

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

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

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Docket No. C2004-1

INITIAL BRIEF OF  
TIME WARNER INC. ET AL.

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.

December 23, 2004

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**INTRODUCTION**

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.") hereby respectfully submit their initial brief in this proceeding.

On December 1, 2004, Time Warner Inc. et al. filed Complainants' Memorandum of Law and Policy Relating to the Editorial Pound Charge for Periodicals. We stated there that the question of whether to introduce zoning in the editorial pound charge (EPC)<sup>1</sup> presents some "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

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<sup>1</sup> As we did in the memorandum, in this brief we follow the practice of the Court in *Mail Order Ass'n. of America v. United States Postal Service*, 2 F.3d 408, 434-37 (D.C. Cir. 1993) (MOAA), which for convenience used the term "editorial pound charge" or "EPC" to denote the pound rate applicable to non-advertising matter in Periodicals Class Outside County mail.

in Commission proceedings." We expressed the view that those issues--i.e., the historical purposes of the unzoned EPC and its continuing justification under sections 101(a) and 3622(b)(8) of the Act--could most usefully be addressed in a separate memorandum of law prior to the briefing stage of this proceeding. We indicated that the memorandum was intended "in place of what would otherwise have been our treatment of these issues on brief," where we did not intend to revisit them "[u]nless new matters or additional arguments c[a]me to light in the interim."

Because nothing new has come to light since our memorandum respecting the unzoned EPC's history or the proper interpretation of the Act's provisions regarding "bind[ing] the Nation" (§ 101(a)) and recognizing the "educational, cultural, scientific, and informational value" of mail matter (§ 3622(b)(8)), we place our reliance on the memorandum with respect to those issues.

The discussion that follows is therefore mainly addressed to the record evidence that we have presented in support of the following two assertions in our Complaint (filed January 12, 2004):

- (1) that the price signals sent to mailers in current Periodicals rates "are substantially inconsistent with cost incurrence as now understood," resulting in rates that are "significantly inefficient" and fail adequately "to recognize the mail's preparation, neither of which results is contemplated by the Act" (Complaint at 6); and
- (2) 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."

These subjects have been addressed extensively 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).

To the extent that this discussion does deal with the continuing justifiability of an unzoned EPC, its focus is not on the historical or legal aspects of the subject but rather on whether the unzoned EPC is consistent with sound principles of

economics and rate regulation. Specifically, we will review the substantial evidence on the record of this docket showing:

- (1) that the unzoned EPC is, as alleged in our Complaint, "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";
- (2) that the unzoned EPC imposes substantial operational and pricing inefficiencies on the Postal Service and the Periodicals subclass as a whole;
- (3) that the unzoned EPC provides a rate benefit to some publications only at the cost of imposing complementary rate burdens on other publications with similar (low circulation/high editorial) characteristics;
- (4) that no evidence exists showing what role the unzoned EPC currently plays--or indeed that it currently plays any role--in fostering "widespread dissemination of information"; and
- (5) that no evidence exists showing that any type or category of Periodicals publication would suffer severe or undue harm or be threatened by bankruptcy due to editorial zoning as proposed by the complainants.

The testimony of witnesses Mitchell (TW et al.-T-1), Stralberg (TW et al.-T-2 and RT-2), Gordon (TW et al. T-3), Schick (TW et al.-T-4), and O'Brien (TW et al.-RT-1) all provide support for one or more of these propositions. Just as significantly, the testimony of witnesses for American Business Media (ABM), the McGraw-Hill Companies, Inc. (McGraw-Hill), and the National Newspaper Association (NNA) make highly generalized assertions to the contrary but fail entirely to substantiate them.

## **I. BACKGROUND AND PURPOSE OF THE TIME WARNER INC. ET AL. COMPLAINT**

On January 12, 2004, the five complainants, all major users of Periodicals class mail, initiated this proceeding in order to propose "fundamental reform of the Periodicals rate structure to achieve greater conformity with the ratemaking provisions of the Act."<sup>2</sup> The historical background of longstanding criticism of the Periodicals rate structure by an array of parties and rate-design experts, long-term deterioration in the efficiency of Periodicals mail-processing operations, and persistent, unanswered challenges to the reliability of Periodicals mail-processing cost attribution and distribution is reviewed in the Complaint itself (at 4-5 and 14-19) and in the testimony of witness O'Brien (TW et al.-RT-1 at 2-7: Tr. 5/1426-31). In both of those places, the Complainants acknowledged that the Postal Service and the Commission have long recognized and sought to address the problems and that their efforts have brought some progress toward more incentive-oriented rates, but we also observed that progress had been modest at best and that the fundamental causes of the poor performance of the Periodicals class remained largely unaddressed.

Of particular concern to the Complainants was that, after some promising developments in the late 1990s, progress stalled. O'Brien describes the work of the joint industry/USPS Periodicals Operations Review Team, which was created shortly after the issuance of the Docket No. R97-1 decision under the sponsorship of American Business Press (now American Business Media), the Magazine Publishers of America, and the Postal Service:

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<sup>2</sup> Complaint of Time Warner Inc. et Al. Concerning Periodicals Rates (January 12, 2004) ("Complaint"), at 4.

The primary data gathering effort of the Team, of which I was a member, was a series of visits to postal facilities in the fall of 1998. During these visits, it became quite clear to me and the other members of the Team that in many instances the rates charged to Periodicals class mailers bore little relation to the costs incurred by the Postal Service to process and deliver the mail.

TW et al.-RT-1 at 5: Tr. 5/1429. He also recounts how little has been done in the six years since the Periodicals Operations Review Team issued its Report in March 1999, recommending that "[t]he Periodicals rate structure should be reviewed to ensure that it is consistent with the overall Periodicals processing strategy and induces appropriate mailer behavior." Particularly disappointing in the period immediately leading up to the filing of their Complaint were the failure of the Postal Service to file "its long awaited Product Redesign case" (id. at 6: Tr. 5/1430) and the conservatism bordering on timidity that characterized the Periodicals classification proposals that the Postal Service was willing to support.

