

ORDER NO.1399

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

Before Commissioners: George Omas, Chairman;
Tony Hammond, Vice Chairman;
Dana B. Covington, Sr.; and
Ruth Y. Goldway

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

Docket No. C2004-1

ORDER ON PERIODICALS RATE COMPLAINT

(Issued March 26, 2004)

Summary. Five mailers who make extensive use of Outside County Periodicals rates have lodged a formal complaint with the Commission pursuant to section 3662 of the 1970 Postal Reorganization Act (the Act or the PRA).¹ They assert that the Complaint “concerns fundamental reform of the Periodicals rate structure” in the interest of achieving greater conformity with statutory ratemaking provisions. Complaint at 4. Complainants contend that the need for such reform is clear, as is the path that should be taken to achieve it. They seek hearings on their allegations regarding the inefficacy of the rate structure and other relief consistent with their claims, including the potential adoption of an alternative rate schedule.

The Commission accepts the Complaint under section 3662, over the Postal Service’s objection, and announces its intention to hold hearings under section 3624 to

¹ Complaint of Time Warner Inc., Condé Nast Publications, a Division of Advance Magazine Publishers Inc., Newsweek, Inc., The Reader’s Digest Association, Inc. and TV Guide Magazine Group, Inc. Concerning Periodicals Rates, January 12, 2004 (Complaint). These mailers are also collectively referred to in this order as Complainants.

determine whether the allegations in the Complaint are valid.² If the Commission finds that to be the case, it will issue a recommended decision on classification changes under section 3623. This decision will not include a rate recommendation.

I. THE TIME WARNER INC. ET AL. COMPLAINT

The Complaint includes information addressing applicable Rule 83 provisions, such as identification of the Complainants; a statement of the grounds for the complaint and the statutory policies at issue; a description of similarly affected classes of persons; and a description of the relief sought. As part of the stated grounds, it provides detailed observations on numerous Periodicals issues and initiatives, including developments leading to the creation of a joint Periodicals Task Force, a description of certain Task Force recommendations, and comments on AFSM 100 productivity.³ Complaint at 17-18.

The filing also includes two exhibits, an extensive evidentiary proffer, and two attachments. Exhibit A is a multi-year comparison of Periodicals costs and inflation; Exhibit B is the Complainants' proposed alternative rate schedule for Outside County Periodicals Non-Letters. The evidentiary proffer announces the Complainants' readiness to sponsor the testimony of the following expert witnesses: Robert W. Mitchell (TW et al.-T-1) on Periodicals rate design; Halstein Stralberg (TW et al.-T-2) on the development of Periodicals costs; John Steele Gordon (TW et al.-T-3) on the impact of technological progress on "the widespread dissemination of information" in the United States; and Joe Schick (TW et al.-T-4) on the impact on smaller publications and their printers of eliminating the unzoned editorial pound rate. The proffered testimony of

² The American Postal Workers Union, AFL-CIO (APWU), in a February 13, 2004 letter addressed to the Secretary of the Commission, expressed its opposition to the Complaint. Reasons include the Complaint's reliance on Docket No. R2001-1 rate case assumptions; concern that the proposal is a "radical departure" from the current methodology; the possibility of establishing a poor precedent; the absence of an allegation that current Periodicals rates are illegal; and the alleged inappropriateness of the Commission's interference in the discussion process. The rules of practice do not specifically authorize the APWU's filing at this point in the absence of a motion, but the Commission accepts it and has considered the points it raises in reaching its conclusions.

³ AFSM 100 equipment is the Service's newest mechanized flat sorting equipment.

witnesses Mitchell and Stralberg appear, for information, as Attachments A and B to the Complaint. Related workpapers have been filed with the Commission's docket section as library references. Complainants indicate the testimony of the other witnesses they have identified can be provided reasonably soon.

