit recommendation of any actual rate changes. In other words, the only possible outcome of such a proceeding (if any changes were recommended at all) would be the recommendation of shell classifications.

⁸ If the Commission, over the objections of the Postal Service, nonetheless ultimately continues to treat the filing as a complaint, the Postal Service wishes to be quite clear regarding the potential effects of this Answer. As noted above, Rule 84 imposes the obligation to admit or deny factual allegations, and indicates that allegations not explicitly answered will be deemed admitted. The Postal Service submits, however, that the host of materials furnished with the Complaint fail to articulate distinct factual allegations in any format susceptible to meaningful response. For that reason, it would

B. Even assuming, *arguendo*, that the Complaint had included clearly articulated allegations that the existing rate structure fails to conform to the policies of the Act, proceedings under section 3662 would still be inappropriate.

While, on the one hand, no rate complaint can be entertained under section 3662 without an unambiguous claim that the rates being charged do not conform to the policies of the Act, on the other hand, not every such allegation is necessarily sufficient to justify further proceedings under that section. Consideration of some types of challenges to rates would not be consistent with the intended purposes of section 3662, or might be inappropriate for other reasons. Such is the case here.

The types of issues raised by the instant Complaint are matters that the parties previously have had repeated opportunities to litigate, most recently in the last omnibus rate proceeding. Specifically, complainants challenge the combined classification and rate structure of Periodicals. In this context, that structure embodies the determination of which characteristics of mailings and mail pieces will be taken into account when determining the total postage paid by mailers for delivery of their publications, and which characteristics will not. Explicitly or implicitly, every time rates are recommended for a subclass, the combined structure is either established, or (if there are no changes in the characteristics encompassed by the rate schedules), reestablished. As an unsuitable structure cannot provide a framework for suitable rates, any recommendation by the Commission of rates for a subclass necessarily carries with it affirmation by the Commission, either tacit or express, that the combined classification and rate structure

be utterly inappropriate for the Postal Service to be deemed to have admitted anything, merely by virtue of the absence in this Answer of an explicit response. Under these circumstances, if the Commission wishes to proceed under section 3662, the Postal Service respectfully suggest that, at a minimum, complainants must be required to reformat/amend their pleadings to clearly articulate the factual allegations upon which their claims are predicated, in a format that facilitates meaningful response.

recommended is consistent with the policies of the Act. Over the years, this structure for Periodicals has been the focus of intense controversy and litigation.

The clear connection between the challenges complainants seek to pursue now, and their opportunity to pursue such challenges previously, is highlighted by the fact that the information relied upon in the filing all appears to be material that was available during the last omnibus rate proceeding. See Complaint at 8-9. Moreover, complainants rely on representations regarding the long standing nature of the perceived deficiencies in the existing rate structure which they now seek to resolve.

They state:

The need for such reform, and the deficiencies that underlie that need, have grown increasingly evident over the last two decades.

Id. at 4. Along the same lines, they assert:

What may not have been apparent in 1990 but became so over the ensuing decade is that the Periodicals rate structure does not send proper, cost-based rate signals to mailers.

Id. at 18. These circumstances give rise to the question of whether a section 3662 rate complaint proceeding is an appropriate vehicle by which the parties are now entitled to challenge the Periodicals rate structure.

The only reasonable response to such an inquiry is no: a rate complaint is not an appropriate vehicle under these circumstances. As observed in the previously-quoted statements by the Governors in Docket No. C99-4 regarding the intended purpose of section 3662,

A complaint procedure is a safety valve. Its function is not a parallel alternative for general updates of rates and fees, but a corrective mechanism for the unusual eventuality in which something goes seriously and unexpectedly wrong between the rate cases initiated under section 3622 – so seriously wrong that the rate or fee no longer “conform[s] to the

policies” of the law.

Governors’ Decision, Docket No. C99-4, at 5.

The nature of the rate structure for a subclass is such that it is extremely unlikely that something could go “unexpectedly wrong” between rate cases.⁹ Certainly the Complaint itself strongly refutes any notion that the deficiencies of which the parties complain are the consequences of things that have gone “unexpectedly wrong” since the last rate case. Nothing in the parties’ Complaint establishes a new need for anything remotely resembling a “safety valve” in order to address these long-standing issues.