Thus, by early 2003, with an expected 2005 omnibus rate filing getting closer and the prospect of any serious classification reform proposal by the Postal Service growing increasingly dim, Complainants believed that there was

a lack of congruity between the elements of the Periodicals rate structure and the actual cost-causing characteristics of Periodicals mail that has become increasingly troubling, and increasingly well understood, during nearly three decades of study and analysis since it was first identified.

Id. at 5: Tr. 5/1429. They also believed that the pace and scope of progress in addressing these concerns had been: (1) excessively cautious because of the Commission's concerns about potential rate impacts on small publications and about providing an adequate period of adjustment for all types of Periodicals mailers, and because of the Postal Service's aversion to any proposal that did not command a "consensus" within the relevant mailing community; (2) more conservative than warranted in light of the substantive improvements in our

understanding of rate design and cost causation over the preceding 10-15 years; and (3) incommensurate with the gravity of the distinctive cost-control problems experienced by Periodicals mail over the same period.

Feeling that "the burden of advancing the cause of cost-based rates" had fallen on them by default (*id.* at 6: Tr. 5/1430), Complainants therefore undertook in the Spring of 2003 a major effort to explore avenues by which that cause might be advanced. That effort led to the conclusion that adequate information is available to proceed with improvements without a specific filing by the Postal Service and that the Commission "possess[es] the authority to remedy deficiencies in the Periodicals rate structure that prevent mailers from taking steps to help themselves, steps that would reduce the costs and increase the efficiency of the Periodicals subclass overall." Complaint at 5. Additional months of work devoted to developing the Complaint that was filed on January 12, 2004.

The gravamen of that Complaint, which we said (at 4) "concerns fundamental reform of the Periodicals rate structure," was as follows:

Because they are substantially inconsistent with cost incurrence as now understood, the signals sent to mailers in Periodicals rates are significantly inefficient, so much so that they impair the value of Periodicals mail service by raising costs and failing to recognize the mail's preparation, neither of which results is contemplated by the Act. Improvements in cost analysis in the past decade, along with advances in mechanization, have shown that costs are determined in meaningful and systematic ways by the makeup of bundles, sacks, and pallets and associated interactions, including entry points. . . . More than half of Periodicals mail processing costs in today's environment are incurred handling the bundles, sacks, and pallets in which mail is entered. Yet the rates provide little information concerning what these costs might be, and, accordingly, there is no way that mailers can make efficient decisions.

*Id.* at 6.

## II. COMMISSION ORDER GRANTING HEARING AND DEFINING SCOPE OF THE PROCEEDING

On March 26, 2004, the Commission issued Order No. 1399, accepting the Complaint under § 3662 (over the jurisdictional objections of the Postal Service<sup>3</sup>) and announcing its intention to hold hearings under § 3624 "to determine whether the allegations in the Complaint are valid."<sup>4</sup>

After reviewing the Complaint, the Commission concluded:

The Complaint raises a sophisticated, not simplistic, claim . . . a challenge to the continued efficacy of Outside County Periodicals rates, given a structure that may be so outmoded and inapposite that the rates it generates ipso facto violate controlling provisions of the Act. . . . The pleading also contains substantial discussion about why Complainants contend that consistency with these policies is lacking. . . . [The Complainants] have provided, throughout their extensive filing, a full and complete statement of their grounds, including specific reference to the postal rates involved and the policies to which it is claimed they do not conform. . . . This is a complaint that raises basic issues about the efficacy and legality of a current rate structure applicable to an entire class of mail. The Commission will consider these issues, ask for and review data as appropriate to inform our deliberations, and if necessary recommend changes to that structure.

Order No. 1399, at 11-12. The Commission also made the important determination, which the Complainants regard as entirely understandable in the circumstances, that its decision "will not include a rate recommendation." *Id.* at 2. Rather, the Commission said,

[i]f this Complaint is found to be justified, the most proper course of action for the Commission will be to recommend to the Governors classification changes that describe and define a rate structure more consistent with the policies of the Act. This

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<sup>3</sup> Answer of the United States Postal Service (February 11, 2004).

<sup>4</sup> Order No. 1399, Order on Periodicals Rate Complaint (issued March 26, 2004), at 1-2.

will allow the Postal Service to develop in the first instance rates designed to fairly implement the new rate structure.

Id. at 13. In reaching this conclusion, the Commission reasoned that

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

Id. It expressed the hope that "not postponing consideration of the potential need for [a] significantly revised rate structure to the next omnibus rate case . . . should result in the most complete and balanced record possible for analyzing the issues raised by Complainants." Id. at 14.

### **III. COMPLAINANTS HAVE SUBSTANTIATED THE ALLEGATIONS IN THEIR COMPLAINT**

#### **A. Stralberg's Costing Testimony (TW Et Al.-T-2) Demonstrates that Periodicals Costs "Are Determined In Meaningful and Systematic Ways by the Makeup of Bundles, Sacks, and Pallets and Associated Interactions, Including Entry Points" (Complaint at 6) and that Existing Data Provide a Basis for Pertinent Improvements in the Periodicals Rate Structure**

##### **1. Stralberg provides a comprehensive, fully documented explanation of how bundles, sacks, pallets, pieces, and weight affect mail-processing costs**

Stralberg begins his direct testimony (TW et al.-T-2: Tr. 1/13 ff.) by describing the major cost-causing characteristics of a Periodicals flats mailing and explaining why it is important that postal rates recognize these characteristics and their impact on Postal Service costs. He further explains "why the flawed assumption inherent in today's rate design, namely that costs depend only on the number of pieces and the number of pounds, combined with other constraints, sends many incorrect signals to the mailers, resulting in Periodicals postal costs being much higher than they need to be." Id. at 4: Tr. 1/22.

