

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

COMPLAINT OF TIME WARNER INC. ET AL.
CONCERNING PERIODICALS RATES

Docket No. C2004-1

COMPLAINANTS' MEMORANDUM
OF LAW AND POLICY RELATING TO
THE EDITORIAL POUND CHARGE FOR PERIODICALS

SUBMITTED IN BEHALF 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.

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A NOTE ON LIBRARY REFERENCE
TW ET AL. LR-12

Library reference TW et al. LR-12, which is being filed simultaneously with this memorandum, and copies of which are being provided to counsel for American Business Media (ABM), the McGraw-Hill Companies, Inc. (McGraw-Hill), the National Newspaper Association (NNA), and the United States Postal Service (USPS), contains the following materials, which are discussed or referenced in this memorandum.

Heiss, Charles A.

"Report on Second-Class Mail to the Postmaster General" (May 21, 1946), rpt. GPO, 1946.

[Hughes Commission]

"Message of the President Transmitting the Annual Report of the Postmaster General for the Fiscal Year Ended June 30, 1911 and The Report of the Commission on Second-Class Mail Matter Appointed Pursuant to a Joint Resolution of Congress Approved March 4, 1911," (February 22, 1912), rpt. GPO 1912.

Kennedy, Jane.

"United States Postal Rates, 1845-1951," Ph.D. dissertation (Political Science), Columbia Univ., 1955 (selection, pp. 34-67; the complete document is available in the USPS library).

Kielbowicz, Richard B.

"Postal Subsidies for the Press and the Business of Mass Culture, 1880-1920," *Business History Review* 64 [Autumn 1990].

Lears, T.J. Jackson.

"From Salvation to Self-Realization: Advertising and the Therapeutic Roots of the Consumer Culture, 1880-1930," in *The Culture of Consumption: Critical Essays in American History, 1880-1980*, ed. Richard Wightman Fox and T.J. Jackson Lears (New York, 1983), 1-38.

McReynolds, Ross Allan.

"History of the United States Post Office," Ph.D. dissertation (Economics), Univ. of Chicago, 1935 (selection, pp. 338-52).

Moroney, Rita L.

"A Study of the Intent of Legislation on Second-Class Mail," U.S. Postal Service, 1977.

A NOTE ON LIBRARY REFERENCE
TW ET AL. LR-12
(continued)

Ohmann, Richard.

"Where Did Mass Culture Come From? The Case of Magazines,"
Berkshire Review 16 (1981): 85-101.

U.S. Post Office Department.

"Postage Rates 1789-1930: Abstract of Laws Passed between 1789
and 1930 Fixing Rates of Postage and According Free Mail Privileges,"
GPO 1946.

"Report of the Advisory Panel on Postal Rates," House Committee on
Post Office and Civil Service, 89th Cong., 1st sess. (Committee Print
1965).

Wilson, Christopher P.

"The Rhetoric of Consumption: Mass-Market Magazines and the
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Consumption: Critical Essays in American History, 1880-1980*, ed.
Richard Wightman Fox and T.J. Jackson Lears (New York, 1983), 39-
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Pursuant to section 30(e)(1) of the rules of practice, 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. (hereafter "complainants" or "Time Warner Inc. et al."), respectfully submit this memorandum of law and policy relating to the editorial pound charge (EPC)¹ for Periodicals class (formerly second-class) mail.

I PURPOSE OF THIS MEMORANDUM

In our Complaint in this docket, filed January 12, 2004, Time Warner et al. alleged that current Periodicals Outside County rates could be brought into closer conformity with the requirements of the Postal Reorganization Act, 39 U.S.C. § 101 et seq. ("the Act") in two respects. First, we proposed to show that the price signals

¹ In *Mail Order Ass'n. of America v. United States Postal Service*, 2 F.3d 408, 434-37 (D.C. Cir. 1993) (MOAA), the Court used for convenience the term "editorial pound charge" or "EPC" to denote the pound rate applicable to non-advertising matter in Periodicals Class Outside County mail. Complainants follow the same practice in this memorandum. All references to MOAA herein are intended to refer only to the section of the Court's opinion addressing the Commission's retention of the unzonned EPC.

sent to mailers in current Periodicals rates "are substantially inconsistent with cost incurrence as now understood" and that the rates are consequently "significantly inefficient" and fail adequately "to recognize the mail's preparation, neither of which results is contemplated by the Act." Complaint at 6. We offered 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." That presentation has been carried forward in the testimony of witnesses Mitchell (TW et al.-T-1), Stralberg (TW et al.-T-2 and RT-2), Schick (TW et al.-T-4), and O'Brien (TW et al.-RT-1) and will be further developed on brief.

Second, we observed that the unzoned EPC "is 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."

We stated:

The Commission too has recognized that the unzoned editorial rate imposes costs in the form of lost efficiencies but has nonetheless declined to approve proposals for change, citing its understanding of the purposes underlying the original creation of the unzoned editorial rate, its interpretation of sections 101(a) and 3622(b)(8) of the Act as favoring "the widespread dissemination of information" as a means of "bind[ing] the Nation," and its concerns for the welfare of small, high-editorial publications.

Complaint at 9.

We pointed out that this issue was "last extensively addressed by the Commission in Docket No. R90-1" and expressed the opinion that, as of that time, "the evidentiary record on the contribution of the unzoned rate to binding the nation was not well developed." *Id.* We proposed to build a "more comprehensive record, including expert testimony by John Steele Gordon [TW et al.-T-3] regarding how a century of technological, economic, and social progress has transformed the conditions that were originally thought to justify an unzoned editorial rate" (*id.*)--that

is, to present new evidence concerning whether social and technological developments subsequent to 1917 have obviated the intended purpose of the unzoned EPC, a question which the Commission answered in the negative in its Docket No. R90-1 Opinion.²

In addition, we alleged that there have been "several changes in circumstances since Docket No. R90-1 [that] 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." Complaint at 9-10. We identified three such developments: (1) the realization of "widespread access" of periodicals mailers "to long-haul transportation of magazines (pool shipments by printers and consolidators) that is much cheaper than what the Postal Service is able to offer"; (2) the burgeoning in the past decade of the long-promised "information revolution," bringing "a proliferation of inexpensive means of communication and a previously unimaginable diversity of information sources that are entirely independent of geography"; and (3) the disposition of the first legal challenge to the unzoned EPC in *Mail Order Ass'n. of America v. United States Postal Service*, 2 F.3d 408 (D.C. Cir. 1993) (*MOAA*), an appeal of the Docket No. R90-1 rate case, in a decision that, we stated, "undercut the Commission's traditional rationale for the policy [and] indicated skepticism about the depth and cogency of the Commission's analysis and the congruence between its means and its ends." Complaint at 10-11.

We expressed the view that a "reconsideration of these issues in light of current knowledge and circumstances" by the Commission would lead to the conclusion that "the policies of the Act are not currently well served by maintaining

² PRC Op. R90-1 (January 4, 1991), ¶¶ 5276, 5279 (V-119, 120-21).

the unzoned editorial rate." *Id.* at 13. More specifically, we proposed to present evidence and argument for the following propositions:

- (1) maintenance of an unzoned EPC for the purpose of fostering "widespread dissemination of information" is no longer an effective, or even explicable, way of recognizing or promoting the "educational, cultural, scientific, and informational value" of periodical publications;
- (2) maintenance of an unzoned EPC 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 value of those publications under § 3622(b)(8) and of § 3621's, § 3622(b)(1)'s, and § 3623(c)(1)'s requirements that rates and classifications be fair and equitable;
- (3) maintenance of an unzoned EPC imposes substantial operational and pricing inefficiencies on the Postal Service and the Periodicals subclass as a whole; and
- (4) maintenance of an unzoned EPC creates substantial obstacles to a rational, comprehensible, economically coherent Periodicals rate design, in derogation of § 3622(b)(7).

Id.

Some of these items, such as number (3) above, present issues primarily of fact. Others, such as number (1), present issues primarily of law and policy, especially of statutory interpretation, that have a long and complex history in their own right, even apart from the attention they have received as subjects of litigation in Commission proceedings.

Such issues ordinarily recede somewhat into the background during the course of evidentiary hearings. And in the rush of meeting tight briefing schedules, they are not always adequately joined or aggressively pursued. Participants who must respond to extensive or complex legal analysis encountered for the first time in the initial brief of another party are especially at a disadvantage. Complainants have therefore determined that in this docket, where the legal and policy issues are

a central part of the case the Commission must resolve, the goal of a full and fair opportunity for argument is best served by submitting our legal and policy arguments prior to the briefing stage. We wish to emphasize that this memorandum is not intended as an addition to but rather in place of what would otherwise have been our treatment of these issues on brief. Unless new matters or additional arguments come to light in the interim, we do not anticipate revisiting these issues in our initial brief.

II. CHANGING FORMS AND OBJECTIVES OF THE PREFERENCE FOR NEWSPAPERS AND MAGAZINES

1 Litigation at the Commission regarding the unzoned editorial pound charge

The Commission has repeatedly recognized that the preference for newspapers and magazines is rooted in historical conditions. See, e.g., PRC Op. R90-1 at V-120-21. But we do not believe it has recognized as fully the degree to which the *form* of the preference has varied as those conditions have changed. There are understandable reasons why it has not done so. Most obviously, the basic zoned/unzoned structure of the second-class rate was not revisited by Congress after 1917, so that by the time the Commission confronted a proposal to zone editorial rates in the early 1970s, that structure was invested with an air of almost venerable antiquity, which its supporters did not hesitate to inflate at every opportunity.³

³ See, e.g., PRC Op. R77-1 (May 12, 1978) at 345: "The proposal to zone editorial matter should be rejected on policy grounds, ABP contends, because it 'flies in the face . . . of nearly 100 years of Congressional, legal and administrative opinion.'" It is difficult to imagine what "legal" opinion was being referred to, since the issue is a matter of policy rather than law, or what "administrative" opinion, since the Post Office Department (POD) disliked and labored to subvert the unzoned second-class rate almost from the moment it was first adopted in 1874 (see Jane Kennedy, "United States Postal Rates, 1845-1951," Ph.D. dissertation [Political Science], Columbia Univ., 1955, at 51-56 [hereafter "Kennedy"]) [included in library reference TW et al. LR-12]) and since, in the decades leading up to the passage of the 1917 Act, successive postmasters general petitioned Congress to zone the full weight of second-class periodicals (see Heiss, "Report on Second-Class Mail to the Postmaster General" [footnote continues on next page])

Another reason for the Commission's adherence to the form of preference adopted in the 1917 Act has been its reliance on the work of Prof. Richard Kielbowicz, a professional academic historian of postal rates and classifications and a widely informed, meticulous, and scrupulously fair scholar, who happens also to be a great admirer of the second-class rate structure that emerged in the 1917 Act.⁴ No alternative perspective on this history has ever been presented effectively to the Commission, although such alternative perspectives, on the part of legislators and policymakers, postal historians, policy analysts, and postal administrators, do exist and have long existed. Instead, arguments favoring the elimination of the unzoned EPC have been framed primarily in terms of economic and regulatory theory.⁵ It is

[May 21, 1946], rpt. GPO, 1946, at 55-64 [included in library reference TW et al. LR-12]). Because the rate for newspapers and magazines was extraordinarily attractive--2 cents per pound in 1879 (the next lowest rate for printed matter was 700 percent higher [Kennedy at 84]), lowered to 1 cent per pound in 1885, where it remained when the Act of 1917 was under consideration (Kielbowicz MC95-1 testimony at 54)--there was an enormous temptation for non-qualifying mailers to evade the second-class eligibility restrictions. The broadness and ambiguity of the eligibility restrictions (e.g., "published regularly at stated intervals," "having a legitimate list of subscribers," "published for the dissemination of information of a public character" [see Kennedy at 53]), exacerbated the problem and made the 1879 Act a nightmare for postal administrators. See also Docket No. R90-1, Rebuttal Testimony of Richard B. Kielbowicz on Behalf of American Business Press (ABP-RT-3) (hereafter "R90-1 Kielbowicz testimony"), at 5 ff.; Docket No. MC95-1, Testimony of Presiding Officer Witness Richard B. Kielbowicz (hereafter "MC95-1 Kielbowicz testimony"), at 47-52. As for flying in the face of "Congressional . . . opinion," it should suffice to point out: (1) that the 1917 Act represented a compromise reached in the Conference Committee when the Senate refused to accept the House bill applying zoned rates to the entire weight of the publication, which had passed the House after unanimous approval by the Ways and Means Committee (Kielbowicz, "Postal Subsidies for the Press and the Business of Mass Culture, 1880-1920," *Business History Review* 64 [Autumn 1990]: 451-88 [hereafter "Mass Culture"], at 473 ; R90-1 Kielbowicz testimony at 9); and (2) that Senator Gerry, a leading *opponent* of the proposed zoned rate, nevertheless stated that the existing flat rate was not "equitable" and that the rates "should never have been placed on the basis that they now are" (65 Cong. Rec. 6050, 6049 [1917]). The issue is discussed in greater detail later in this memorandum.