A. Grounds for Filing the Complaint

Reasons for seeking reform. Complainants claim that the need for reform — and deficiencies that underlie that need — “have grown increasingly evident” over the last two decades. In support of this contention, they cite historical trends showing increases in mail processing costs and declines in mail processing productivity, despite extensive efforts by the Postal Service and mailers to achieve more efficient Periodicals handling. *Id.* at 4-5 (fn. omitted). They point to the Service's apparent belief that rate design changes are needed to address inefficiencies in the Periodicals class, given repeated rate and classification filings pursuing various alternatives. *Id.* at 5. They also note successive reductions the Commission has made in Periodicals cost coverage. However, they observe that “with coverage barely above 100 percent since the [Docket] No. R97-1 rates went into effect, virtually no leeway remains for the Commission to shield mailers in this way from the problems of the subclass or deficiencies in its rate structure.” *Ibid.*

Inefficient price signals. Complainants identify inefficient price signals as a significant deficiency in the underlying rate structure. They say these signals stem from a longstanding focus on whether Periodicals costs are piece- or pound-oriented. However, they assert that improvements in cost analysis over the past decade, along with advances in postal mechanization, now show that costs are determined “in meaningful and systematic ways” by factors other than the basic piece/pound distinction. These include how bundles, sacks and pallets are made up, including related presort levels, and associated interactions, such as mailing entry points. *Id.* at 6. Given that recognition of these cost-causing factors in current rates is extremely

limited, Complainants assert that mailers cannot make efficient mailing decisions, and should not be expected to do so. *Ibid.*

Consequently, Complainants argue that the price signals in the existing rate structure are not only inconsistent with cost incurrence as now understood, but inconsistent to the point that they impair the value of Periodicals mail service in two ways: by raising costs and by failing to recognize the way Periodicals mail is prepared. They assert that neither result is contemplated by the Postal Reorganization Act. *Ibid.*

Obsolete and counterproductive unzoned editorial pound rate. Complainants regard the unzoned editorial pound rate, which dates to 1917, as another serious deficiency. They characterize it as “a substantial impediment to the development of a more efficient Periodicals rate structure and an anomalous element that complicates and sometimes defeats coherent Periodicals rate design.” *Id.* at 9. They note that the Commission has recognized that this feature imposes certain inefficiencies, but has declined to approve proposed changes based on references in sections 101(a) and 3622(b)(8) to “widespread dissemination of information” as a means of “binding the Nation” and out of a concern for certain mailers.

Complainants make three related assertions on this point. One is that the record on the unzoned editorial pound rate in previous Commission proceedings is deficient because it does not adequately address historical, cultural, technological and legal developments since 1917. *Id.* at 10. Another is that the decision in *Mail Order Ass’n. of America v. United States Postal Service*, 2 F.3d 408 (D.C. Cir. 1993) significantly undermined the Commission’s rationale for maintaining the unzoned editorial rate preference. *Id.* at 11-12. A third claim is that changes since Docket No. R90-1 cast doubt on whether the unzoned editorial rate currently generates policy benefits that outweigh the burdens it imposes in derogation of other policies of the Act, or even advances the policies of the Act at all. These changes include the availability of pool shipments, the emergence of mass media, and the burgeoning information revolution. *Id.* at 10.

Complainants contend that reconsideration in light of current knowledge and circumstances will demonstrate that maintaining an unzoned editorial rate for the purpose of fostering “widespread dissemination of information” via Periodicals:

- is no longer a useful, or even explicable, way of recognizing or promoting the educational, cultural, scientific and informational value (ECSI) of Periodical publications;
- provides a rate benefit to long-haul publications only at the cost of imposing complementary rate burdens on similarly situated short- and average-haul publications, in derogation of the recognition owed to the ECSI element of those publications under section 3622(b)(8), as well as the requirement that rates and classifications be fair and equitable, as set out in sections 3621, 3622(b)(1) and 3623(c)(1);
- imposes substantial operational and pricing inefficiencies on the Postal Service and the Periodicals subclass as a whole; and
- creates substantial obstacles to a rational, comprehensible, economically coherent Periodicals rate design, in derogation of section 3622(b)(7). *Id.* at 13.