Because Periodicals flats are prepared in presorted bundles which are then placed either in sacks or on pallets, many processing costs are incurred in handling not individual flats but bundles, sacks, and pallets (or other containers used to transport sacks and bundles). Stralberg describes the types of handling that are performed on Periodicals bundles, sacks, pallets, and individual flats and shows that most of the costs of such handling occur on a per-unit basis. For example, the costs of handling sacks (including opening, shaking out and recycling each sack) depend mostly on the number of sacks, in addition to other characteristics of the sacks, such as their presort level and where they are entered into the postal system relative to their final destination. Id. at 5-8: Tr. 1/23-26.

Because costs are incurred each time an employee handles a bundle or sack or pallet, while current Periodicals rates are based only on the number of pieces and pounds in a mailing, Stralberg argues, mailers have insufficient incentives to help reduce the costs their mail imposes on the Postal Service. He believes that the rate structure should also include per-bundle, per-sack, and per-pallet charges. *Id.* For example, in explaining why there should be per-sack charges, Stralberg says: Such charges would, in my opinion, quickly reduce the fairly widespread practice among Periodicals mailers of sending sacks with only one or a few pieces in them through the postal system. A cost based sack charge may not seem unreasonable if the sack contains 40 pieces, but it would present a strong disincentive to mailing a sack with only one piece.<sup>5</sup>

Similarly, with regard to bundles, Stralberg points out that while the current rates provide strong incentives to use small bundles in order to maximize the per-piece presort discounts, there are no offsetting incentives to minimize the number of bundles that postal employees must handle. Cost-based charges for bundles, sacks, and pallets as well as pieces will give mailers and software developers incentives to seek the proper balance between (1) avoiding piece-sorting costs by creating finely presorted bundles, and (2) avoiding bundle-handling costs by creating fewer, less finely presorted bundles. Similar tradeoffs apply to sacks and pallets. By producing less finely presorted but fewer sacks and pallets, and entering them as

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<sup>5</sup> *Id.* at 6: Tr. 1/24. Later developments in this proceeding have provided ample evidence that, while sacks with only a single piece in them may be relatively rare, sacks with only a single bundle in them are used extensively by many mailers. It is precisely mailers who use such low-volume sacks that would, absent changes in mailing practices, experience high increases in postage under the cost-based rates proposed by Complainants, whereas mailers that use an average of 40 or more pieces per sack, even if they are small and do not use pallets, would do fairly well under the proposed rates. See section III.C and D below.

close to the final destination as possible, mailers can in many instances reduce the Postal Service's overall handling costs.<sup>6</sup>

Stralberg points out several anomalies in the current piece-rate structure. He also points out that with the advent of the AFSM-100 sorting machines, machinability of flats on these machines has an important impact on costs, and he proposes that Periodicals rates also distinguish between machinable and non-machinable flats. *Id.* at 9-10: Tr. 1/27-28.

Stralberg also identifies various mail processing costs that, while they involve handling individual pieces or bundles, are more properly characterized as weight- or cube-related. *Id.* at 11-12: Tr. 1/29-30. For example, flats bundles may be sorted into hampers or other rolling stock, which when full are removed and transported to the next location, where the bundles will be processed. Such containers will fill up faster if the flats are thick or there are many flats per bundle. These costs are therefore primarily determined by cube, which tends to vary in closer proportion with weight than with the number of pieces or bundles, and so it is more appropriate to classify them as per-pound costs.

*Id.* at 9: Tr. 1/27. Similarly, flats pieces that have been sorted once are moved to subsequent operations that may or may not be in the same postal facility. These movements entail costs, but such costs are again mostly weight- or cube-related. *Id.* at 11: Tr. 1/29.

Questions about which Periodicals costs are piece-related and which are pound-related have long been debated but never fully resolved. Stralberg

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<sup>6</sup> Traditionally, the Postal Service has used minimums specified in the DMM to avoid the use of excessively small bundles and pallets. There are no real minimums for sacks, however. Stralberg argues that such minimums are better abandoned and replaced with rate incentives because minimums are never optimal for all occasions. For example, it does not make sense to use the same bundle minimums for machinable and non-machinable pieces. *TW et al.-RT-2* at 30: Tr. 5/1569.

contributes to our understanding of this issue in two important ways: first, by identifying costs that are neither piece- nor pound-related and are more properly thought of as per-bundle, per-sack, or per-pallet costs; and second, by identifying specific mail-processing activities that are predominantly weight-related.

There have been only a few feeble attempts in this proceeding to rebut Stralberg's analysis of cost-causing factors. There seems, in fact, to be no serious disagreement that the numbers of bundles, sacks, and pallets are important drivers of Periodicals mail-processing costs, or that mailpiece machinability also affects costs.<sup>7</sup> The few objections that have been raised are of two kinds.

One objection is that there are other cost drivers in addition to those identified by Stralberg and Mitchell. This is a fact that no one denies, but the number of bundles, sacks, and pallets in a mailing have been shown by Stralberg to be major cost drivers over which the mailer has control through decisions about how to prepare a mailing and are therefore suitable for inclusion in rates. Furthermore, as described in the following section, Stralberg has demonstrated the feasibility of estimating the unit costs and volume data that are needed to include these cost drivers explicitly in the rate schedule.

The second objection to Stralberg's cost analysis is that he did not identify all the costs that are in fact primarily weight-related. That is probably true, since to some extent weight affects almost all postal operations, including some that traditionally have been thought of as strictly piece-related (see, e.g., *id.* at 38: Tr.

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<sup>7</sup> The Postal Service apparently agrees not only that the numbers of bundles, sacks, and pallets affect costs, but that to make these numbers explicit elements in the rate schedule is an idea whose time has come, for it has been conducting "market surveys" in which Periodicals and Standard mailers are asked their reaction to hypothetical rate schedules involving per-bundle, per-sack, and per-pallet charges.