⁴ See Docket No. MC95-1 Kielbowicz testimony, at 54; "Mass Culture" at 487-88; and Docket No. R90-1 Kielbowicz testimony, *passim*.

⁵ For example, in Docket No. R90-1, USPS witness Mitchell made the following arguments:

- that measuring "implied cost coverage" on advertising and editorial matter in second class provides a reliable method for gauging editorial benefit and virtually guarantees that "there is no danger of the editorial benefit being removed" (USPS-T-20 at 26-28).
 - that there were a number of differences between the situations in 1917 and the present: much steeper zoning of the advertising rates than today; the absence of the piece rate, the editorial piece discount, and the SCF discount in 1917--all of which
- [footnote continues on next page]

therefore understandable that the Commission has "framed the question as a choice between what it viewed as 'economic' considerations on the one hand and 'public policy' considerations on the other."⁶

The current *form* of the preference has sometimes been treated by its advocates in Commission proceedings with a reverence more appropriate to an inheritance from the founding generation. They have peremptorily conflated the unzoned EPC with the preference itself and misconstrued the *public policy* arguments for eliminating the unzoned EPC as arguments against the preference for periodical publications and the goals that preference has traditionally served.⁷

have altered the form of the editorial benefit in a way that recognizes cost relationships; the fact that the editorial benefit was financed in 1917 by general revenues but is now financed by advertising rates. 29-34.

- that high-editorial publications, which the Commission views as beneficiaries of the unzoned pound rate, tend to be light in weight and therefore much more affected by the piece rate than the pound rate.
- that the unzoned rate is inconsistent with the goal of "lowest combined costs" and is therefore contrary to the national economic interest. 40.
- that the Postal Service's early role of linking different regions of a young country is today served by many other means and that economically rational, cost-based postal rates would not deprive any part of the country of access to information, including that in magazines. 41.
- Dow Jones witness King expressed his inability to understand how the zoned rate proposals threaten the editorial benefit or the existence of second class, in light of the fact that none of the proposals would lower the overall editorial benefit for the class. He provided a chart showing that the flat rate produces wide disparities in the editorial benefit received by different publications and another chart showing that the beneficiaries of the flat rate are not the lightweight, high-editorial magazines for which the Commission has expressed special concern, but rather are heavier than the average and have lower than average editorial content.
- King also testified that the flat editorial rate sends distorted drop ship signals, resulting in a squandering of postal resources, unfairly shifts costs between second-class mailers, distorts a number of existing worksharing incentives and impedes the implementation of others, causing the SCF discount to be in the piece charge rather than the pound charge where it logically belongs, and impeding the proper incorporation of destination entry discounts and containerization discounts into the rate structure.

⁶ MOAA at 435 (citing PRC Op. R90-1 at V-119).

⁷ For a typical example of these traits, see witness Schaefer's statement that:
[footnote continues on next page]

This memorandum is intended in part to draw the Commission's attention to other materials bearing upon the argument over unzoned editorial rates, materials that have been available for consideration in previous dockets but that have not attracted attention.

2. The history of rate preferences for newspapers and magazines

a. Legislation prior to 1917

Generally, before 1852, different rate schedules applied to newspapers and magazines, and rates for both varied by zone. But the rates did not differentiate between advertising and editorial, which continued to be the case until the Act of 1917. The Act of 1852 eliminated both zoning and the distinction between newspapers and magazines, charging all periodicals 1 cent for the first three ounces

McGraw-Hill . . . sees no reason for the Commission to abandon its venerable policy of promoting widespread dissemination of diverse editorial content through a low unzoned pound charge for editorial content. In our view, the vital role of hard-copy Periodicals in binding the nation together is undiminished by the Internet.

MH-T-1 at 3.

This statement can serve to represent innumerable similarly vacuous and formulaic repetitions of the Commission's opinions in favor of an unzoned EPC. Several of the endlessly repeated formulae are present: "venerable policy"; "widespread dissemination"; "diverse editorial content"; "vital role"; "binding the nation." Those that are absent are present elsewhere in Schaefer's testimony: "maintenance of a broad, vibrant and diverse Periodicals class as a whole" (id. at 2); "maintenance of a broad, vibrant and diverse Periodicals class" (presumably as a whole) (id. at 6-7); "the fundamental purpose of the Periodicals class – to promote the widespread dissemination of diverse editorial content through preferential postal rates in view of its 'educational, cultural, scientific and informational' ('ECSI') value and its role in binding the nation together" (id. at 3); same (id. at 27).

The impression of mechanical repetition conveyed by the quoted statement is confirmed by an examination of its substance. Referring to the *Commission's* policy as "venerable" is inadvertently comic (if it is not something worse); normally, such language would be reserved for the policy of successive Congresses dating back to the administration of Washington, or at least to 1917, that is described as "venerable." The identification of "a low unzoned pound charge" with "widespread dissemination" is not logical but rote, as is confirmed by the fact that the statement makes equally good sense if the word "unzoned" is simply omitted. And to say that the "vital role" of Periodicals in binding the nation is "*undiminished*" by the Internet is simply thoughtless, as it would be to say that the "vital role" of the automobile in transporting people is "undiminished" by the airplane; when an alternative technology takes over some part of the functions previously performed by periodicals, or the automobile, their role may remain no less vital, but it is certainly *diminished*.

and 1 cent for each additional ounce, no matter how far they were transported.⁸ Later acts, however, restored the distinction between newspapers and magazines in the form of lower rates for weeklies and dailies (mostly newspapers) than for less frequently published periodicals (mostly magazines). Under the Act of 1863, for example, weekly publications paid five cents per quarter (approximately 0.38 cents per copy) for each four ounces of weight or fraction thereof. Those published more frequently than weekly paid an additional five cents per quarter per four ounces for each additional issue (e.g., a daily publication paid 35 cents per quarter per four ounces, which amounted to approximately the same per-copy rate as for weeklies). However, periodicals published less frequently than weekly paid one cent per *copy* for each four ounces of weight or fraction thereof, approximately 2.63 times as much.⁹ The magazine rates prior to 1852 therefore resembled the fully zoned rates proposed in this docket, whereas the 1863 rates subsidized long-distance (i.e., chiefly national) publications, by charging the same low rate irrespective of distance, and also contained a substantial preference for publications issued weekly or more frequently, i.e., for daily and weekly newspapers as opposed to monthly magazines.

In 1874, the rate was reduced to two cents per pound on the bulk weight of publications issued weekly or more frequently, without regard to distance travelled or the number of copies. Publications issued less frequently than once a week were charged three cents per pound. Thus the rate preference for weeklies over monthlies was substantially reduced. By assessing postage on the basis of bulk weight at the office of mailing, the Act of 1874 effectively eliminated the minimum-

⁸ Act of August 30, 1852 (10 Stat. 38-39).

⁹ Act of March 3, 1863 (12 Stat. 704-707) (Thirty-Seventh Cong., Sess. 3, Ch. 71, Sec. 35-36).

per-copy feature of the earlier system, so that the actual reduction in rates was more dramatic than is apparent from the reduction of the nominal per-pound rate.¹⁰

The 1879 Act, which created the four still-existing classes of mail, lowered postage on magazines still further, by applying the two cents per pound rate to virtually all second-class matter and extending the free-in-county rate (formerly restricted to weekly newspapers) to all of second class.¹¹ In the debates on the legislation, second-class rates were described as being intended for "legitimate" periodicals that contribute to "the dissemination of useful knowledge." 1879 Cong. Rec. 2134 (April 28). The higher rate for periodicals published less often than once a week enacted in 1874 was decried by Congressman Money as discrimination against the "very best class of periodical literature" in favor of "the daily newspapers with their load of gossip and scandal and everyday topics." *Id.* In response, Congressman (later Speaker) Cannon made two arguments for retaining a higher rate for less-frequently issued periodicals: 1) "that class of publications go to comparatively few people, not to the many," and 2) "there is no reason because one rate is too low that the other should be brought down to it." *Id.* at 2136.

Cannon's statements that the subsidy would remain excessive even after the proposed classification reforms indicate that serious doubt existed as early as 1879 about whether the benefits of the extremely low, unzoned rates for periodicals were worth their enormous cost to the treasury. They also exemplify fundamental, continuing disagreement about whether one kind of periodical merited a greater subsidy than another. Congressman Money argued that smaller-circulation, high-brow publications were most deserving of subsidy because of their moral and

¹⁰ Act of June 23, 1874 (18 Stat. 232, 233, 237) (Forty-Third Cong., Sess. 1, Ch. 456, Sec. 5); see also Kennedy, at 46.

¹¹ Act of March 3, 1879 (20 Stat. 358-361) (Forty-Fifth Cong., Sess. 3). See also Kennedy at 48.

literary superiority. Cannon argued that publications which spread information most widely by having the largest circulations and greatest frequency were the most worthy of public subsidy. The legislation that was enacted treated both types of publications roughly equally, by applying the unzoned two-cent pound rate to virtually all second-class matter.

The problems both of the revenue drain and of unqualified matter infiltrating second class worsened subsequent to passage of the unzoned 2-cents per pound rate. Although the 1879 Act had included books in *third* class, paperbound books in the guise of periodicals continued to be sent in prodigious quantities at second-class rates in order to evade the dramatically higher third-class rates. In 1894, Congress considered an amendment to the postal classification laws to expressly deny second-class rates to books that were issued in the guise of periodicals. Some now-familiar arguments were raised in debates on that bill. A “vast industry” had “grown up” under the loophole in second-class eligibility requirements that let in books masquerading as periodicals. The rate had encouraged “extraordinary advances” in technology, resulting in much cheaper paper and typesetting, and the resulting availability of cheap books had created a “very large demand” for them. If passed, therefore, the amendment would “kill[] the business without doubt, and . . . take[] away from the people their sole opportunity to get cheap books in this form.” 1894 Cong. Rec. 4050-51. Some argued that the books thus distributed were mostly trash, others that they were mostly the “best literature.” One suggested that the true parties behind the legislation were “the bookbinders, the men who want to sell bound books” against the interests of “the people,” who “know that it pays better to buy literature, and not binding.” *Id.* at 4052.

b. The War Revenue Act of 1917

According to Prof. Kielbowicz, whose view of the matter has been accepted by the Commission, Congress declined to zone the second-class editorial rate in the War Revenue Act of 1917 because it desired to promote the widespread dissemination of information. A careful review of the legislative history of the Act suggests that this view requires substantial qualification.