B. Evidentiary Proffer

Complainants state that they are prepared to present evidence supporting their contention 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. This includes the Mitchell, Stralberg, Gordon and Schick testimonies. They note, in particular, that witness Gordon’s testimony will show how a century of technological, economic and social progress has “transformed the conditions ... thought to justify an unzoned editorial rate.” *Id.* at 9. Complainants consider the improvements they propose meritorious in their own right, quite apart from other factors affecting mailers, but further claim that “the unprecedented and unexplained Periodicals cost and rate increases of recent years make it all the more important to explore every available path of progress.” *Ibid.*

C. Main Elements of the Proposed Alternative Rate Structure

Complainants assert that the following “simple remedies” will make Periodicals rates far more reflective of associated costs. These changes are reflected in their Exhibit B rate schedule, and include:

- establishing separate charges for the bundles, sacks and pallets used in each mailing, instead of deriving all Periodicals revenue from piece and pound charges;
- recognizing both bundle and container presort levels, as well as the effect of the mailing’s entry point, on costs incurred;
- recognizing the importance of AFSM 100 machinability for non-carrier route flats; and
- continuing a preference for editorial content in Periodicals, but allowing publications with high editorial content to earn lower rates by entering mail closer to its final destination.

Id. at 7.

Complainants acknowledge that their proposal includes more rate elements than the current structure, but say it “would allow simplification of the ever more complex mail preparation requirements.” Id. at 8. They also assert that their proposal is not a complete solution, and suggest that the Service “may possess more recent cost and mail-characteristics data with more accurate unit cost estimates.” Ibid.

D. Relief Sought; Basis for Jurisdiction

Requested relief. Complainants seek hearings on their complaint under section 3624 of the Act and issuance of a decision, under sections 3622, 3623 and 3625 of the Act, recommending the adoption of cost-based Periodicals Outside County rates that

(1) more fully reflect differences in operational and cost-causing characteristics within the Periodicals Outside County subclass; (2) discontinue the policy of maintaining an unzoned editorial pound rate; and (3) promote more efficient methods of mail preparation and entry by sending mailers better price signals. *Id.* at 21.

Jurisdiction. Complainants assert that the Commission's jurisdiction to hear this matter is founded on 39 U.S.C. § 3662, §§ 101(a) and (d), §§ 403(a) and (c), § 3622(b)(1)-(8), and § 3623(c)(1). *Id.* at 19. Section 3662 establishes the Commission's authority to hear rate and service complaints. The other referenced provisions address various policies, such as "Nation binding," fairness and equity of rates and classifications, efficient services, and recognition of the degree of mail preparation. These provisions are set out in the body of the Complaint. *Id.* at 19-20.

In addition, the Complainants cite with approval the following Commission statement on jurisdiction:

In a Section 3662 complaint, the rate at issue need not be per se 'unlawful,' before changes may be recommended. In each case, the Commission will evaluate the relevant facts and circumstances, and determine whether the policies of the Act, on balance, call for the recommendation of a change in rates.

Id. at 2, fn. 1, citing PRC Op. C99-4, Opinion and Recommended Decision on Complaint of Continuity Shippers Association, April 14, 2000, at 13.

III. POSTAL SERVICE ANSWER

The Postal Service filed its Answer to the Complaint on February 11, 2004.⁴ Therein, it states that it does not oppose improved efficiency in Periodicals rate design;

⁴ Rule 84 requires the Service to file its Answer to the Complaint within 30 days of filing. The Answer is to include 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; a statement regarding the Service's position on the allegations in the complaint, and facts and reasons supporting such position; the Service's position on the requested relief; its recommended disposition, including whether or not a hearing shall be held, and a statement of any facts and reasons in support of such position. 39 CFR § 3001.84.

believes more can be done in this regard; and says it is exploring many of the structural changes Complainants propose. Answer at 2. At the same time, it opposes any form of Commission action on the Complaint at this time, other than summary dismissal. The Service cites an array of legal, policy and practical considerations in support of its position. The most serious of these are alleged deficiencies in the form and substance of the pleading.