1/56). The effort to identify other weight-related components of Periodicals costs should continue beyond this proceeding, as Stralberg himself recommends.<sup>8</sup>

## **2. Stralberg develops an expanded set of billing determinants**

In order to add an element to the rate schedule for Periodicals (or any other class), one must know what revenues the new rate element will raise; this in turn requires knowing the number of units to which the new rate element will be applied. The billing determinants that the Postal Service collects each year are based on mailing statements and only supply information about current rate elements.

To perform the rate design in this case, witness Mitchell needed information on the number of bundles, sacks, and pallets by the appropriate presort levels and container entry point categories. He also needed piece-volume data by bundle presort level, machinability, and pre-barcoding. Stralberg developed a method to extract these extended billing determinant data, normalized to the FY03 test year (TY03) on which the current rates are based. For this purpose he used the documented results of two Postal Service surveys: the Docket No. R2000-1 mail characteristics survey, contained in LR-I-87; and the Docket No. R2001-1 entry point study, contained in LR-J-114.

To extract data from the LR-I-87 mail characteristics survey of R2000-1, Stralberg adopted a method similar to that used by witness Miller (USPS-T-24; LR-J-61) in R2001-1. But whereas Miller only extracted some piece-related billing

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<sup>8</sup> Id. at 39-40; Tr. 1/57-58. Witness Miller (USPS-T-2) argues that there may be a weight-related component to the cost of handling pallets, based on an answer Stralberg provided to an ABM interrogatory asking the maximum unobstructed speed at which a forklift could travel with a pallet. Stralberg answered that he did not know but that he assumed the weight of the pallet, among other factors, might impact the maximum speed. That answer is hardly relevant to the true cost of moving pallets at postal facilities across platforms and workroom floors. Such moves hardly ever involve maximum unobstructed speed and almost always involve navigating through (sometimes congested) traffic.

determinants, and only used them internally in his model, Stralberg devised a way to use the same methodology to extract bundle-, sack-, and pallet-related volume data, by appropriate presort categories. He then used the LR-J-114 entry point data to expand his sack and pallet volume data.

No attempt has been made to rebut any part of Stralberg's development of the expanded billing determinant data and not a single question about his methodology was raised in either his written or oral cross examination.

### **3. Stralberg develops all the unit costs needed in the proposed rate design**

Stralberg developed a comprehensive mail flow model to estimate all the unit costs needed for Mitchell's cost-based rate design. The starting point for this development was the model presented by the Postal Service as LR-I-332 in Docket No. R2000-1. The LR-I-332 model started out as a joint industry/Postal Service development project in the early stages of R2000-1. Stralberg was intimately involved in the early stages of that project. TW et al.-T2 at 17-18: Tr. 1/35-36.

The LR-I-332 model is the first known model of Postal Service mail processing that provides estimates of per-piece, per-bundle, per-sack, and per-pallet unit costs for Periodicals flats, broken down further by presort level, entry facility in the case of sacks and pallets, and machinability and pre-barcoding in the case of pieces. Stralberg recognized it as the best available starting point for developing the types of unit cost data that would be necessary in order to propose a comprehensive reform of the Periodicals rate structure.

Stralberg also realized, however, that the model as it had been left at the end of the Docket No. R2000-1 rate case still needed considerable work. Following is Stralberg's summary of the most important changes he had to make to the original model:

- wage rates and piggyback costs from TY01 of R2000-1 were changed to TY03 of R2001-1;
- the model was changed to use PRC costing methodology;
- the R2000-1 modeling assumptions for flats piece sorting were changed to the R2001-1 assumptions, which include a more dominant role for the AFSM-100 machines;
- mail flow assumptions for containers entered at origin facilities were modified in accordance with the LR-J-114 entry point data;
- some costs categorized in the original model as per-bundle were re-categorized as per-piece, and other costs originally categorized as per-bundle or per-piece were re-categorized as primarily weight related.
- a CRA adjustment was applied to the modeled costs to make them correspond to TY03 after rates mail processing costs for non-letter Periodicals.

Id. at 18: Tr. 1/36.

All of the above changes, as well as many additional minor adjustments and corrections, are described in detail in Stralberg's direct testimony and the associated library reference.<sup>9</sup> Before turning his unit cost estimates over to Mitchell, he normalized them, using the extended billing determinants, to match the TY03 CRA cost data. TW et al.-T-2 at 33-34: Tr. 1/51-52. To match the CRA data more closely, he performed separate normalizations for unit costs that represent piece sorting activities and those that represent other types of processing activities. Id. at 34-36: Tr. 1/51-53.

There has been practically no rebuttal of the unit costs provided by Stralberg. The criticism of witness Miller (USPS-T-1) amounts to little more than the observation that this is not the kind of thing the Postal Service intended the LR-I-332

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<sup>9</sup> Id. at 18-38: Tr. 1/36-56; TW et al. LR-1, Revised 4/26/04.

model to be used for. In so arguing, Miller reveals his ignorance of the genesis of the LR-I-332 model development.<sup>10</sup>

Miller's testimony says (at 5) that "the goal of most special cost studies is to calculate avoided or additional costs, not 'bottom-up' costs for specific mail." Tr. 6/2158. But Miller does not explain what he means by "bottom-up costs," an expression not used by Stralberg or Mitchell. Nor does he explain in which sense he believes that the types of unit costs computed by Stralberg's model, or by LR-I-332, are fundamentally different from the unit costs he himself presented in Docket No. R2001-1, other than being somewhat less aggregated.<sup>11</sup>

The Stralberg/LR-I-332-type models do add a level of complexity as well as realism relative to Miller's type of presort-related flats model, because they include handlings performed at postal platforms and recognize that flats do not pass through the entire postal system as flats but start out as sacks or pallets, which are then opened to become bundles, which in turn are eventually opened to become individual pieces.