In 1885, the rate for second class had been lowered from 2 cents per pound to 1 cent per pound, still unzoned.¹² According to Charles Heiss (at 69-70):

This action appears to have been taken with the minimum of consideration. . . . [The Post Office Department] did not foresee the material increase in postal expenditures for that class of mail . . . nor that this 1 cent rate having been established, would be continued in effect for a third of a century and open the door to thousands of publications which, with but little regard to their contribution to the public good, would seek second-class permits largely because of the liberal governmental subsidy, but would later oppose an increase in rates because of adverse financial reactions.

The impetus for the Act of 1917 was the fact that the government was believed to be subsidizing periodicals in second class to the tune of \$87 million per year (at a time when the entire federal budget was just over \$500 million per year).¹³ The *Saturday Evening Post* alone, it was believed, paid \$3 million less in postage than it cost the Post Office to transport it.¹⁴ As Kielbowicz writes:

Postmaster General . . . Burleson recommended that the House Ways and Means Committee add to the Omnibus War Revenue Bill a provision that would calibrate second-class rates to distance. This proposal would have zoned the entire contents of publications. The

¹² Act of March 3, 1885 (23 Stat. 387); see also MC95-1 Kielbowicz testimony, at 47; and Heiss, at 50.

¹³ See TW et al.-T-1 (Mitchell), at 18, n. 9: Tr. 3/815.

¹⁴ "Mass Culture," at 475; see also 473-74.

committee unanimously adopted Burleson's recommendation, according to Chairman Claud Kitchin.

R90-1 Kielbowicz testimony at 9.

The argument that won the day for the continuance of a low, flat rate for editorial matter was that a sudden change in a rate structure that had been so long in existence would create rate shock, even driving some publications out of business. Publishers had used this argument successfully on other occasions, in spite of decades of complaints from postmasters general and presidents, and in spite of general recognition in Congress that the subsidy was enormously expensive. Whenever increases were proposed, publishers would demand hearings and send teams of witnesses to Washington to swear that their businesses would be ruined and the nation would sink into parochialism. Simultaneously, they conducted letter-writing campaigns and maintained a steady editorial barrage against the proposals.¹⁵

Prominent opponents of zoning like Senators Gerry and Smoot cited these predictions of rate shock during the debate on the 1917 Act--although both of them believed that the existing rate structure was inequitable and that periodicals should be required to bear the costs of transporting and handling them. Smoot argued that Congress should notify publishers that the rates would be zoned at some stated time in the future. Senator Pomerene responded that publishers had already gotten fair warning and protested that "[t]here has hardly been a year when this matter has not been fully debated, and each year these pensioners on the government's bounty have insisted that there should be another hearing." The effectiveness of the

¹⁵ Kielbowicz provides a thorough account of this lobbying campaign. R90-1 Kielbowicz testimony, at 8-15; see also "Mass Culture," at 471-87. However, in concluding that the 1917 Act represented a Congressional commitment to "widespread dissemination," he gives too much credence to the dire predictions voiced by publishers in editorials and Congressional hearings. See, e.g., R90-1 Kielbowicz testimony, at 21.

publishing industry's lobbying in thwarting Congressional action is suggested by the following facetious exchange on the floor of the Senate:

Mr. Smoot: The publishers so far have been successful in defeating an increase in rates on second-class mail matter. They have asked for hearings and they have been granted time and time again. . . . [T]he reports have been made, and I doubt very much whether they have ever been read by one-tenth of the Senators, and I doubt very much whether the country knows what they contain.

Mr. Pomerene: . . . my belief is that if there is any one subject connected with taxation in this country with which the Senate generally is familiar it is this one very question of postal rates.

Mr. Smoot: And yet the Senator must admit that we have not acted.

Mr. Pomerene: Oh, I realize that; and I think we all know why.

Mr. Smoot: I could guess, I think.

Mr. Pomerene: Yes; and I think the Senator and I would agree.

65 Cong. Rec. at 6020 (1917).

It is therefore possible to regard the bifurcated rate adopted in 1917 not as an imperishable solution to a perennial question about how to conform rate design to settled policy but as a first step toward the goal of fully compensatory (i.e., "cost based") periodicals rates. That was, after all, the goal that had been endorsed in the decades leading up to the Act by successive postmasters general and two prominent commissions appointed to study the subject of second-class mail.¹⁶ If

¹⁶ In his annual report for fiscal year 1890, Postmaster General Wanamaker stated: "The Post-Office Department would be self-sustaining if it had credit for the work it does for nothing, and practically nothing, and if these different classes of mail matter were all put on a self-sustaining basis." In the report for fiscal year 1897, Postmaster General Gary stated: "It is impossible to continue the present system of second-class mail transportation without swamping the revenues of the postal service." In the report for 1901, Postmaster General Smith stated that rectifying the problem of the second-class deficit "would revive the Department from the one oppressive burden which cripples and weighs it down, and which stands as a constant and formidable barrier against improvement and progress for the benefit of all the people in many directions." According to Heiss, the annual reports of Postmaster General Burleson for the years 1913 to 1916 "each make reference to the necessity of taking at least
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one considers the legislative history of the Act primarily in terms of the actions taken by, and statements made in, the two houses, rather than in terms of the arguments of the interest groups that lobbied against zoning, it is fully consistent with the view that the rationale and primary objective of Congressional action was to bring periodicals revenues more closely into line with periodicals costs. Moreover, the 1917 Act, once it had been passed, was not regarded as having settled the matter or solved the problem of second-class deficits. Postmaster General Burleson commented as follows on the Act's passage in his annual report for 1917:

The Department does not favor the use of the postal system as a means of raising revenues except to meet the cost of the service and so informed the Committees of Congress. . . . The difference between the revenue from this class of mail and the admitted cost of its transportation and handling is so great and the proof so conclusive that the publishers could no longer hope to defer some just and remedial legislation by Congress.

Quoted in Heiss, at 61.

In 1933, in a response to a request for its current views on the question of second-class rates from the Bureau of the Budget, the Post Office Department stated:

It has been pointed out that the principal part of the deficiency of the revenues is traceable to the loss in handling second-class matter, and the amount of the loss has been characterized in some quarters as a "subsidy" to the publishers of newspapers and magazines. The proposal to raise the rates of postage on publishers' second-class matter is calculated to eliminate this so-called subsidy--to secure additional revenues from second-class mail sufficient to meet the expenditures which are apportioned to that class of mail matter by the cost ascertainment.

Quoted in *id.*, at 62.

In 1946, in his "Report on Second-Class Mail to the Postmaster General," Heiss stated:

moderate steps to require those using the second-class privilege to pay a fair part of the cost of that service." Heiss, at 61. The postmasters general's statements are quoted in Heiss, at 55-56.

The Congress . . . while providing low second-class rates . . . has at no time established *formally* a policy that publications of the second class should be carried in the mails without regard to the cost of handling in recognition to the contribution which publications might make to public education and welfare, national development or any other contribution to the public good. . . .

[I]t would appear reasonable to assume that when Congress in 1879 defined second-class matter and continued the preferential rates thereon it did so from the viewpoint of conditions then confronting it, and the character of the publications issued at that time. The Congress obviously could not have intended to foreclose later changes in rates of postage which might be found desirable under substantially changed economic and social conditions. . . . Most certainly the picture presented to the Congress of 1879--67 years ago, was a very different one from that now presented. It was a situation which then doubtless justified some measure of governmental aid to newspapers and the better type of periodical to stimulate greater development and distribution. Such aid, however, has no longer the same justification.

The publishing industry can for the most part ultimately adjust itself to paying substantially the cost of postal service performed for it. . . .

The Department . . . may at least expect that where it performs services in a competitive field, as it does in the case of second-class mail, that it should, as soon as the publishing industry can adjust itself to that basis, be reimbursed for expenditures which it incurs. . . . Publications, other than the type specifically granted a concession, which can not in the long run meet costs of production and distribution through the sale of their product present the question as to whether their existence is either economically or socially justified.

Id. at 72, 75, 77.

The zoning provision adopted in 1917 moved second-class rates toward a compensatory level in two ways: by charging copies of periodicals that were entered into the mail a rate nearer to what it cost the Post Office to transport and deliver them, and by discouraging copies of periodicals that were being produced and mailed solely on account of the excessively low rates from continuing to enter the mailstream. Significantly, at the same time that it continued to press for more compensatory second-class rates after passage of the 1917 Act, the Post Office

also pursued cost reductions through aggressive promotion of more efficient mailing practices:

Beginning around the First World War, the post office worked with larger mailers to achieve efficiencies that helped both. In creating bulk subclasses, for instance, Congress expected the senders to do more premailing preparation--facing, sorting, bundling and the like.

MC95-1 Kielbowicz testimony at 105-06.

Then as now, however, because the Post Office had no authority over rates and very little authority over classifications, it lacked the ability to promote more economical mailing practices by adjusting rates to reflect the costs that less efficient practices caused it to incur. Its only practical leverage was "discrimination in attention"--i.e., encouraging economical practices by providing inferior service to mailers who would not adopt them.¹⁷

¹⁷ Ross Allan McReynolds, "History of the United States Post Office," Ph.D. dissertation (Economics). Univ. of Chicago, 1935, at 346 (selection included in library reference TW et al. LR-12). McReynolds tells an interesting, and familiar, story under the heading "Economical handling methods encountered publisher opposition":

Increased weight of newspapers and magazines already had led the post office to seek means of reducing their postal costs. In 1896 it began systematically to have publishers separate mailing lists, packages, and sacks of periodicals by rural routes, towns, railway post office routes, and states in order to speed delivery and to reduce the cost of distributing them. In June, 1896, sixteen offices received 52.5 per cent of the publishers' sacks fully and 17.8 partly distributed; and in June, 1909, they received 74.8 per cent fully and 19.6 per cent partly distributed. In 1909, too, the copies of 8,384 publications received at 166 of the largest offices were 77.32 per cent fully and 15.97 per cent partly distributed. The post office lacks authority to require distribution of publications by senders except as different postage rates are due, but discrimination in attention can practically enforce it.