Alleged flaws in the Complainants' filing. The Service asserts that under the clear meaning of the language of section 3662 and Commission rules, the threshold question in any rate and service complaint must be whether the existing rates are unlawful, not whether some alternative set of rates would constitute an improvement. *Id.* at 3-4. It claims, however, that the instant 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.” *Id.* at 4. It therefore argues that the Complaint fails to establish the necessary foundation for conducting a section 3662 rate complaint proceeding: namely, specific and colorable allegations that the existing rates fail to conform to specific policies of the Act. *Id.* at 6.

The Service claims that this failure not only prevents Complainants from establishing the only statutory basis for proceeding under section 3662, but also precludes the Service from meeting its obligations under the Commission's rules. *Id.* at 2-3. In particular, it asserts that Complainants do not specifically allege that existing rates, fees, or classifications for Periodicals mail do not conform to specific policies in the Act. Instead, the Service says the Complainants explicitly indicate that the status quo conforms to those policies because they state that the purpose of their alternative is “to achieve greater conformity” with the ratemaking provisions of the Act. *Id.* at 3. It also says critical factual allegations are never clearly articulated in a format to which the Postal Service can directly respond, but instead “the factual foundations ... 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.” *Id.* at 6-7. As such, the Service says they do not lend themselves to the type of answer typically expected in section 3662 proceedings or contemplated by the Commission’s rules. In addition, it asserts that 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. *Id.* at 8.

Contentions regarding section 3662 jurisdiction. The Service asserts that the Complaint is really an attempt to initiate broad-based rate and classification changes across the Outside County Periodicals subclass, and therefore “falls conspicuously outside the range of cases contemplated to be entertained pursuant to section 3662.” *Ibid.* In fact, it says that such treatment would violate both sections 3622(a) and 3628 of the Act. In an extended discussion, the Service presents its views on the regulatory scheme set out in the statute, attendant rights and responsibilities of the respective agencies, and section 3662’s purported status as a limited “safety valve.”

Moreover, the Service claims section 3628 is clearly intended as the exclusive channel for review of rate case matters. It dismisses Commission statements suggesting that section 3628 does not preclude it from reviewing rate and related classification issues within a complaint proceeding. *Id.* at 17, citing Order No. 1310, Docket No. C2001-2, April 27, 2001, at 13-14. Given this position, the Service says that since the combined classification and rate structure the Complainants now propose to improve was established (or, at the least, reestablished) 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. *Id.* at 16-18 (citing the legal doctrines of *res judicata* and collateral estoppel).

Opposition to the initiation of a mail classification proceeding. The Service acknowledges that the Commission has the option to consider the filing as if it were a petition to institute a classification proceeding pursuant to section 3623, but encourages it to decline to do so. In support of this position, the Service says the next omnibus rate case will provide a vehicle for consideration of the Complainants’ concerns. It also

contends that the absence of such a proceeding would allow it to continue consultations with all Periodicals mailers to develop a Periodicals rate and classification proposal for future consideration by the Commission. *Id.* at 20-21. Finally, the Service says deferring consideration of these issues would allow it to determine whether co-mailing and co-palletization can provide Periodicals mailers with the efficiency-related “choices” that underlie the Periodicals redesign proposed in the Complaint. *Id.* at 21.

If the Commission does hold a hearing, the Service suggests that it may parallel, at least in some respects, progress the Service is making on similar issues with mailers. *Id.* at 21-23. It also says that since smaller publications can be expected to strongly oppose the Complaint’s substantive proposals, the opportunity to include them may be lost. *Id.* at 23.

IV. DISCUSSION

A pivotal question in any filing before the Commission is whether jurisdiction lies. In this case, the Postal Service asserts that the Complainants have failed to make the requisite jurisdictional showing because there is neither an “unambiguous claim” that existing rates do not conform to applicable policies, nor adequate identification of the policies that are implicated. Moreover, it believes that Complainants’ reliance on a Commission statement, in PRC Op. C99-4, regarding the scope of section 3662 is misplaced. It contends the Commission’s view is not a legally supportable position. *Id.* at 4, fn. 2 (referring to Complaint at 2, citing PRC Op. C99-4, April 14, 2000, at 13).