Another criticism offered by Miller is that the various productivity, acceptance, and mail flow data used in Stralberg's model either are too old or "may not support" the type of analysis performed. Without any comprehensible explanation, he insists

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<sup>10</sup> Miller claims that LR-I-332 was developed in order to respond to PRC Order No. 1289 (issued March 28, 2000). and POIR 4 (issued February 25, 2000). But, as the Postal Service confirms in response to an interrogatory redirected from Miller, the development of LR-I-332, with strong industry involvement, started prior to either of those dates. While Stralberg was present and an active participant at the initial February 10, 2000 meeting, as well as several subsequent phone conferences and meetings, to discuss the methodology and data used in model development, Miller was not. Responses to TW et al./USPS-RT1-3, redirected to the Postal Service and TW et al./USPS-RT1-3c: Tr. 6/2258, 2123..

<sup>11</sup> Miller also says he believes the cost analyst's job is to provide worksharing related cost estimates to a "pricing witness," who then determines an appropriate "pass through" to achieve "rate design goals." Miller at 6. In fact, Stralberg did provide his cost estimates to the pricing witness, Mitchell, who used those cost estimates to achieve a set of carefully considered rate design goals.

that the same data he and others used in developing the current rates are not reliable when used by Stralberg in developing the proposed rates. USPS-RT-1 at 9-11: Tr. 6/2162-64.

In fact, both Stralberg and the Complaint itself make quite clear that the Complainants recognize the limitations of much of the older data that Stralberg had to rely on. The Commission recognized the same fact when it decided that no new rates would be recommended at the end of this proceeding. As the Commission also recognized, however, these limitations relate to the suitability of the data for current use in setting rates based on current costs. They do not limit its suitability for recommending improvements in rate design over the design that existed when the data were collected and indeed long before they were collected. See Order No. 1399 (March 26, 2004) at 13-14.

None of the objections raised by Miller or others identifies specific inaccuracies in Stralberg's model. Nor does Miller offer suggestions for any better data source that Stralberg could have made use of, or respond constructively to any of the many costing issues Stralberg raised.

#### **4. Stralberg raises several important costing issues that have never previously been addressed**

Inherent in the Complainants' case, and in the Commission's decision to hear the case but without recommending new rates, is the assumption that newer and, it is hoped, better data will be available in the upcoming rate case, which will allow the Postal Service to develop more accurate estimates of bundle, sack, and pallet unit costs, which can then be used to recommend more cost-based Periodicals rates. In preparing its costing analysis, we hope that the Postal Service also will give serious consideration to the many costing issues raised by Stralberg and to the many flaws that he identified in the original LR-I-332 model. Some of these issues are summarized below.

a. *Weight related costs*

The LR-I-332 model defined certain costs as being incurred on a per-bundle or per-piece basis, even though, as Stralberg has shown, they are predominantly weight-related. The question of whether there are additional costs that ought to be classified as wholly or partially weight related should be pursued further. TW et al.-T-2 at 36-38: Tr. 1/54-56.

b. *Bundle breakage issues*

The Postal Service clearly cares greatly about bundle breakage and in recent years has tried to do something about it, including implementing a comprehensive set of regulations for how bundles are prepared by mailers. When it comes to costing, however, the fact is that it is difficult to estimate the costs of bundle breakage and to what extent such costs should be considered piece-, bundle-, or container-related. LR-I-332 treated such costs as per-bundle costs, but Stralberg has explained that they should more properly be categorized as per-piece costs, since when a bundle with many pieces breaks the added costs are proportionately larger than when a bundle with a few pieces breaks. He also notes, however, that since breakage occurs mainly to bundles that have traveled in sacks, there is justification for defining some of the resulting costs as container-related. He also points out several flaws in the Postal Service's model of bundle breakage costs, as exemplified by Miller's model in Docket No. 2001-1, that tend to exaggerate the total costs of bundle breakage. TW et al.-T-2 at 21-22 & n. 17, 25 n. 20: Tr. 1/39-40, 43.

c. *Bundle preparation costs*

Stralberg explains that while the opening of non-carrier route bundles and preparing the flats in them for piece sorting incurs significant costs in today's postal facilities, he was not able to model those costs, because no suitable productivity

data exist (or at least none have been made public by the Postal Service). TW et al.-T-2 at 9: Tr. 1/27. Also, whether such costs are primarily piece-related or bundle-related, and whether they are also to some degree weight-related, remain to be determined.

*d. Pallet-related productivity rates*

Stralberg points out that the pallet productivity rates he was able to use (for loading, unloading, cross docking, etc.), which are mostly BMC-based, may exaggerate the costs of handling pallets in smaller SCFs and DDUs, where pallets are moved much shorter distances.

*e. Incoming secondary costs at DDUs*

The Postal Service still performs a large part of its incoming secondary flats distribution manually in its delivery units (DDUs). Yet it does not know what productivity rates it achieves in that type of sorting. Response to TW et al./USPS-RT1-1a.b: Tr. 6/2121. Because the costs involved are fairly large, model inaccuracies can result from not knowing the true productivity of this operation. This possibility applies not only to Stralberg's model but equally to traditional worksharing models such as that presented by Miller in R2001-1.

These are only some of the important costing issues addressed in Stralberg's testimony to which the Postal Service has provided little or no meaningful response in this docket. It should address all of these issues in its preparation of the upcoming rate case.

**B. Mitchell’s Rate Design Testimony Explains the Substantial Inefficiencies and Distorted Incentives that Result from the Failure to Recognize these Cost Drivers and from the Unzoned Editorial Pound Charge, and Presents an Alternative Rate Structure that Would Better Align Rates with Accepted Economic Principles and the Ratemaking Policies of the Act**

In his testimony and associated discovery responses, witness Mitchell (TW et al.-T-1: Tr. 3/793 ff.) explains the weaknesses in the current rates, develops rates that address those weaknesses, and explains the alignment of his rates with accepted economic principles, the emphasis of the Commission in prior opinions, and the guidance provided in the Act. Mitchell’s testimony encompasses virtually every important issue in this proceeding, and his analysis is supported and complemented by the testimony of the other witnesses for the Complainants, most notably that of Halstein Stralberg (TW et al.-T-2: Tr. 1/13 ff.). Except for occasional expressions of antipathy to deaveraging and allegations that Mitchell does not care about the welfare of small publications (see Tr. 6/1692, 1932, 2231), participants have not found fault with Mitchell’s work.<sup>12</sup>

**1. Mitchell cogently explains the benefits of cost-based rates and the destructive effects of rates that do not reflect underlying economic realities**

Mitchell first shows, by developing a rate index, corrected for changes in product mix and cost coverage<sup>13</sup>-- in effect, a cost index<sup>14</sup>--that despite numerous

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<sup>12</sup> McGraw-Hill witness Schaefer has a major heading: “Any Valid Concerns of Complainants Should Be Addressed Through Appropriate Discounts Rather Than De-Averaging of Rates.” The fact is, however, that excepting rare instances of new mailer activities, there is no difference between deaveraging and providing discounts. Tr. 6/1942.