Freight periodical transportation brought further savings. In 1911 matter for which speed was considered unessential was moved from Buffalo and Pittsburgh to Chicago, St. Paul, Council Bluffs, Cincinnati, and St. Louis in fast freight trains. Matter was transferred to freights at intermediate points, where mail also was shifted to mail trains for delivery. The next year, mail freights were added between Washington and Atlanta, and also between Cincinnati, Chattanooga, and Atlanta. The financial savings from the freights were large, amounting to \$1,427,432, or 44.9 per cent of the regular mail train cost, in 1914; \$574,390, or 43.7 per cent, in 1918; and \$498,858, or 39.5 per cent, in 1919. Publishers complained of the freight transportation, however, and the appropriation bill for 1913 forbade its extension. Freights could travel as fast as local passenger trains, but the publishers and the

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This frustration was a recurring theme among postal administrators and experts who studied the existing classification framework in the years prior to postal reorganization. In 1965, for example, a seven-member advisory panel reported to Postmaster General Gronouski:

A key objective of reclassification should be the harnessing of business and institutional capacities, putting them to work to simplify postal operations and to improve postal productivity. Incentive rates and improved mail classification could serve as inducements for large mailers to extend their premailing preparation: sorting, bagging, palletizing, transporting, etc. The payoff is reduced operating costs and lower capital outlays for the postal service would make a significant contribution toward meeting the current revenue deficiency. Also incentive rates may enable volume mailers to cut their mail costs.¹⁸

The objective of the 1917 Act can therefore reasonably be characterized as taking a first step toward bringing second-class rates closer to a compensatory level. Its specific terms, i.e., the form of the second-class rate that emerged from the legislative process, can more reasonably be interpreted, in the view of the complainants, as a political compromise responsive to the pressures of interest groups and adventitious circumstances than as a carefully crafted solution to a longstanding policy dilemma (as Kielbowicz regards it¹⁹).

The richest source of evidence supporting this view of events is found in the work of Prof. Kielbowicz himself, in facts that he fully and fairly relates (although he does not in testimony draw the same inferences from them that we do) and in facts

public wanted limited and fast mail service if they could secure it at no higher postage charges.

Id. at 345-46 (the section of McReynolds dealing with second-class rates is included in library reference TW et al. LR-12).

¹⁸ House Committee on Post Office and Civil Service, 89th Cong., 1st sess., "Report of the Advisory Panel on Postal Rates," at 8 (Committee Print 1965) (included in library reference TW et al. LR-12).

¹⁹ MC95-1 Kielbowicz testimony, at 54; R90-1 Kielbowicz testimony, at 2-3.

related in the wide-ranging source materials he cites. We will review some of those facts below. In arguing that they lead to inferences somewhat different from those he draws, we will also take note of the fact that his partiality for the rate structure adopted in 1917 is aligned with social and political attitudes that were widespread among American academic historians and political scientists in the 1970s and 1980s.

It is possible to conclude, solely on the basis of the evidence that Kielbowicz himself presents, that the 1917 Act was *chiefly* a product of contemporary pressures brought to bear by contending factions in the publishing industry (newspapers versus magazines; rural and small-town publishers and their advertisers versus those centered in the great cities) and by contending political factions (anti-progressive Republicans such as Taft, and Democrats such as Wilson, whose supporters were primarily Southern, small-town or rural, anti-immigrant, and opposed to American involvement in World War One, versus the more cosmopolitan, pro-war, pro-industry, pro-immigrant great cities and manufacturing centers of the northeast and midwest).

Among other admissions in Kielbowicz's MC95-1 testimony is that this policy objective, to the extent that it was genuine rather than merely rhetorical, was very much a consequence of the immediate circumstances at the time the legislation was under consideration: "World War I revived latent feelings of sectionalism, and some in the press and Congress argued that the unzoned editorial rate was particularly important in binding the nation together."

In his fullest and most scholarly treatment of the subject, "Postal Subsidies for the Press and the Business of Mass Culture, 1880-1920" ("Mass Culture"), Kielbowicz is entirely frank about the importance of various factions in influencing the legislation. That account needs to be consulted by anyone considering the question of whether the second-class rate structure created by the Act of 1917

represented primarily a commitment to "bind[ing] the Nation together through the . . . educational [and] literary . . . correspondence of the people" (39 U.S.C. § 101(a)).

In the opening paragraph of "Mass Culture" (at 451), Kielbowicz writes:

Recognizing communication's role as an agent of commerce and purveyor of culture, many supporters of the postal reform hoped that it would bolster the small-town press in the face of increasing competition from the national media, protect local retailers from large-scale merchandisers, and, ultimately, stave off the incursions of an aggrandizing national culture that they found unsettling.

He concludes that essay (at 488) with the following words:

For the small-town press, the [1917] law promised relief from head-to-head competition with regional and national publications. For politicians actuated by feelings of partisanship or vindictiveness, it meant a diminished subsidy for unfriendly magazines and metropolitan dailies. Zoned advertising postage ultimately capitalized on tensions between small and mass retailers, among regions, and between rural and urban culture--schisms that overlapped and reinforced one another.²⁰

As Kielbowicz also makes clear, this division of opinion and interests was also *political*--i.e., partisan--in nature:

²⁰ Other students of postal history whom Kielbowicz relies on also explain the 1917 Act primarily in terms of contemporaneous political and social circumstances that plainly no longer obtain. See, for example, Rita L. Moroney, "A Study of the Intent of Legislation on Second-Class Mail," U.S. Postal Service, 1977, at 41, 42 (included in library reference TW et al. LR-12):

Taft was the first President to make a direct assault on the nation's publishers, and some members of Congress and a preponderance of publishers believed this drive to increase postage was politically, not financially, motivated and that the President was attacking the periodicals because they had not supported his administration. . . .

It was during the debates on this bill [the 1917 Act] that members of Congress brought their fear of and resentment toward the Press into public focus.

See also Kennedy at 56-59a ("[A]s part of the War Revenue Act of October 3, 1917, and in an almost vengeful spirit, judging by the remarks of some legislators, Congress raised second-class postage," id. at 56).

Zoned advertising postage has a dual appeal for the Wilson coalition: it struck at large, eastern-based periodicals and at publications that seemed to favor American entry into the European war.

As the debate over zoned advertising postage evolved, the rural Democratic majority gradually recognized the long-term benefits of this policy solution. Postage would be raised mainly on national magazines and on a handful of the large urban papers issued from northeastern cities and a few industrial centers in the Great Lakes states. This spared their constituents, the rural and small-town press. Moreover, calibrating postage to advertising struck a blow, however slight, against the encroachments of national market institutions. Finally, rural Americans distrustful of the culture purveyed by national magazines embraced this measure as affording some protection.

"Mass Culture" at 478.

In his testimony to the Commission, Kielbowicz states that the 1917 Act represents a "creative solution" to the problem of "bring[ing] the second-class mail category, and its underlying policy, into line with publications' dual nature-- commercial products that conveyed public information and culture," a solution "that calibrated a public resource--cheap postage--to the public benefit it produced." MC95-1 testimony at 53-54. However, in his more detailed treatment of the subject in "Mass Culture," he makes clear that his approval of the 1917 Act also derives in considerable measure from his identification of the Act with the cause of agrarian values and antipathy to "mass culture," urbanization, the industrial revolution, the development of national markets and marketers such as Marshall Field, commercialization, consumerism, and the spread and inculcation of middle-class cultural, social and economic aspirations. In the introductory pages of that essay, Kielbowicz writes:

The mass circulation magazines and city newspapers that emerged in the 1880s and flourished thereafter were highly visible manifestations of modern industrial society. In their scale of operations, editorial content, and advertisements, these periodicals both embodied and projected modern mass culture. Unlike the small-town press, mass circulation publications endeavored to reach regional or national audiences. . . .

Advertising, more than any other feature of popular publications, served as a conduit of the industrial economy and its concomitant mass culture. Publishers increasingly conceived of their periodicals, especially magazines, as extensions of the nation's marketing system; delivering consumers to producers became their *raison d'être*. Modern advertising tried to inculcate the habits and virtues of consumption, helping to wean Americans from their nineteenth-century preoccupation with production. Ironically, stories that reminded readers of their declining control over public affairs often were surrounded by advertisements by brand-name products promising increased control over readers' personal lives--more acceptable appearance, better health, and the like. By building confidence in products, especially through brand loyalty, advertisements cultivated consumers' trust in unseen, distant companies. Such corporations also reached directly into thousands of communities. Mail-order houses bought space in small-town newspapers--advertisements revealingly called "foreign" by editors--diverting income from local merchants. Combining elements of communication, culture, and commerce, turn-of-the-century advertising trumpeted a way of life welcomed by many but clearly not all. . . .

Restructuring the postal subsidy was a "means to adjust, regulate, and mitigate the consequences" of a communications system that, using government resources, blanketed the nation with the symbols and messages of an urban industrial order. As industries centrally involved in the production and dissemination of public culture, journalism and advertising certainly exercised "subtle power to assign meaning and significance to various cultural phenomena." The postal subsidy extended to publishing firms was the most obvious pressure point available to policymakers seeking to constrain or redirect the cultural thrust of the print media.

Id. at 451-54 (footnotes omitted).

These passages reflect the conventional attitudes of American academic historians and political scientists in the 1970s and 1980s, perhaps slightly less fashionable today, which were dominated by neo-Marxian analysis of the sort represented by the sources that Kielbowicz cites approvingly in footnotes and on which he primarily relies in this discussion.²¹ To say this does not constitute an

²¹ TW et al. LR-12 contains three representative examples of these source materials: Richard Ohmann. "Where did Mass Culture Come From? The Case of Magazines," *Berkshire Review* 16 (1981): 85-101 (cited in fn. 1 of "Mass Culture"); T.J. Jackson Lears, "From Salvation to Self-
[footnote continues on next page]

Realization: Advertising and the Therapeutic Roots of the Consumer Culture, 1880-1930," in *The Culture of Consumption: Critical Essays in American History, 1880-1980*, ed. Richard Wightman Fox and T.J. Jackson Lears (New York, 1983), 1-38; and Christopher P. Wilson, "The Rhetoric of Consumption: Mass-Market Magazines and the Demise of the Gentle Reader, 1880-1920," in *ibid.*, 39-64 (both of the latter cited in fn. 2 of "Mass Culture").

Pointing out Kielbowicz's dependence on this school of analysis is not intended as a criticism, much less a refutation, of his arguments or conclusions. It *is* intended to demonstrate that his description of the 1917 Act in his Docket No. MC95-1 testimony as a "creative solution" to a more-or-less generally acknowledged problem in rate design tells only part of the story and expresses only some of his reasons for approving of the rate, and that his description of the bifurcated rate structure created by the Act in his R90-1 testimony as intended to encourage "the broadest dissemination of informational material" (p. 21) is at best partial and at worst potentially misleading.

Complainants wish to make unmistakably clear that we intend no suggestion that Kielbowicz, on this point or any other, is intentionally, or even negligently, misleading. On the contrary, he is forthcoming to an exemplary degree. Typical of this characteristic is his response in Docket No. MC95-1 to an interrogatory that asked him to elaborate on the subject of the political influence of interest groups in the passage of the 1917 Act. He responded in part:

Three kinds of politics--business, cultural, and partisan--figured in the passage of zoned advertising/unzoned editorial postage. . . .

The *business politics* involved struggles within and among the newspaper, magazine, and advertising industries plus tensions in the nation's marketing system. For instance, many small-town newspapers and retailers, whose fortunes were often intertwined, favored zoned advertising postage to keep so-called "foreign" (i.e., out-of-town) advertising and retailers (e.g., mail order) out of their communities. . . .

The *cultural politics* involved struggles among regions and between urban and rural interests. . . . [M]any publications were seen as cultivating urban, national values that offended the sensibilities of many Americans. The debates leading to the passage of the 1917 law reflected considerable hostility to the values of eastern, urban areas and the publications that purveyed them. . . .

Partisan politics were certainly reflected in the debates. . . . Final passage of the 1917 law depended in large part on the power of southern and western Democrats in Congress. Many opposed America's entry into the war, and they blamed the national press for inciting war fever; also, these lawmakers often resented the culture and business influence of the national magazines and larger urban newspapers.

Response to USPS/PO-T1-18, at 1-2: Tr. 5711-12.