The Commission concludes that no fundamental flaws in the filing preclude its acceptance for the purpose of determining whether the concerns it raises are justified. The Service’s contention that Complainants have failed to invoke jurisdiction because

they have not used several “magic words” is not persuasive.⁵ First, it invokes the “plain meaning” of a statutory provision only at the expense of a “plain reading” of the entirety of the pleading. The Complaint raises a sophisticated, not simplistic, claim. Thus, the Service’s near-exclusive focus on one or two phrases in the Complaint ignores its very core: a challenge to the continued efficacy of Outside County Periodicals rates, given a structure that may be so outmoded and inapposite that the rates it generates *ipso facto* violate controlling provisions of the Act. Considered in this light, the Complainants’ reliance on the Commission’s previous statement regarding its responsibility to evaluate relevant facts and circumstances is not misplaced.

Failure to identify policies, as required by Rule 83. The Service also contends that Complainants have failed to comply with Rule 83 in certain respects, including a failure to identify the policies they believe are involved. Complainants devote more than a page of their pleading to setting out specific provisions of the Act, in addition to citing them in the text. The pleading also contains substantial discussion about why Complainants contend that consistency with these policies is lacking. Given these circumstances, the Service’s argument must be rejected.

Technical compliance. The Service is correct that the filing does not necessarily conform to the format used by others. However, Rule 83 speaks to required information, rather than a set format. The Complainants have provided their full name and address in compliance with Rule 83(a). Complaint at 2-4. In the Commission’s view, they have provided, throughout their extensive filing, a full and complete statement of their grounds, including specific reference to the postal rates involved and the policies to which it is claimed they do not conform. They have described all persons or classes of persons known or believed to be similarly affected (Outside County Periodicals mailers), in compliance with Rule 83(c). *Id.* at 5 and 18-19 (and elsewhere).

⁵ The Service alludes to the possibility that use of the words “greater conformity” rather than something unambiguous may be an “artful dodge” by two or more individual Complainants who consider themselves bound to not object to the current rate structure by virtue of being signatories to the Docket No. R2001-1 settlement. The Commission has no response to this, other than to note the clear evidence that the Complainants have read, and apparently agreed, with the Commission’s statement, in PRC Op. C99-4 at 13, that the rate at issue in a section 3662 complaint need not be per se “unlawful” before changes may be recommended. *See, for example*, Complaint at 2.

They have provided a statement of the specific relief or redress requested, in compliance with Rule 83(d). *Id.* at 1 and 21. No copies of the type of correspondence referred to in Rule 83(e) have been provided. The Commission assumes this is because none exists. If this is not the case, Complainants should supplement their filing in this respect.

Given the foregoing assessment, the Commission concludes that the Service's assertion that technical deficiencies foreclose Complainants from having set out colorable claims is unfounded.

Effect of practical obstacles on holding a hearing. The Service notes that there are several practical considerations the Commission should consider. These include the inability to recommend rates if it proceeds with this Complaint; the possibility of redundant discussions on some issues, as the Service and mailers may continue independent talks; ongoing pallet experiments; strong objections from small mailers; and the ability to address issues the Complaint raises in the next omnibus rate case.

The Commission finds that these considerations are not persuasive reasons to refrain from holding hearings. The inability to recommend rates in a classification case initiated by the Commission is a statutory reality. *Dow Jones v. United States Postal Service*, 656 F.2d 786, 790 (D.C. Cir. 1981). This was a contributing factor in a recent Commission decision to forego initiating a proceeding on non-postal services, see Order No. 1388 (January 16, 2004), but the totality of the circumstances indicate a different result is appropriate here. This is a complaint that raises basic issues about the efficacy and legality of a current rate structure applicable to an entire class of mail. The Commission will consider these issues, ask for and review data as appropriate to inform our deliberations, and if necessary recommend changes to that structure.