<sup>13</sup> Witness Tang questions whether Mitchell should have corrected for cost coverage changes by adopting a uniform cost coverage or by adopting a uniform markup index. Response to TW et al./USPS-RT2-7: Tr. 6/2185 ff. For present purposes, however, this is a non-issue and need not be evaluated or decided; it just happens to make very little difference which of the two approaches is

[footnote continues on next page]

advances in technology and substantial increases in the use of pallets, Periodicals costs have increased for some years at a rate far in excess of the Consumer Price Index. He argues that this fact "makes it all the more important to search for other avenues of progress, on which this Complaint focuses." Tr. 3/800. Rates that make the mailstream more efficient are a step that can be taken toward alleviating the detrimental impact on mailers of rising Periodicals costs.

Mitchell explains that costs are not recognized adequately in the current rates, that many of the signals provided in those rates are counterproductive, and that the rates are poorly aligned with accepted rate design principles, recognized by the Commission, dealing with such things as cost recognition, efficient component pricing, the appropriate recognition of worksharing, the importance of signals in rates, and notions of lowest combined cost.

Acknowledging that costs *do* receive attention and that the Commission *has* approved many cost-based changes in the Periodicals subclasses, Mitchell argues that there nevertheless remains an excessive degree of averaging in some rate categories, discouraging efficiency in postal operations and unnecessarily inflating class-wide costs. For example, pieces in a carrier route bundle *on a 3-digit pallet*

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used. See TW et al.-LR-4, Sheet 1, year 2001 on line 9; column K shows an index of 262.72 at a constant markup, and column L shows an index of 275.3 at a constant markup index.

<sup>14</sup> Witness Tang pointed out that the average per-piece postage actually paid by Periodicals mailers over the same period rose less precipitously (USPS-RT-2 at 9-11: Tr. 6/2162-64); but the average per-piece postage (often referred to as average revenue per piece) is a revenue index, expressed on a unit basis, not a cost index. It is affected by changes in product characteristics (such as weight per piece) and product mix, including the degrees of presorting, prebarcoding, and dropshipping, and is often associated with investments mailers make in the way they prepare their mail. It is therefore irrelevant to the question of how rapidly the costs of Periodicals have risen.

In TW et al./USPS-RT2-22(d) (Tr. 6/2217-18), Tang was asked whether she agreed that the purpose of Mitchell's index was to develop a cost index. She agreed that it was, but pointed again to TW et al./USPS-RT2-7 as providing reasons why Mitchell's index might not "adequately fulfill that purpose." A review of that response provides several reasons why the Commission might change the cost coverage over time, but no reasons why a price index at a constant cost coverage (or at a constant markup index), suitably corrected for mix, would not be adequate as an indicator of costs.

receive different processing and incur different costs from the same pieces in the same bundle *on a 5-digit pallet*, yet the rates are the same.

But, as explained by Mitchell and demonstrated by Stralberg's analysis of costs, the lack of costbasedness goes much deeper than the averaging of costs among pieces within existing rate categories. We now understand and have information on basic cost drivers that are not recognized in rates at all. For example, the cost of handling sacks depends largely on the number of sacks and is relatively independent of the number of pieces in those sacks. The number of sacks, then, a number that mailers do influence, is the determinant of costs. Yet there are no per-sack charges, with the consequence that mailers are unable to make informed decisions on how many sacks to use.

Mitchell outlines the nature of cost drivers and the role they should play in rates. If a 10 percent increase in volume occurred, one would in general expect a 10 percent increase in the number of sacks, and then a 10 percent increase in the variable costs of handling sacks. The linkage goes from volume to sacks to costs. The driver is the number of sacks. Its importance derives from the ability of mailers to control it and from the fact that the cost of handling a sack is relatively independent of the number of pieces therein. The other cost drivers not currently recognized in rates are the number of bundles and the number of pallets.

Postal Service witness Miller (USPS-RT-1: Tr. 6/2150) testifies that the number of cost drivers is really very large and that those selected for recognition in this Complaint are but a small subset, apparently meaning to imply that the drivers selected may be arbitrary or no different in character and importance from any number of other unrecognized drivers. Miller provides a list of 20 examples of other possible drivers, which includes network configuration, building configuration, equipment available, methods used, and piece dimensions. Tr. 6/2157. But these are clearly not suitable cost drivers for rates. Given a volume increase of 10

percent, one would not expect a 10 percent increase in network configuration or in piece dimensions, nor would a 10 percent increase in these in any sense cause a 10 percent increase in any variable cost associated with them. Furthermore, mailers cannot respond to signals relating to network configuration or to most of the other drivers that Miller lists. Simply put, they are not drivers in the appropriate sense and they are not suitable for recognition in rates. The drivers identified in the Complaint relate to mail preparation alternatives faced regularly by mailers. There are links between volume, drivers, and costs. The options mailers have are not narrow; mailers can respond to signals. If additional drivers of similar importance were identified, Complainants would support their recognition as well. We know of none, and Miller has identified none.