Yet he maintained in the same response:

Despite these political interests, I believe that zoned advertising/unzoned editorial reflected an ingenious and careful policy choice by Congress. . . . [T]his solution preserved the best of the old policy--a flat editorial rate--while adjusting the second-class rate structure to acknowledge the highly commercial nature of many publications.

Id. at 1, 3: Tr. 5711, 5713..

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argument that these views are without merit, nor would it be accurate to say that they are passé among American academics. The same antipathy to "mass culture" that was manifested in the first decades of the last century by hostility to Sears, Roebuck, Wanamaker's, Montgomery Ward and *The Saturday Evening Post* continues to have a large constituency, as evidenced by a similar animus toward McDonald's, Starbuck's, Wal-Mart, and "communications conglomerates" such as Time Warner. The chief complaint animating that hostility also remains the same: "homogenization of opinion," of culture, of life in general.²² To point all of this out is to say only that Kielbowicz's approval of the policy solution represented by the 1917

That is a judgment respecting the merits of the 1917 Act at the time of its adoption. The view of the complainants is that the evidence demonstrating the importance of the political influences that Kielbowicz describes is incontrovertible, whereas the evidence is weak that the bifurcated rate structure adopted represents an "ingenious and careful policy choice by Congress." That solution was, after all--as Kielbowicz elsewhere recounts--a cobbling together of "elements of the House-passed zone plan and Sen. Hardwick's rate differential on advertising content" that was finally accepted by the conference committee only after "several days of wrangling" and a threat by the House to hold up passage of the entire War Revenue bill. R90-1 Kielbowicz testimony at 13. In any event, it is worthy of note that every fact mentioned in this discussion is drawn from Kielbowicz's own full and fair presentation.

Better guidance for evaluating the continued desirability of the unzoned EPC can be found, we believe, in statements of Kielbowicz that were made in a broader context than the consideration of any single act:

Before the Reorganization Act, . . . policymakers and preferred mailers frequently debated the means of financing the public service functions of the post office. Less effort, with some notable exceptions . . . was expended on identifying the particular benefits derived from underwriting the transmission of certain kinds of mail matter. Policymakers rarely confronted one central issue--whether preferential postage rates were the most appropriate and effective means to accomplish certain social goals. . . .

Champions of certain public policies often invoke the weight of history to justify the continuation of government programs they favor. But subsidizing the delivery of certain mail matter, like many public policies, has grown in ways that strayed far from the intentions of those who initiated the policy. In addition, changing social conditions have invalidated some of the reasons that once justified the practice. Finally, attaching weight to the fact that a policy has survived a number of decades provides no assurance that it was well crafted in the first place.

(With Linda Lawson), "A Policy History of Selected Preferred Mail Categories," Prepared for the U.S. Postal Rate Commission, April 20, 1986, at 9, 148.

²² See, e.g., Docket N. MC95-1, Rebuttal Testimony of Victor S. Navasky on behalf of American Press (ABP-RT-7), from which (at 4 and 9) the quoted phrases in the last two sentences are taken.

Act, like the Act itself, represents in part allegiance to one side in a continuing division of opinion. It is impossible to refrain from observing, however, that the identification of that position with the objective of "bind[ing] the Nation" is problematic, if not wholly factitious.

(c) Developments subsequent to 1917

Many things have changed since 1917. For example, regional attitudes have reversed, and criticism of mass culture and cultural homogenization is now identified more with elite, north-eastern, urban opinion and with the interests of ethnic minorities and immigrant groups than with southern, small-town, or rural opinion. In addition to noting the lack of a well developed record in earlier proceedings, the Complaint (at 9-10) in this docket alleges that "several changes in circumstances 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." One of these changes, the development of "widespread access to long-haul transportation of magazines (pool shipments by printers and consolidators) that is much cheaper than what the Postal Service is able to offer" (id. at 10), not to mention a long-term decline in the relative importance of transportation costs, has been addressed by several witnesses. Another, the fact that the long-predicted "information revolution" has over the past decade burgeoned into an unmistakable reality, has been addressed by witness Gordon. The adjudication by the Court of Appeals for the District of Columbia Circuit of a legal challenge to the unzoned EPC adopted in Docket No. R90-1, will be addressed in part III of this memorandum.

The Commission has had previous occasion to consider whether communications technologies and American society in general have changed in ways that have minimized or eliminated the efficacy of the unzoned editorial rate in

"assur[ing] readers' access to public information regardless of location" (Kielbowicz R90-1 testimony at 21). As early as Docket No. MC76-2, for example, the OOC (now OCA) argued

that while the different rates for editorial and advertising matter were originally intended to promote the dissemination of information, there is no evidence that furtherance of this objective is achieved by maintaining this rate differential.

PRC Op. MC76-2 (September 30, 1977), at 4-5.

Another way of putting the issue is to ask whether American society has become so cohesive, or media of communication so ubiquitous and inexpensive, that the unzoned EPC no longer makes any significant contribution to "bind[ing] the Nation" by assuring the "widespread dissemination of information." That question is addressed in this docket in the testimony of witness Gordon (TW et al.-T-3).

In fact, the complainants are unaware that any empirical or evidentiary nexus between the unzoned EPC and the objective of "bind[ing] the Nation" has ever been firmly established for any period subsequent to the passage of the Act of 1917, including with particularity the last two decades. Even before the Act was adopted, the existence of such a nexus was questioned by no less a personage than President Taft.²³ And approximately thirty years after the passage of the Act, the best informed and most percipient historian of second-class rates at that time, Charles Heiss, surveyed the conditions that had justified unzoned rates in the 19th and early 20th centuries and concluded that, in 1946, they no longer obtained:

²³ See "Message of the President Transmitting the Annual Report of the Postmaster General and the Report of the Commission on Second-Class Mail Matter" (February 22, 1912), rpt. GPO 1912, at 11 (included in library reference TW et al. LR-12) ("That newspapers and magazines have been potent agencies for the dissemination of public intelligence and have consequently borne a worthy part in the development of the country all must admit," but there is no longer any "warrant for the great disparity between existing postage rates on periodicals and the cost of the service the Government performs for them").

The States and Territories contained many sparsely developed areas, and a large immigrant population. The country was confronted with internal reconstruction problems following the Civil War. Travel was slow and communication facilities were very limited. . . .

[T]he Nation was then still relatively young with extensive unsettled frontiers. In 1880 the population per square mile of land area in the continental United States was 16.9 persons compared with 44.2 in 1940. The area west of the Mississippi river contained only about 22 percent of the total population of the United States in contrast with 31 percent in 1940. . . .

Immigration from foreign countries was heavy during this period and there was a real need for disseminating worth-while information, especially to those who settled in these outlying and undeveloped areas. It was necessary to inculcate American ideals into the great numbers who were arriving from foreign shores, to avoid the formation or perpetuation of nationalistic or sectional groups. . . .

Many from the Eastern States and millions of those who had migrated to this country moved into the sparsely settled areas of the West and there was need for the nation to weld these various population elements into a cohesive national entity, fully organized within its borders. . . .

Railroad and telegraph facilities were limited; there were no aeroplanes, no automobiles, no super highways and travel by any means, even between local communities, was slow; and there were no telephones, radios or moving picture houses. All of these are now material instrumentalities in disseminating information. There were few libraries of any size in rural communities to which recourse could be had for information and it was necessary to depend upon newspapers and other publications.

All of these factors gave justification during a period after 1850 for the Congress to encourage through low second-class rates, the dissemination of worth-while information through newspapers and periodicals, particularly to the many largely self-contained communities then existing. . . .

The facilities for distribution of information and matter of educational value are no longer limited to newspapers and periodicals[,] and second-class publications are not, as earlier, the principal media for disseminating news and other information for the "public good." Books in large numbers; the communications companies; the moving picture houses; the automobile and the aeroplane are definitely "competitors." Radio broadcasting features "news" and discussions of a wide variety, and in the evening gives "tomorrow's headlines" and important phases

of items, national and local. In areas where there may not be a daily paper available the radio has become an effective and prompt news disseminator. . . . [W]ithout minimizing the importance for this purpose of some types of publications, this view expresses a well established fact.²⁴

More recently, another thoughtful historian of postal rates, after canvassing the same historical background, wrote:

A century later, these conditions are changed. The frontiers without access to printing presses or newspapers have vanished. Magazines and periodicals can be obtained readily by anyone. Immigration problems are virtually nonexistent through absorption. The railroads, the automobile, the telephone, the telegraph, the radio, television, and jet planes reach even the remotest of sections.

Moroney at 34-35.

As previously indicated, at the same time this conclusion was presented to the postmaster general by his resident Research Administrator/Historian, essentially the same argument was presented to the Commission by the OOC in Docket No. MC76-2. It was advanced again by the Postal Service and other parties in Dockets No. R87-1 and R90-1. In each instance it was rejected by the Commission. When the question of whether to eliminate the unzoned EPC was most recently litigated before it in Docket No. R90-1, the Commission weighed the testimony of Dow Jones witness Charles King against that of Kielbowicz, stating:

King finds that the "justification" for a flat editorial rate to bind the Nation together in the early part of this century is no longer applicable. We are now in the "Information Age" with FAX systems and sophisticated telecommunications.

PRC Op. R90-1 (January 4, 1991), ¶ 5276 (V-119).

Against which it weighed the view of Kielbowicz that:

²⁴ Charles A. Heiss, "Report on Second-Class Mail to the Postmaster General" (May 21, 1946), rpt. U.S. GPO, 1946, at 73-74, 76 (included in library reference TW et al. LR-12).

[w]ith migrations of people more pronounced in 1990 than in 1917, the need for continuation of the editorial flat rate system is as great in binding the [N]ation together in 1990 as in 1879 or 1917.

Id. at ¶ 5277 (V-120) (quoting Tr. 44/23278-79).

The Commission agreed with Kielbowicz, remarking:

We do not find any new "Information Age" since 1987 when we last examined this question.

Id. at ¶ 5279 (V-120-21).

Since Docket No. R90-1, the issue of whether the usefulness of the unzoned EPC has been overtaken by history was addressed again by Prof. Kielbowicz in a colloquy with Commissioner Quick in Docket No. MC95-1. Kielbowicz stated:

It is tempting to say we have national television today; we have the Internet today; therefore, we don't need some of the older services. But I guess I think some of these newer services are not perfect substitutes for some of the older services that we do have.

The Post Office is good at delivering highly specialized information that you don't get over network television. Cable has yet to provide it. The Post Office has been carrying that since the mid-1800s. The particular publications look different, but I don't think that has changed.²⁵

²⁵ Tr. 5770-71. See also Docket No. R90-1, Tr. 24/23284-85, where, when asked whether he regarded radio and television as "effective means of communication," Kielbowicz responded:

For certain purposes. But not for all purposes of communication, they're effective. But for many forms of communication--communicating technical information, for example, they're extremely ineffective.

At a later point in the hearing he expanded on that comment (id. at 23303):

[M]y concern . . . is that for specialized periodicals of national circulation, viewing it from the vantage point of recipients who are, obviously, scattered over the nation, they should have equal access to the editorial information on those page[s], and although . . . there have been a number of changes in communications, television does not provide the kind of information you find on the pages of professional journals, business journals and even the magazines that hobbyists get, despite the improvements in communication. The Postal Service is really the best conduit for that kind of information nationwide.