Nonetheless, practical considerations lead the Commission to conclude that this inquiry should not result in the recommendation of specific rates. Foremost among these considerations is the importance of avoiding unnecessary disruption to the businesses of both Periodicals mailers and the Postal Service. Before the type of

sweeping changes suggested by Complainants are implemented, substantial time must be allowed for mailer education on the new design, as well as on use of new mailing statements that would have to be designed and distributed. Postal facilities would have to prepare for an altered mailstream. Publishers and printers must have adequate opportunity to alter their mailing practices in recognition of any new rate structure prior to its implementation.

Given the industry's concerns about any rate increases in the current economic climate, Commission consideration of potential changes in specific rates in the context of this complaint would be likely to obscure the careful review of more important structural concepts. Proceeding to review the effects of the current and proposed rate structures on economic efficiency and the various public policies of the Act as a first step, before attempting to design actual rates, is most likely to allow for efficient evaluation of relevant and material issues. If a new structure is found appropriate, the period for education and preparation can begin while specific rates are being developed.

There is widespread recognition that the Postal Service is planning on submitting an omnibus rate request shortly. In the interim, it may be possible to develop and analyze additional cost and volume data that may be identified as necessary for use in that case. Further, issues resolved in this case can perhaps be implemented in that case. Regardless of the timing of additional dockets the importance of avoiding potential widespread confusion attendant to implementing a new rate design without allowing substantial time for mailer education and preparation, convince the Commission that it is best to forego any specific rate recommendations in response to this Complaint. If this Complaint is found to be justified, the most proper course of action for the Commission will be to recommend to the Governors classification changes that describe and define a rate structure more consistent with the policies of the Act. This will allow the Postal Service to develop in the first instance rates designed to fairly implement the new rate structure.

The fact that discussions may occur in other forums while a Commission proceeding is underway may dilute attention in some respects, but may energize the

inquiry in other ways. In addition, Commission proceedings offer significantly more potential for open and public discussion than might be the case with some industry/Postal Service talks. Data from ongoing pallet experiments could presumably be introduced into the hearing record as it becomes available, so no party would appear to be disadvantaged by a parallel complaint hearing on pallet-related issues.

Two other factors cited as obstacles — the likelihood of strong objections from some mailers and the ability to consider issues raised here in a future rate case — actually present no greater hurdles than they would in any circumstance. In fact, the Commission's assigned statutory role is to serve as a forum for matters that are often inherently contentious, and it is no stranger to opposition from mailers who oppose various proposals and initiatives, be they in the category of large or small. Past experience indicates that the Commission allows all parties' concerns to be aired, and this proceeding will be no different. Finally, not postponing consideration of the potential need for significantly revised rate structure to the next omnibus case avoids at least two difficulties. One is that interested mailers and the Commission are not likely to be as preoccupied by myriad other, complex controversial issues such as are present in omnibus rate cases. Additionally, outside the context of the 10-month statutory time frame of a rate case, there is considerably more leeway in almost all aspects of scheduling. This should result in the most complete and balanced record possible for analyzing the issues raised by Complainants.

IV. PRELIMINARY PROCEDURAL MATTERS

Hearings. The anticipated scope of this case encompasses matters raised in the Complaint, as well as other issues found to be germane. This proceeding will address concerns about the efficacy of the rates generated by the current structure in light of:

- the extremely low cost coverage the class has been assigned in recent rate decisions;
- persistent, disproportionate increases in Periodicals mail processing costs;

- recent trends in mail processing productivity; and
- the impact of the unzoned (or “flat”) editorial pound rate on the Commission’s ability to recommend rates that are consistent with the statutory ratemaking criteria.

Status of Time Warner Inc. et al.’s proffered testimony. Complainants are directed to file all testimony, including that already provided as attachments to its Complaint with the Commission no later than 30 days from the date of this Order.