The entire structure of the statute’s ratemaking provisions underlie the above-quoted statements of the Governors in Docket No. C99-4. As discussed above, that structure calls for rate cases to be initiated by the Postal Service under section 3622(a). The Commission then conducts hearings and recommends any changes to the Governors, and the Governors act upon those recommendations under section 3625. The process by which parties may challenge rate or classification determinations resulting from this administrative process is established by section 3628. Essentially, parties have a limited amount of time to seek review of rate or classification changes by a federal court of appeals. Section 3628 is clearly intended to constitute the exclusive channel for review of rate case matters.

Consequently, since the combined classification and rate structure that complainants now propose to improve was established (or, at the least, reestablished)

⁹ The obvious point of comparison, of course, would be matters relating to rate levels. As costs change and volumes change from year to year, it is quite conceivable that issues involving rate levels might warrant consideration under section 3662 in a period between omnibus rate cases. Issues relating to rate structure, however, are much less

in the last omnibus rate proceeding, it was incumbent upon any party challenging that structure to pursue those types of issues then, up to and through the judicial review provisions of section 3628. As the Governors have suggested, rate complaint cases under section 3662 were intended to offer a safety valve for consideration of issues and circumstances which unexpectedly arise between rate cases. They should not be allowed to become a vehicle by which the exclusive review provisions of section 3628 can be circumvented, any more than they should be allowed to become a vehicle by which the rate case initiation provisions of section 3622(a) can be circumvented. Section 3662 is not available to provide a substitute means to challenge the conformance of an established rate structure with the policies of the Act by parties who, pursuant to 3628, could have challenged that rate structure when it was established, but did not do so.

The Commission has previously declined to recognize the limitations created by the availability of review under section 3628 on the scope of the complaints it may entertain under section 3662. In Order No. 1310, declining (on other grounds) to institute proceedings in Docket No. C2001-2 (Complaint on Priority Mail Rates), the Commission suggested that, in terms of sections 3628 and 3662, “each section is independent from the other,” and concluded that “§ 3628 does not preclude the Commission from reviewing rate and related classification issues, at any time, within a complaint proceeding.” Order No. 1310 (April 27, 2001) at 13-14.

These sweeping assertions, however, do not withstand critical scrutiny. Litigants in any forum are not afforded unlimited opportunities to argue and reargue their cases, and common law doctrines of claim preclusion (*res judicata*) and issue preclusion

likely to be materially influenced by such year-to-year developments.

(collateral estoppel) apply to administrative agencies, as well as courts. Those doctrines “enforce repose” of previously resolved issues, in order to prevent the unjustifiable imposition of further litigation on those who have already “shouldered their burdens,” and in order to preserve the resources of the adjudicatory system. See, *Astoria Federal Savings & Loan Assoc. v Solimino*, 501 US 104, 107-08 (1991).

Adoption of the Commission’s apparent suggestion in Order No. 1310 that, for example, a party could actually lose its court appeal under section 3628, and yet face no bar to immediate pursuit of the same challenge to the established rates under section 3662, would contradict fundamental principles of sound jurisprudence.

The Postal Service submits that section 3628 provides the exclusive avenue of review for legal challenges when a rate structure is established. Practically speaking, the rate structure is “established” in each omnibus case, and interested parties have the opportunity to intervene before the Commission and, if necessary, pursue judicial review under section 3628. Parties such as the complainants, who are long-established large businesses possessing extensive familiarity with postal ratemaking matters (either directly, or indirectly through trade associations), can be presumed to have had ample opportunity to participate in shaping the established rate structure, both before the Commission and, if necessary, before the courts. As a matter of general principle, therefore, in the absence of any dramatic and compelling change in circumstances, the broader statutory scheme and the limited purposes of section 3662 are not served by affording these parties an additional crack at a rate structure which, if perceived to be deficient, should have been challenged under 3628 at the time of its most recent adoption.

Beyond this general principle, at least two of the complainants are signatories to the Stipulation and Agreement in Docket No. R2001-1. Item 5 of the Terms and Conditions of that document included agreement by the signatories that the rates and classifications proposed at that time, including the Periodicals rates now in effect, “are in accordance with the policies of Title 39, United States Code.” Thus, those parties cannot now assert that those very same rates “do not conform to the policies set out in [title 39]” for purposes of attempting to initiate a section 3662 rate complaint.