Without reducing the benefit provided to editorial matter, and using cost information provided by witness Stralberg, Mitchell develops a revenue-neutral set of rates that zone the full weight and recognize the cost drivers identified above.<sup>15</sup> In kind, although not in specific detail, Mitchell's methods are in line with the methods used to develop rates in the past by the Commission, and they honor rate principles relied on regularly by the Commission. Mitchell selects a proportion of revenue to obtain from the pound rates and develops cost-based rates for the zones. He also develops piece rates (recognizing many of the same categories recognized in current rates), bundle rates, sack rates, and pallet rates. These in turn depend appropriately on entry points and relevant aspects of makeup. Except for overriding concerns about whether progress should be made, no questions have been raised on this record concerning *any* specific aspect of his rate design.

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<sup>15</sup> Tang emphasizes that any redesign of Periodicals rates "needs to take into account revenue leakage from existing activities." Testimony, p. 8 line 12: Tr. 6/2232. However, when asked if she was aware of any leakages Mitchell had not accounted for, she responded: "No." Tr. 6/2184.

Even where the rates developed by Mitchell contain discounts similar to those currently in existence, his proposed design is in many cases more balanced. Consider his pallet discounts. A 3-digit pallet entered at an origin office would pay a pallet charge of \$40.02. A group of 3-digit sacks entered at the same office would pay \$3.22 each. His discount for using a pallet depends, therefore, on the number of sacks eliminated per pallet. That is, it is related to the actual savings, not just to some average. If the pallet and the sacks are entered at a different location, the charges are different, reflecting different savings to the Postal Service and providing different signals to the mailer.

All of these charges are fairer and more coherent than the pallet discounts now in place. Consider the current rates for two pallets arriving at a destination SCF facility, one in a Postal Service truck and one in a private truck. To the mailer of the pallet in the Postal Service truck, the rates say, in effect: "The Postal Service has saved several cents per piece carrying your mail across the country because you put it on a pallet rather than in sacks. Plus, it saves an additional 2 cents per piece here at this destination facility. You will therefore receive a discount of *0.5 cents per piece*." To the mailer of the pallet in the private truck, however, the rates say: "Relative to being in sacks, you have saved the Postal Service nothing carrying your mail across the country, because the Postal Service did not carry it. But you have saved it 2 cents per piece here at this destination facility. You will therefore receive a discount of *1.5 cents per piece*." This structure defies rational explanation. Equally troubling examples could be offered. The rates proposed by Mitchell are free of such characteristics.

Another notable feature of the proposed rates is that the sack rates vary with the entry office, i.e., with whether the sacks are dropshipped. This means that the dropship discounts tend to be larger for sacks than for pallets, whereas they are smaller under the current rates. The larger dropship discounts for sacks make

sense, because the postal savings for dropshipping sacks are larger. The rates would thus provide an incentive to get expensive sacks out of the system and would be more fair to mailers who dropship sacks, sometimes by air freight, or who otherwise enter sacks in destination facilities. Moreover, the smallest publications of all tend to be entered in sacks at destination offices, and the number of such publications is very large. See Response of Postal Service Witness Tang to Notice of Inquiry No. 1, items 1, 2, and 9.

**2. Mitchell proposes an alternative rate structure that better conforms to the policies of the Act**

In the final section of his testimony (Tr. 3/841 ff.) Mitchell explains the ways in which his proposed rates are more consistent than current rates with the guidance provided in the Act. The increased congruity of rates with costs (factor b(3)) is obvious, as are the incentives for improved preparation of the mail (factor b(6)). These factors are central to the development of the proposed rates. Similarly, the value of the mail service (factor b(2)) is more thoroughly recognized and more effectively enhanced under the proposed rates, which would empower individual mailers, who understand what value they place on things like bundles, sacks, and pallets, and who also know their own costs, to make properly informed decisions about the number of them they wish to purchase.

The question of rate complexity (factor b(7)) has been the subject of some difference of opinion. See McGarvy Tr. 6/1782 and Schaefer Tr. 6/1942. Especially in view of the complexity of the current rates, this is a non-issue. The proposed rate structure employs units such as bundles, sacks, and pallets, as well as characteristics like makeup, entry points, and presort levels. These are all inherently understandable to mailers because they are already central to their operations. Even to the very smallest of Periodicals mailers, sometimes portrayed as arranging mailings on a kitchen table, the number of bundles and containers is

neither an unfamiliar concept nor difficult to ascertain. Larger mailers use computers and have never complained about complexity. Neither is the process of optimization around the new rates inordinately complex. As witnesses Stralberg and O'Brien explain, the most important changes that mailers will need to make, such as changing the sack minimums in a program, can be explored and implemented quite easily. Tr. 5/1432 and 5/1568. Software vendors will, as always, respond with more sophisticated approaches. For the proposed changes as for the many previous changes approved by the Commission, the higher returns due to any increase in complexity will substantially exceed any higher costs.

Even though there is no precise or generally accepted yardstick, formula, or principle by which to assess questions of fairness, as Mitchell explains, the proposed rates have many features that most people would regard as improvements in fairness. They would recognize costs according to incurrence. The likelihood of a mailer seeing his rates increase because of a decision made by another mailer would be considerably reduced. Similarities and differences among mailers would be recognized in terms of their cost effects. Most persons would view it as unfair for one mailer to be given the same rate as another whose efforts have made it less expensive for the Postal Service to provide the service.

Mitchell also argues that it is fair to "give mailers tools for responding to the situations they face, and for influencing the market into which they are essentially locked." This principle is one of the central lessons of the history of regulation. Regulatory regimes that present consumers with an array of choices and whose rates bear some rational relation to the underlying economic realities (i.e., to the real costs of the choices involved) and allow them to adjust their conduct according to those choices are less destructive to neighboring sectors of the economy, are perceived as less arbitrary (and in fact *are* less arbitrary), and are therefore more

sustainable than those that sever the connection between price to the consumer and real cost. Mitchell explains:

They [mailers] have sought options for cooperating with the Postal Service in ways that would help both sides. They have been willing to invest of themselves and make changes, if only given the options and the appropriate signals. They have found themselves *with* the motivation, but *without* the tools. The proposed rates provide mailers with a broader range of signals relating to costs and resource usage. The rates place a little more of the outcome in the hands of the mailers themselves, so they can do more than stand and watch. I believe this is an inherently fair thing to do.