Representation of the general public. In conformance with section 3624(a) of title 39, U.S. Code, the Commission designates Shelley S. Dreifuss, Director of the Commission’s Office of the Consumer Advocate (OCA), to represent the interests of the general public in this proceeding. Pursuant to this designation, Ms. Dreifuss will direct the activities of Commission personnel assigned to assist her and, upon request, will supply their names for the record. Neither Ms. Dreifuss nor any of the assigned personnel will participate in or provide advice on any Commission decision in this proceeding.

Request related to Complaint format and Rule 84 obligations. The Commission has considered the Service’s request that, at a minimum, Complainants be required to recast their filing in a manner that facilitates an admission or denial pursuant to Rule 84. The motivation for this request appears to be a concern that the Complaint’s format may place the Service’s compliance with Rule 84 in jeopardy because its February 11, 2004 Answer does not admit or deny any factual allegations. It notes that Commission rules indicated that the absence of an explicit response in its Answer may be deemed to be an admission of some fact. Answer at 13-14, fn. 8.

Rule 84 serves at least two main purposes: it is a formal avenue for the Service to address matters raised in a complaint, and a vehicle for the Commission to make certain procedural and substantive determinations. As a general observation, the Commission notes that the Answer the Service has provided conveys a clear grasp of the legal and technical issues involved in the Complaint, a full understanding of

attendant consequences, and the ability to identify alternative courses of action. To the extent the Service is concerned about admissions by default, the Commission states that, given the circumstances presented by the format of the filing in this case, it is waiving the applicability of that portion of Rule 84. Accordingly, the Service's objection on this ground is moot.

The Complainants will not be directed to recast their pleading. To the extent the Service's request that this be done derives from the fact that two proffered pieces of testimony were attached to the Complaint, it is moot. The Service is not expected to address those evidentiary proffers at this time. To the extent the request grows out of the claim that specific policies of the Act have not been identified, the Commission finds this contention plainly erroneous. The body of the Complaint identifies and quotes numerous policies; moreover, the discussion includes explanations of which policies are implicated and why this is so. Complaint at 19-20. Finally, the fact that discrete paragraphs are not numbered, as they have been in some complaint filings, does not appear to significantly impede a response.

Request for opportunity for comments from others. The Service suggests that the Commission provide an opportunity for others to comment prior to instituting proceedings on the Complaint. The Commission believes that sufficient facts and information have been placed before it via the Complainants' pleading and the Service's February 11, 2004 Answer. Interested parties will have an opportunity to address issues of concern to them throughout the hearing process.

Intervention; hearing. Those wishing to be heard in this matter are directed to submit a notice of intervention, on or before May 21, 2004, via the Commission's Filing Online system, which can be accessed electronically at <http://www.prc.gov>. Persons needing assistance with Filing Online may contact the Commission's Docket Section at 202-789-6846. Notices shall indicate whether participation will be on a full or limited basis. See 39 CFR §§ 3001.20 and 3001.20a. The Commission anticipates holding a hearing in this case. To assist the Commission in making decisions relative to this determination, participants are directed to indicate, in their notices of intervention,

whether they intend to participate in the hearing and the nature of that participation. Pursuant to rules 26-28, participants may initiate discovery following the submission of Complainants' testimony.

Public notice. The Commission directs the Secretary to arrange for publication of this Order in the *Federal Register*.

V. ORDERING PARAGRAPHS

It is ordered:

1. The Commission establishes Docket No. C2004-1, Periodicals Rate Design, to consider matters raised in the Complaint of Time Warner Inc. et al. and other germane issues.
2. The Commission will sit en banc in this proceeding.
3. The deadline for filing notices of intervention is May 21, 2004.
4. Notices of intervention shall indicate whether the intervening party intends to participate in the hearing, and the nature of that participation.
5. The deadline for filing direct testimony is 30 days from the date of this order.
6. Shelley S. Dreifuss, Director of the Commission's Office of the Consumer Advocate, is designated to represent the interests of the general public.
7. The Secretary shall arrange for publication of this document in the *Federal Register*.

By the Commission.

(S E A L)

Steven W. Williams
Secretary