Of course, this difficulty quite likely explains the failure of the Complaint to include an unambiguous assertion that the current rates are unlawful. As discussed in the first portion of this pleading, that failure precludes consideration of complainants’ proposed alternative rate structure as part of a rate complaint proceeding. The terms of the Stipulation and Agreement, however, equally preclude the signatories from either attempting to remedy that failure with a belated explicit assertion that the current rates actually are unlawful, or from arguing that the original Complaint should be interpreted to have included such an assertion. Either way, a rate structure which they agreed was lawful then is lawful now. One of the primary intended effects of the agreement into which they entered was a waiver by all signatories of their subsequent ability to challenge the rates which were incorporated into the settlement, following extensive negotiations with all parties. The signatories cannot escape the effects of their commitments at that time.¹⁰

¹⁰ With regard to the other three complainants, even if they did not directly join in the settlement agreement, they are quite likely to be members of trade associations representing their interests that did sign the agreement. More fundamentally, as indicated above, these are sophisticated mailers who had ample opportunity to participate more actively in the last rate case had they chosen, and to challenge any aspect of the current rate structure they saw fit to question in a proceeding of the type in

Overall, the structure of the Act contemplates that only the Postal Service can initiate rate cases, or classification cases with rate consequences. Whatever other purposes were intended for section 3662, its provisions do not permit the complainants, under the current circumstances, to achieve such an objective. Nor should section 3662 be used to afford complainants an additional opportunity to challenge the rate structure emanating from the last rate case, when they could have raised their concerns at that time either administratively or, under section 3628, with the court of appeals. Complainants are entitled to no relief under section 3662, and their filing should instead be treated like a petition to initiate a mail classification case.

III. As a matter of policy, the Commission should decline to initiate a mail classification proceeding in response to the instant filing

Although the Commission is unable to entertain the parties' complaint pursuant to section 3662 for the reasons explained above, under these circumstances there presumably also exists the option to consider the filing as if it were a petition to institute a classification proceeding pursuant to section 3623. See, for example, Order No. 1121, Docket No. C96-2 (June 24, 1996), at 10. Treating the filing as such a petition, in fact, would be much more commensurate with its structure and content, as also noted earlier. While the Postal Service considers it appropriate for the Commission to treat the parties' filing as a request to initiate mail classification proceedings, the Postal Service nevertheless submits that compelling policy grounds exist for the Commission at this time to decline to initiate a section 3623 proceeding to address the contentious

which such matters were intended to be addressed and resolved. Sitting out a rate case should not be grounds to enhance a party's ability to collaterally challenge the outcome of the case.

ratemaking issues raised by the Complaint. Instead, the Commission should let the Postal Service continue consultations with all Periodicals mailers to develop a Periodicals rate and classification proposal for future consideration by the Commission.

The Complaint focuses on creating price signals so that mailers can make efficient choices in preparing their publications for the Postal Service.¹¹ But mailers of some small publications can be expected to respond that they do not have such choices, because of the nature of their publications, regardless of the existence of pricing incentives.¹² There is a need to determine whether comailing and co-palletization can provide Periodicals mailers with the choices that underlie the complete redesign of Periodicals rates envisioned by the Complaint.

The Postal Service and the Commission are making tangible progress on these issues. Docket No. MC2002-3 created experimental rate incentives that seek to help smaller publications combine their mailings, and thus achieve the efficiencies of larger publications. Because that docket's per-piece incentives have been found to be inadequate for high-editorial, heavy-weight publications, the Postal Service will, in the coming days, file a new request for alternative experimental per-pound discounts to encourage still more publications to co-palletize. The results of these experiments will soon establish whether new or enhanced printing operations can be established to combine the mailings of smaller publications on more efficiently handled pallets. These experiments will help determine whether most publications really do have a "choice" of

¹¹ See, e.g., Complaint at 6-7 ("In preparing a Periodicals mailing, choices are made that substantially affect how many bundles, sacks, and pallets the Postal Service must handle and how much they will cost to handle."); Complaint, Attachment A at 36 ("Mailers can make choices based on container preferences, in view of the cost consequences of those decisions.").

¹² In Docket No. MC95-1, for example, the Commission concluded that there were

more efficient mail preparation and transportation.

The Postal Service shares many of the concerns expressed in the Complaint regarding potential opportunities to improve Periodicals efficiency through rate design. These issues began being affirmatively addressed through some of the mail preparation initiatives described in Docket No. R2000-1 (for example, reduction in bundle breakage, elimination of skin sacks for carrier route mailings, combined automation and presort mailings, and implementation of vertical flat casing). The rates arising out of Docket No. R2001-1 provided incentives related directly to the palletization of Periodicals and the deposit of those pallets closer to the point of delivery, as well as a new Area Distribution Center (ADC) dropshipping discount.¹³ And as mentioned previously, the Postal Service has worked to develop mechanisms for smaller-circulation publications to be combined and prepared in the more efficient manner normally associated with larger-circulation mailings. Despite these ongoing efforts, the Postal Service agrees that there is more to be done to promote efficiency within the Periodicals rate design.