While expressing this opinion, Kielbowicz at the same time candidly acknowledged that he could not supply empirical evidence of a nexus between the objectives of § 101(a) and the unzoned EPC. When asked to "provide all evidence available to you from primary sources that supports your assertion that the unzoned editorial rate in fact advances the function set forth in the second sentence of section 101(a)," he responded:

Documenting the extent to which the unzoned editorial rate helps "bind the Nation together" would probably require data about periodicals' circulation patterns and how readers use publications. I do not have access to these kinds of information.

Answer to USPS/PO-32.

In setting out the background that justifies revisiting this issue again fourteen years after the Commission last addressed it, it is important to note just how qualified and guarded were Kielbowicz's previous statements regarding the continuing importance of the unzoned EPC.

The one statement in his Docket No. R90-1 testimony expressing support for the unzoned EPC as a feature of *current* rather than of historical rate design is the sentence quoted by the Commission in its Opinion to the effect that the unzoned EPC continues to be justified because "migrations of people [are] more pronounced in 1990 than in 1917." This, however, is a puzzling assertion, whether taken as referring to migrations to the United States from abroad or to migrations wholly internal to the United States, and Kielbowicz was unable on cross-examination to amplify, explain, or defend it:

Q. On what do you base your conclusion that migrations of people are more pronounced in 1990 than in 1917 or 1879?

A. I guess I would actually rephrase that. I don't particular[ly] like the word "migration" here. I would argue the general point of that sentence is that, in fact, the flat rate is as important, I think, to large sectors of society in 1990 as it was when it was adopted in 1917.

Tr. 24/23285.

That answer, of course, restates Kielbowicz's conclusion but does not address the issue of what *contemporary circumstances* led him to that conclusion.

In Docket No. MC95-1, the continued existence of the unzoned editorial rate was not at issue as such, but the continuing validity of the rationale for an unzoned EPC was widely perceived to be implicitly at issue. Significantly, Kielbowicz affirmed repeatedly in his testimony in that case that he had formed no opinion on any of the Postal Service's proposed classification changes. Tr. 5746. He additionally affirmed that he knew of nothing in the Postal Reorganization Act or its legislative history that "would preclude consideration of" eliminating the unzoned EPC. Tr. 5747-49, 5757-58 (the quoted phrase is from Tr. 5749).

What this leaves in the way of arguments from Kielbowicz for the continuing importance of the unzoned EPC are his previously quoted statements not agreeing that the purpose of the unzoned rate had been obviated by modern communications technologies, an opinion grounded on the observation that the Postal Service is "good at delivering highly specialized information" or "communicating technical information" and that newer media such as radio and television are "extremely ineffective" for that purpose.²⁶ That is an observation with which any well-informed person would agree. However, even assuming *arguendo* that the superiority of print media over radio and television (as well as telegraph, telephone, etc.) in communicating "highly specialized" or "technical" information would justify continuation of an unzoned EPC in the absence of competing alternatives,²⁷ it is the

²⁶ Docket No. MC95-1, Tr. 5770-71; Docket No. R90-1, Tr. 24/23284-85.

²⁷ We grant the assumption *arguendo* only because we do not think that there is evidence to support the view that the unzoned rate currently results in wider dissemination of or greater accessibility to information.

view of the complainants that an outstanding alternative, which is manifestly superior to Postal Service delivery for the stated purpose, has incontrovertibly established itself as a permanent and central feature of American life since 1990 (or 1995). We are referring, of course, to the Internet.

As observed at the beginning of this memorandum, the form of the postal rate preference for newspapers and magazines has changed over time with changes in social, economic, and demographic circumstances. The purposes thought to be served by the preference have changed as well. "[T]he generation that crafted the first postal policy [in the era of the nation's founding] recognized that a nation as geographically and socially diverse as the United States would encounter difficulties sustaining national unity," whereas the architects of the policy enacted in 1917 sought to "str[i]ke a blow . . . against the encroachments of national market institutions [and] the culture purveyed by national magazines." "Mass Culture" at 455, 478. The original purpose of the preference, which was, in the words of President Washington, "[t]he circulation of political intelligence" or "diffusing a knowledge of the laws and proceedings of the government,"²⁸ had by 1879 evolved into "the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry."²⁹ When next reformulated, in the Act of 1976, the description of the material deserving of a preference was more general still, encompassing "educational, cultural, scientific and informational [ECSI] value to the recipient." As Kielbowicz has observed:

The newspaper category, from which second class grew, favored political information from the start. Slowly but significantly Congress added categories for various kinds of materials because of their

²⁸ Fourth Annual Address to Congress (November 6, 1792) and Third Annual Address to Congress (October 25, 1791), quoted in Rita L. Moroney, "A Study of the Intent of Legislation on Second-Class Mail," U.S. Postal Service, 1977, at 17, 16 (included in library reference TW et al. LR-12).

²⁹ Act of March 3, 1879 (20 Stat. 358-361).

educational and cultural benefits. In roughly chronological order, the categories were for periodical pamphlets, magazines, nonprofit publications, library materials, and books.

MC95-1 testimony at 104.

Just as the ambiguity of language of the Act of 1879 bedeviled postal administrators from the day of its enactment (as it continues to do unto the present day), so the language of the 1976 Act is fraught with ambiguity and has occasioned disagreement from the day of its enactment. It is clear that Congress intended to maintain a rate preference for newspapers, magazines, and books in recognition of their informational value, but that is about all that is clear. The legislative history of the provision is meager and unilluminating. It is also clear, judging by the postal reform bills passed out of committees in the House and the Senate in the last year carrying forward the language of § 3622(b)(8),³⁰ that Congress intends the preference to continue. But the task of giving those words concrete meaning, of determining the specific form and the degree of the preference, is delegated to the Commission's expert judgment in light of the guidance contained in the Act and the circumstances that exist at the time.

The complainants believe that the circumstances that the Commission has previously considered decisive in determining the form of the editorial preference for Periodicals have changed. We do not contend that the unzoned EPC has lost its efficacy in preventing sectionalism or promoting national cohesion since the Commission last considered the matter in 1990, because the evidence supports the view that its efficacy for that purpose, if any, was already vestigial by that date. We do contend, however, that its efficacy for promoting *nationwide* dissemination of information, particularly "highly specialized" or "technical" information, and making

³⁰ 108th Cong., 2d. Sess., S. 2468 (as introduced), § 3622(c)(11); H.R. 4341 (as reported) § 3622(c)(11).

such information equally accessible in all parts of the country has been largely superseded and is rapidly disappearing altogether.

Witness Gordon (TW et al.-T-3), who claims (and displays) no expertise on postal rates but whose expertise on the history of technology and business and their impact on society in America in the 19th and 20th centuries has not been challenged, presented testimony relevant to both the unzoned EPC's role in preventing sectionalism and its role in promoting widespread dissemination of information.³¹ After sketching the development and universal spread of various communications media over the course of the 20th century and their impact on American society, he concludes that "[t]here is no longer the slightest chance that setting postal rates for editorial content in Periodicals class mail by zones" could foster sectionalism or a lack of national cohesion. Tr. 3/627; see also *id.* at 688. And after reviewing the astonishing development of the Internet between 1990, when "there were 300,000 computers on the net," and 2002, when "143 million homes [were] using the Internet" and "[a]lmost forty million Americans . . . had high-speed access," he concludes:

Thanks to the Internet, the communications industry is in a state of flux it has not seen since the dawn of the industrial age made modern newspapers and magazines possible, perhaps since Gutenberg invented movable type more than five hundred years ago.

Tr. 3/624, 784, 626.

³¹ Gordon's testimony on cross-examination has drawn comment based on his disinclination to endorse the ECSI preference for periodicals. But there is nothing remarkable about this disinclination: (1) the very first interrogatory response filed by Gordon stated that he had formed no opinion on the subject (Tr. 3/634); (2) he testified not as a policy witness but as a historian, concerning changes in objective historical circumstances relevant to the continuing effect of the unzoned editorial rate (see Complaint at 21, proffering "Testimony of John Steele Gordon Concerning the Impact of Technological Progress on the Widespread Dissemination of Information in the United States: 1879 to the Present"); and (3) the specific historical issue to which his testimony was addressed is how social, economic and technological changes over the course of the 20th century have affected the potential utility of the *unzoned EPC* in promoting national cohesion, preventing sectionalism, and promoting widespread access to information. Whether there ought to be an ECSI preference is an entirely different question, one that has been resolved by Congress, as reflected in the plain language of the Act.

Gordon also testified that for highly specialized, technical, or time-sensitive information of the kind most important to business and the professions, the Internet has already displaced or is rapidly displacing print media as the primary source of access.³² Thus a historical fact that remained essentially unchanged for a period of centuries (during which almost everything else seemed to change) is currently passing away before our eyes--namely, the preeminence of print over all other media as a means of communicating and memorializing information that is voluminous, or complex, or that demands for whatever reason great accuracy or precision of expression.

(d) The Postal Reorganization Act of 1970

The legislative history of the Commission's governing statute, the Postal Reorganization Act, is thoroughly ambiguous with respect to second-class rate design. When the Congress that enacted the PRA meant to require the continuation of preferences for particular types of mail, it wrote those preferences into the statute. See, e.g., §§ 3623(d) and 3683, which respectively require "uniform" First-Class rates and unzoned rates in fourth-class special rate. No such provision was included regarding the unzoned EPC. The Senate Committee Report on the Reorganization Act, which, according to Kielbowicz, "provides the best insights into [the Act's] classification principles" (MC95-1 testimony at 101), listed the preferential rates that were intended to continue after reorganization. The list does not include an unzoned rate for editorial matter in second class. The Report then states: "The committee recommends that all other preferences heretofore

³² Tr. 3/620-26, 680-82, 691, 697. ABM has done its best to confuse these two separate subjects, by interpreting Gordon's testimony as suggesting that the specialized information formerly available only in technical and trade journals can now be found on television or in Internet chat rooms. As was established during the hearing on Gordon's testimony, for every ABM-member publication with respect to which ABM raised this issue, the same information was available on the Internet (although not in chat rooms) and apparently comparable information was available on a multiplicity of sites. Tr. 3/771-79.

established by law for the mailing of any mail matter be abolished, but that the mailers be given a significant period of time to adjust to any impact caused by rate increases.” S. Rep. No. 91-912, 91st Cong., 2d Sess. 11, 13 (1970).

The Senate Committee Report also stated that the rate structure Congress was leaving in place, until the Commission could adopt a new one, was overgrown with inequities and irrationalities that had accumulated over the Post Office Department’s long history and that Congress intended its newly created expert commission to rectify over time. The report indicated that this was in fact a central reason for reorganization:

The committee’s inquiries and every responsible study show that the Postmaster General is blocked or undercut at every turn by a labyrinth of postal statutes echoing every postal concern, interest, or whim expressed by Congress over a 200-year period. Laws have changed laws and have added to the body of them so that, by accretion, they have multiplied, decade by decade, leaving the Postmaster General bound in his own house. Twist and turn as he may, he cannot function in the public interest as a responsible manager. . . . [I]t is not too soon for a complete break with the past.

S. Rep. No. 91-912, 91st Cong., 2d Sess. 2 (1970).

In his testimony in Docket No. R90-1, Kielbowicz essentially confirmed this view of Congress's intentions in enacting reorganization:

The primary purpose of the Postal Reorganization Act of 1970 was to remove politics from the Postal Service and to put it on a businesslike footing. Rate making was transferred from Congress to the Postal Rate Commission. The existing mail classes on the first day of postal reorganization were to continue in effect *until the Postal Rate Commission established a new mail classification schedule*. Thus, the basic entry requirements for second class as well as its rate design, including the editorial flat rate, continued.

R90-1 Kielbowicz testimony at 15-16 (emphasis added).

(e) Changes made by the Commission to the Periodicals rate structure

Since reorganization, consistent with the statements in the Senate Committee Report, the Commission has recommended a number of substantial changes to the Periodicals rate structure that (1) belie assertions that it lacks broad discretion to reassess policies of the past in light of today's circumstances and (2) have significantly diminished the potential effectiveness of the unzoned EPC as an instrument of policy.

The best reference point for evaluating the significance of the Commission's actions may be Kielbowicz's summary of where periodicals classifications stood when the Reorganization Act was adopted in 1970:

Historically, the nature of mailers created a kind of classification hierarchy, corresponding loosely to lawmakers' perceptions of the mail's social utility. The implicit hierarchy is evident in the following examples of different types of publications:

First, and atop the hierarchy, are the periodicals issued by nonprofit organizations. . . .

Second, Congress regarded regular-rate periodicals in the second-class as producing noteworthy public benefits because they offered enough reading matter to "overbalance" their commercial content.

Third, in creating a separate category for controlled-circulation publications, lawmakers appreciated that trade journals with at least 25 percent editorial content ably served their specialized audiences even if their circulation were largely free.

MC95-1 Kielbowicz testimony, at 106.

Since then, the Commission has recommended the following changes to the second-class rate structure:

- In 1972, a piece charge was implemented. Approximately 60 percent of second-class revenue now comes from the piece charge and 40 percent from the pound charge.

- In 1980, the Commission abandoned the long-established "paid subscriber" requirement for second-class regular rate eligibility and admitted controlled-circulation, or "requester," publications, which are distributed free to their recipients.
- In Docket No. R84-1, the Commission provided for a discount from the piece charge based on percentage of editorial content.
- In various dockets, presort discounts, barcode discounts, SCF and ADC and DDU dropship discounts and "zones," and pallet discounts were introduced.
- Two Experimental Mail Classification dockets recommended special discounts for co-palletized pieces that are dropshipped, one of which set rates for some editorial matter entered in the destination facility that were lower than the rates for other editorial matter entered in the same facility.

The creation of a piece rate altered a policy of basing second-class rates entirely on pounds that Congress had enacted in 1874, re-enacted in 1879 and 1917, and that was continued until reorganization in 1970. The Commission's admission of controlled circulation to second class also overturned a long-established Congressional policy that these publications should receive a substantially smaller rate preference than regular-rate publications on both their advertising and their editorial content, should pay the same rates on their editorial as on their advertising, and that none of their weight should be zoned. Congress had not provided any separate classification for controlled-circulation publications until 1934, when it provided for a rate applicable to the entire weight, irrespective of distance traveled or proportion of editorial content, that was approximately 1 cent per pound higher than the regular-rate zone-8 rate for advertising.³³ This rate relationship continued

³³ Instead of selecting a low zones 1&2 rate for editorial and extending it to zone 8, Congressional intent for controlled-circulation publications took the form of selecting a high zone 8 rate and requiring that it be applied to the full weight in all zones.

throughout the period that Congress set rates.³⁴ All of these actions by the Commission represent changes in longstanding Congressional policy that remained in effect until postal reorganization.

The fact that the flat editorial rate is of long standing and remained law at the time of reorganization, therefore, does not warrant an assumption that Congress intended that rate to be continued in perpetuity.

III. CURRENT STATUS OF THE UNZONED EPC AS LAW AND POLICY: *MOAA v. UNITED STATES POSTAL SERVICE*

In addition to other changes since 1917, constitutional law respecting state neutrality as between competing communications media has evolved. Cases such as *Minneapolis Star and Tribune v. Minnesota Commissioner of Revenue*, 460 U.S. 575(1983) established the principle that differential taxation of different segments of the press is unconstitutional under the First Amendment.³⁵ The Court in *MOAA* alluded to the implications of such cases for application of 39 U.S.C. § 3622(b)(8):

³⁴ U.S. Postal Service, "United States Domestic Postage Rates, Recent History," Department of Rates and Classification, Rates Division (October, 1974).

³⁵ Minnesota's ink and paper tax violates the First Amendment . . . because it targets a small group of newspapers. The effect of the \$100,000 exemption . . . is that only a handful of publishers pay any tax at all, and even fewer pay any significant amount of tax. The State explains this exemption as part of a policy favoring an "equitable" tax system, although there are no comparable exemptions for small enterprises outside the press. . . . Whatever the motive of the legislature in this case, we think that recognizing a power in the State . . . to tailor the tax so that it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme. It has asserted no interest other than its desire to have an "equitable" tax system. The current system, it explains, promotes equity because it places the burden on large publications that impose more social costs than do smaller publications and that are more likely to be able to bear the burden of the tax. Even if we were willing to accept the premise that large businesses are more profitable and therefore better able to bear the burden of the tax, the State's commitment to this "equity" is questionable, for the concern has not led the State to grant benefits to small businesses in general.

460 U.S. 575, 591-92; see also *Grosjean v. American Press Co.*, 297 U.S. 233, 250-51 (1936) (2 percent gross receipts tax imposed by Louisiana on the sale of advertising of all newspapers with a weekly circulation over 20,000 held invalid under the First Amendment because keying the tax to circulation curtailed the flow of information).

The Commission argued that this provision, which was added to the Act in 1976, "reinforces the special nature of the editorial content of second-class mail and requires special treatment of such." PRC Op. at V-121. The trouble with the argument is that both the advantaged and the *disadvantaged* [by the unzoned EPC] publications supply these informational benefits. The Commission gave no reason why it considered the educational, cultural, scientific, and informational value of local publications such as *The Washington Post*, or dropshipped publications such as *Time*, to be less than that of long-haul publications such as *The New Republic*; any reading of the statute that authorized the Commission to make such judgments would run into constitutional heavy weather, as the First Amendment limits the content-based distinctions that the government may make even in a proprietary capacity. . . . ³⁶

MOAA, of course, went on to uphold the Commission's decision to retain an unzoned EPC, on the basis of § 101(a) of the Act:

The Commission also relied upon 39 U.S.C. § 101(a)'s mandate that the USPS "bind the nation together through the personal, educational, literary and business correspondence of the people." This rather broad anti-Balkanization principle supports the view that the Service is entitled to enhance "widespread dissemination of information," not in the sense of increasing the "units of information" mailed, but in the sense of increasing the *nationwide* distribution of units of information.

Id.

³⁶ 2 F.3d at 436. The Court's cautionary words might be occasioned by Commission statements such as the following:

Because criterion 8 requires attention to the value of editorial matter "to the recipient," and different recipients will value different types of editorial matter, we cannot treat it as fungible, as between one publication and another.

PRC Op. MC91-3 (July 17, 1992), ¶ 4028 (p. 101).

See also MC95-1 Kielbowicz testimony (at 101-02) regarding the Postal Reorganization Act:

[T]he Senate committee's report . . . expressly disapproved of basing classification decisions on judgments of social acceptability. "[I]f postal rates and postal classifications[s] are going to be established on the basis of . . . 'social acceptability,' then Congress is clearly better qualified to make such judgments than the Postal Service or any expert commission. Such purely political judgments are the province of Congress," the Senate report insisted.

The import of a decision is often manifested by the references to it in years to come. In this regard, it is noteworthy that a decision rejecting an appeal brought by the lead complainant in this docket, Time Warner (along with another large publisher, Dow Jones), and unanimously upholding the Commission's retention of an unzoned EPC, as urged by intervenors ABP (now ABM), McGraw-Hill, and NNA, has in this docket been given prominence by that complainant and associated advocates of eliminating the unzoned EPC but has not once been mentioned by the ardent defenders of its retention. Nor was the *MOAA* case mentioned or alluded to by the Commission in its opinion in Docket No. MC95-1, although the Commission in that opinion addressed the same issues and provisions of the Act addressed in *MOAA*. See, e.g., ¶¶ 5286-89 (V-122-24). The reason for this reticence is, we believe, captured by the following statement in the Complaint (at 11):

While the Court upheld the rate as within the permissible bounds of the Commission's policymaking judgment, it nevertheless undercut the Commission's traditional rationale for the policy, and it indicated skepticism about the depth and cogency of the Commission's analysis and the congruence between its means and its ends.

While we attribute considerable importance to what the Court said in *MOAA*, we acknowledge what it did not say. We do not assert that the implicit logic of *MOAA* requires the Commission to eliminate the unzoned EPC. On the contrary, we accept the correctness of the Court's holding that the Commission's decision to retain the unzoned rate in Docket No. R90-1 was within its proper authority under the Act.

Complainants believe that the Court's conclusion that § 3622(b)(8) does not lend support to an unzoned EPC is correct and should be followed, because we find the logic of the Court's analysis compelling. However, we concede that the Court's judgment in that regard is, strictly speaking, dictum. At the point that the Court concluded that the Commission's reliance on § 101(a) was sufficient as a matter of

law to support its decision, the Court's interpretation of the ECSI provision ceased to be essential to the outcome of the case. Having conceded this much, however, we emphasize that the Court's conclusions regarding § 3622(b)(8), although dictum, are dictum of the strongest possible sort. The Court expressly rejected the Commission's interpretation of one of the two statutory provisions on which it grounded its decision to retain an unzoned EPC not just as insufficient to support that decision but as an incorrect interpretation of the law. Moreover, at the point in its analysis where the Court considered the Commission's reliance on § 3622(b)(8), it appeared to believe that that provision was most likely to be dispositive of the outcome. Had it concluded that the Commission's interpretation was "a permissible construction of the statute," even if it disagreed with that interpretation, the Court would have been bound, under the extremely deferential standard of *Chevron U.S.A. v Natural Resources Defense Council*, 467 U.S. 837, 842 (1984) to uphold the Commission's decision, and the case would have been at an end.

Only when the Court found itself unable to sustain the Commission's reliance on § 3622(b)(8) under the *Chevron* standard did it move on to the apparently less promising source of statutory authority, § 101(a). And although the Court found § 101(a) legally adequate to shield the Commission's decision from reversal, its uneasiness about the Commission's analysis clearly persisted. The best it was able to say about the Commission's decision was that "a zoned EPC . . . *could be viewed* as inconsistent with the Congressional purpose of 'binding the nation' together" (emphasis added) and that it therefore had "no basis for calling arbitrary and capricious the Commission's decision to adopt a rate structure favoring mailers who send their publications long distances." 2 F.3d at 437. We think it is also significant, although not mentioned by the *MOAA* Court (perhaps because it was unaware of the fact), that § 3622(b)(8) had been, until Docket No, R90-1, not merely

the principal but the sole statutory basis for the Commission's decisions (in MC76-1, R77-1, and R87-1) declining to zone the editorial rate.³⁷

MOAA held that under § 101(a) the Commission was "entitled to enhance 'widespread dissemination of information,' not in the sense of increasing the 'units of information' mailed, but in the sense of increasing the *nationwide* distribution of units of information," and that the Commission could therefore give decisive weight to "the prospect of detrimental impact upon small publications which are mailed to the distant zones."³⁸ The Commission has not explained, however, and the Court apparently did not probe, the link between breadth of dissemination and any effect on small mailers (who mail also to the non-distant zones). This link needs to be addressed. It is not enough to observe that the mix of large and small mailers might be affected by the rate structure selected.