More broadly, the Postal Service is actively studying many of the issues raised by the filing. In particular, the Postal Service has been working with a wide variety of Periodicals mailers to investigate pricing alternatives, including those based in part on direct charges for bundles, sacks, and pallets of mail.¹⁴ The Postal Service's consideration of these matters includes a process by which input is solicited across the spectrum of Periodicals mailers. The result is much more likely to be a set of proposals

“practical limitations of co-mailing at this time.” PRC Op., MC95-1, at V-117-118.

¹³ The Commission characterized these Periodicals recommendations as “continu[ing] to reflect a strong focus on implementing structural changes in Periodicals that may foster cost containment and service improvement.” PRC Op., R2001-1, at 104.

¹⁴ In addition, the co-palletization experiment to be proposed later this month will address issues related to how the goals of efficiency can be reconciled with the flat

with broader support within the Periodicals community. Given an opportunity, the Postal Service may be able to resolve some contentious issues prior to presentation of its proposals and commencement of the subsequent Commission review process. In summary, the Postal Service shares many of the concerns of the Complainants and is actively pursuing potential initiatives that would advance the goals of efficiency in Periodicals while attempting to actively address issues important to smaller volume mailers. In that way, the Postal Service hopes to achieve the shared goals of more efficient rate design and fairness and equity for Periodical mailers as a whole.¹⁵

That opportunity is lost if litigation commences on the basis of the instant filing. The Complaint is sponsored by large publications only. Smaller publications can be expected to strongly oppose the substantive proposals in the Complaint.

Even if useful progress could be made in the context of an immediate mail classification case initiated by the Commission under section 3623, as noted earlier, the end result would still be limited to recommendation of shell classifications. The Governors have in several instances noted their disinclination to lock themselves into

editorial pound rate.

¹⁵ In Docket No. R2000-1 witness O'Brien, on behalf of Time Warner and many other Periodicals intervenors, first presented the rate grid concept that underlies Time Warner's current complaint. The Commission, in declining to act on witness O'Brien's proposal, concluded that the relative impact on Periodicals mailers is a challenging issue, that:

played a major role in reclassification decisions, as witness O'Brien acknowledges, and undoubtedly would do so again, given the logical rate implications of extensive de-averaging. This is not an insurmountable obstacle, but raises policy questions that are quite different from the more pragmatic issues associated with rate complexity and costing. The postal community's attention to the grid's policy implication may foster approaches acceptable to all stakeholders.

PRC Op., R2000-1, at 455.

shell classifications. See, for example, the Decision of the Governors of the United States Postal Service on the Recommended Decision of the Postal Rate Commission on Prepaid Reply Mail and Courtesy Envelope Mail, Docket No. R97-1 (June 29, 1998) at pages 4-5. Even the Commission itself recently noted the shortcomings of shell classifications, when it denied a petition for a classification proceeding on unclassified products offered by the Postal Service. Order No. 1388 at 14-15 (January 16, 2004). A mail classification proceeding would “not appear to represent the most efficacious use of the Commission’s and potential parties’ resources.” *Id.* When the Postal Service is already working on a proposal, including both classifications and related rates, that it can make to address the concerns raised in the Complaint, it especially makes sense to wait for that proceeding to consider the Complaint’s issues. Any delay resulting from this approach should be limited, moreover, since even under a worst-case scenario, the next omnibus rate case would provide a vehicle for consideration of the Complaint’s concerns.

Therefore, the interests of the Commission, the Postal Service, and Periodicals mailers in general are all best served by dismissing the complaint and allowing the Postal Service the opportunity to continue to pursue these issues more prudently. If, nonetheless, the Commission is considering initiating a mail classification proceeding on the issues raised by the Complaint, the Postal Service urges the Commission to first

obtain comments from all interested parties, including further comments from the Postal Service, before determining whether to proceed with such a case.

Respectfully submitted,

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February 11, 2004

CERTIFICATE OF SERVICE

I hereby certify that, in accordance with section 12 of the Rules of Practice, I have this day served the foregoing document.

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