The MOAA Court's apparent uneasiness with the Commission's analysis stems, we believe, from doubts about whether the specific action taken by the Commission, retaining an unzonated EPC, actually furthers the policy of "bind[ing] the Nation" through the widespread dissemination of information. The Court found that the Commission had interpreted § 101(a)'s "rather broad anti-Balkanization principle" of "bind[ing] the nation together," "a value that Congress favored strongly," as implying a concern for the "widespread" or "nationwide" or "long-distance" transmission of information. It appeared to find this inference somewhat puzzling, or

³⁷ The Docket No. R90-1 Opinion states that "the Commission has consistently interpreted §§ 101(a) and 3622(b)(8) to support the public policy of widespread dissemination of public information." ¶ 5279 (V-121). That statement is apparently in error, however, if it was intended to indicate that the Commission had cited § 101(a) as justification for the unzonated editorial rate. All of the Commission's previous decisions concerning the editorial rate rely upon § 3622(b)(8) but make no mention of § 101(a).

³⁸ Id. at 436, 437 (quoting PRC Op. R77-1, at 350). Whether the unzonated EPC does in fact enhance the nationwide distribution of information is addressed in Appendix A of witness Mitchell's testimony (TW et al.-T-1). His approach abstracts from the "units of information," in line with the Court's emphasis.

perhaps it would be more accurate to say somewhat conclusory--i.e., lacking an entirely clear explanation of the inferential link between the premise and the conclusion.³⁹

The obligation to “bind the Nation together” appears from the legislative history to have been intended as no more than a general statement that under reorganization the Postal Service’s primary obligation would continue to be the public service of maintaining a nationwide postal system. The inclusion of personal and business correspondence in the section hardly suggests a preference for magazines in particular, much less a preference for long-haul rather than short-haul

³⁹ The Court’s difficulties in parsing the Commission’s analysis plainly reflect the difficulty of the policy and interpretive issues with which the Commission has had to grapple. The abstractness of the issues, the vagueness of the statutory provisions, and the slipperiness of the terminology connected with this matter are all illustrated by the following passage from the Commission’s Opinion in Docket No. MC91-3 (¶ 4059 [p. 113]):

We believe that the current rate structure promotes the widespread dissemination of information by treating all editorial pounds on an equal basis. We are required to consider the educational, cultural, scientific, and informational value of mail to the recipient (§ [3622(b)(8)]), which suggests that--since different recipients value different types of editorial matter--equity is promoted by treating all individual publications equally.

Treating all "editorial pounds" equally and treating "all publications" equally are in fact mutually exclusive alternatives between which the Commission cannot avoid choosing. As the Commission has elsewhere acknowledged, the unzoned EPC discriminates in favor of some editorial pounds (those carried long distance) and against others (those entered locally):

The Service and OOC correctly observe that the uniform editorial rate perpetuates an internal subsidy: editorial matter mailed a short distance is charged more than its true costs, and matter sent to the distant zones receives a "free ride."

PRC Op. R77-1 (May 12, 1978), at 349.

The Commission’s justification for the *unequal* treatment of editorial pounds is that it is necessary in order to make possible "equal" treatment of individual publications, specifically, "equal" treatment of "small, nationwide publications" and publications with sufficiently high density or a sufficiently compact geographical distribution to cause them to be relatively less costly to transport and deliver. (This is essentially the analysis of the Commission’s policy at which the Court in *MOAA* arrives.)

It is clear that the two objectives simultaneously espoused by the Commission in Docket No. MC91-3 are mutually exclusive. It is also clear that neither of the two follows from the fact that "different recipients value different types of editorial matter." The requirement of equal, or evenhanded, treatment of all editorial matter is a consequence not of the different values that people place on different kinds of editorial matter but rather of the impermissibility and impracticability of recognizing those differences in rates.

magazines. That is, the language is so general that it might equally well be used to support the widespread dissemination of almost any kind of mail. The connections in the Commission's logical chain of inference are obscure, and nothing in the legislative history of the statute supports its interpretation. However, since the Court was unable to find that, as an exercise in statutory interpretation, the Commission's view was unreasonable, the only question that remained was the reasonableness of the Commission's conclusion that the unzoned EPC promotes the widespread dissemination of information.

The Court observed that there was testimony on the record that "a zoned EPC would threaten the existence of [certain] nationwide publications," and that the Commission had relied on this testimony for the conclusion that a zoned EPC would have "detrimental impact upon [certain publications] which are mailed to the distant zones" and would "interfere with long-distance transmission." Its task was therefore at an end. The Court could not insist that persuasive evidence of the genuine likelihood of bankruptcies is necessary to justify the continuation of the unzoned rate. The Commission, however, can and should evaluate evidence of alleged detrimental impact more critically.⁴⁰

⁴⁰ The Commission's Docket No. R90-1 Opinion (¶ 5277 [V-120]) quotes testimony by Kielbowicz that "[c]ontinuing the flat editorial rate . . . is the best way to facilitate widespread circulation of public information nationally" in order to assure that "information found on the pages of periodicals [will] be just as accessible to the residents of Washington State as to the residents of Washington, D.C." But when challenged on cross-examination to explain the basis for this view, Kielbowicz was unable to point to anything more than an indefinite impression:

A. I have not talked to any publishers about what they would do in the wake of this rate hike. . . .

I guess it's conceivable, although I would concede unlikely[,] that subscription rates would vary by distance.

However, I think if one of the--well, the proposal put forward by the Postal Service endorsed by MPA were to be adopted, it's likely that some publishers that are extremely reliant upon use of the mails would find it more difficult to stay in business, and if they went out of business, the readers, the recipients of that information, would be denied access in that form.

[footnote continues on next page]

The *MOAA* Court, when looking for substantial record evidence to support the Commission's finding that zoning the EPC would have detrimental impact on nationwide distribution of information, ignored the Commission's express reliance on Kielbowicz in its Opinion and dipped directly into the record to summarize testimony by publishers and printers, alleging that zoning the EPC might bankrupt small publications that are mailed to the distant zones, to which the Commission's opinion made no direct reference. 2 F.3d at 436. The weight of similar allegations by some of the same parties about the alleged detrimental impact of the rate structure proposed by complainants on similarly described, unidentified publications is at issue in this docket. These allegations are rebutted in the testimony of complainants' witnesses Mitchell, Stralberg, Schick, and O'Brien with a thoroughness and definitiveness wholly unlike anything available on the record of Docket R90-1. This issue will be addressed in detail in complainants' initial brief.

On a broader level, complainants believe it has become increasingly evident that events have overtaken the Commission's original analysis of "widespread dissemination of editorial information" primarily in terms of the Postal Service's system of zones. The circumstances which recommended that approach to Congress in 1917, when virtually no national publications were printed in more than one location and the Post Office was the only available means of transporting subscriber copies of magazines great distances, have changed dramatically. The Periodicals rate structure has become more complex and provides many more options to mailers.

Q. They would go out of business because of the rate increase or because of the design of the rate increase?

A. Well, it could be both. . . .

Tr. 24/23282-83.

The Commission also can, and should, reconsider its previous identification of the rate structure created by the 1917 Act with the "long-established policy which has favored the distribution of informational material," which "can be traced back to at least 1917 when Congress rejected zoned pound charges applicable to the total weight of the publication," a policy that "has been carried forward in the Postal Reorganization Act" (PRC Op. MC76-2, at 8-9) and "most recently embodied in 39 U.S.C. § 3622(b)(8)" (PRC Op. R77-1, at 345). As the previous discussion has shown, the "long-established policy" favoring the dissemination of informational material dates at least to the founding of the Nation and has been effectuated through a variety of periodicals rate structures. As the legislative history of the 1970 Act shows, the unzoned EPC is not among the rate preferences that Congress stated should continue after reorganization but rather is presumably among the group of "all other preferences heretofore established" that Congress recommended be abolished after the mailers were given "a sufficient period of time to adjust to any impact caused by rate increases."⁴¹ Moreover, as also discussed previously, the Commission's actions regarding Periodicals classification issues, particularly its granting to requester publications eligibility for the Periodicals regular rate and its creation of a Periodicals regular-rate piece charge and an editorial discount from that piece charge, are inconsistent with the view that its discretion to reconsider a zoned EPC is limited by either the longevity of the unzoned EPC or the fact that it was still in existence when the Reorganization Act was adopted.⁴² Nor, of course, is

⁴¹ S. Rep. No. 91-912, 91st Cong., 2d sess 13 (1970).

⁴² In its Docket No. R90-1 Opinion (¶ 5279 [V-120-21]), the Commission relied on the testimony of Kielbowicz for the conclusion that "longstanding public policies" established in the Act of 1917 are carried forward in the Act of 1970 and thus "require a recommendation to maintain the current flat editorial content pound charge." It is difficult, however, not to question the strength of Kielbowicz's argument for that reading of the 1970 Act, in view of the following exchange between counsel for McGraw-Hill and Kielbowicz during the hearing in Docket No. MC95-1:

[footnote continues on next page]

its discretion limited by interpretations of the 1976 Act that have subsequently been rejected as erroneous by the only federal appeals court to have considered the question. Complainants therefore urge the Commission to reconsider previous statements such as that "longstanding public policies require a recommendation to maintain the current flat editorial content pound charge," which we do not believe remain sustainable under the Court's analysis in *MOAA*.

Q. So if I understand you correctly, when, in your view, when Congress specified binding the nation together as a basic function, the basic function of the Postal Service in the 1970 Postal Reorganization Act, they had reference to the policy, among others, of promoting the dissemination of information and culture through periodicals by utilizing a flat editorial pound rate, among other things?

A. As I said in answer to a previous question, I can't link particular statements on the Floor of Congress or particular House or Senate reports in the legislative history where it links binding the nation together with reference to an unzoned editorial rate.

I guess in my mind I think there is a general connection, but I don't know of any particular connection in the legislative record, history of the Postal Reorganization Act.

Tr. 5757-5758

Respectfully submitted,

s/

John M. Burzio
Timothy L. Keegan
Burzio & McLaughlin
Canal Square, Suite 540
1054 31st Street, N. W.
Washington, D. C. 20007-4403
Telephone: (202) 965-4555
Fax: (202) 965-4432
E-mail: burziomclaughlin@covad.net

COUNSEL FOR
TIME WARNER INC.

s/

David Orlin
Senior Vice President Strategic Sourcing
Advance Magazine Publishers Inc.
4 Times Square
New York, NY 10036
Telephone: (212) 286-6370

ON BEHALF OF
CONDÉ NAST PUBLICATIONS, A DIVISION
OF ADVANCE MAGAZINE PUBLISHERS INC.

s/

Angelo Rivello
Senior Vice-President, Worldwide
Distribution and Manufacturing
Newsweek, Inc.
333 Route 46
Mountain Lakes, NJ 07046-0917
Telephone: (212) 445-5039
E-mail: angelonw@newsweek.com

ON BEHALF OF
NEWSWEEK, INC.

s/

Michael A. Brizel
Senior Vice President and General
Counsel
The Reader's Digest Association, Inc.
Reader's Digest Road
Pleasantville, NY 10570-7000
Telephone: (914) 244-5069
Fax: (914) 244-7807

ON BEHALF OF
THE READER'S DIGEST ASSOCIATION, INC.

s/

John P. Loughlin
President
TV Guide Magazine Group, Inc.
1211 Avenue of the Americas
4th Floor
New York, NY 10036
Telephone: (212) 852-7560

ON BEHALF OF
TV GUIDE MAGAZINE GROUP, INC.