Tr. 3/846.

Finally, Mitchell has carefully considered how best to recognize ECSI value (factor b(8)). The rates he proposes recognize ECSI value in a fair and balanced way, without discriminating among Periodicals mailers or interfering with other rate design objectives, but do not reduce the magnitude of the preference for editorial over advertising. It is true that the proposed rates would reduce the preference accorded some publications with high editorial content that are transported to the most distant zones, which currently receive an extremely large benefit. But arranging to provide that benefit requires the neglect of other desirable goals and imposes an unfairly high cost on other mailers. Moreover, it imposes these costs, Mitchell argues, without furthering the breadth with which any information is distributed or achieving any other identifiable policy objective of the Act. As discussed elsewhere in this brief, the justification and desirability of singling out this one subset of Periodicals mailers for an unusually high benefit is open to serious question.

**C. Stralberg's Surrebuttal Testimony and His Analysis of Data Provided in Response to NOI No. 1 Demonstrate that Relatively Minor Changes in Mail Preparation Would Enable Most Publications to Avoid Severe Rate Impacts**

Faced with insistent but unsubstantiated claims that the proposed rate structure would benefit only a few very large publishers, that the vast majority of the 30,000 or so Periodicals class publications would be unable, because of their size, to adapt to the changes and would experience large increases in postage, and that many would go out of business or be forced to switch to Standard rates,<sup>16</sup> Stralberg set out to investigate the reality behind these assertions.

Collecting the type of data on the mailing characteristics of a variety of publications that is needed for this kind of analysis proved difficult in the early stages of the case, because the witnesses making such claims did not base them on any data or apply them to any identifiable publications or group or type of publications, and because those witnesses would not, or could not, provide requested data on the publications they themselves were affiliated with.<sup>17</sup> By the end of the proceeding, however, much useful information became available on many different kinds of publications, including very small ones. Stralberg had the following data to work with in performing his analysis:<sup>18</sup>

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<sup>16</sup> See, e.g., ABM-T-2 (Bradfield) at 2-6, 12, 16: Tr. 6/1687-89, 1697, 1701; ABM-T-1 (Cavnar) at 5, 21: Tr. 6/1725, 1741; ABM-T-3 (McGarvy) at 1, 6, 9, 13-14: Tr. 6/1775, 1780, 1783, 1787-88; MH-T-1 (Schaefer) at 2, 11, 27-28: Tr. 6/1920, 1929, 1945-46; and USPS-RT-2 (Tang) at 7: Tr. 6/2231.

<sup>17</sup> See Presiding Officer's Ruling on Complainants' Motions to Compel and Request for Declaratory Order (POR C2004-1/16), issued October 28, 2004 (ruling, at 15: "Participants are hereby placed on notice that in the absence of adequate foundational support for Exhibit LB-1 and related testimony, an adverse inference may be drawn"). For further discussion, see section IV.A below.

<sup>18</sup> In response to interrogatories, McGraw Hill also provided information on its publications and estimates of the impact, assuming no change in mailing practices, of the proposed rates. McGraw Hill declined to provide any mail.dat files. Response to TW et al./MH-4(c): Tr. 6/1984-85; and library reference MH-LR-1.

- (1) Mail.dat files for all Periodicals publications mailed by the five complainants, including many supplemental mailings, produced in response to discovery requests of ABM.<sup>19</sup>

Stralberg estimated the impact of the proposed rates on each such publication. Most, but by no means all, would experience lower postage under the proposed rates.

- (2) A table purporting to show estimates of the impact of the proposed rates on 153 Periodicals belonging to five ABM member companies, included in witness Bradfield's testimony as Exhibit LB-1 (Tr. 6/1703-06).

Almost all of these publications were shown with higher postage, some with very large increases. However, most of the underlying data with which these results might have been replicated had been destroyed, and ABM refused to provide such data as had not been destroyed. Tr. 6/1886. In responses to interrogatories, ABM's witnesses confirmed that the table assumed that the publications represented would make no changes in their mailing practices in response to changes in the rate structure.<sup>20</sup>

- (3) A spreadsheet that showed considerably more details about the analysis reported by Bradfield in Ex. LB-1, produced by ABM in response to discovery requests.<sup>21</sup>

From this somewhat more complete information, Stralberg was able to demonstrate that all of the very large increases shown by Bradfield were for Periodicals that use very low-volume sacks, and that these low sack volumes were a direct consequence of fulfillment program input parameters that could easily be modified to produce many fewer sacks.

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<sup>19</sup> Response and Supplementary Response of Witness Stralberg to ABM/TW et al.-T1-3, redirected from witness Mitchell: Tr. 1/112-131.

<sup>20</sup> Responses to TW et al./ABM-T2-24: Tr. 6/1674-75; TW et al./ABM-T3-8(c): Tr. 6/1759-60. Only one witness for an opponent of the proposed changes claimed to have made any study of the ability of any publication to mitigate the impact of the changes by changing its mailing behavior. At the request of counsel for ABM subsequent to the initiation of this proceeding, witness McGarvy made such a study of publications of her employer, Crain Communications. However, ABM objected to providing the results of that study, and the Presiding Officer declined to compel production. See TW et al./ABM-T3-2: Tr. 6/1753; and POR C2004-1/16 at 15.

<sup>21</sup> See TW et al.-RT-2 at 11: Tr. 5/1550; and library reference TW et al. LR-7.

- (4) A folder containing older mail.dat files ( from the year 2001) for 155 ABM publications, produced by ABM in response to discovery requests, pursuant to a non-disclosure agreement.<sup>22</sup>
- (5) An analysis by witness Tang of the potential impact of the proposed rates on 55 large, medium and small publications, sampled from the universe of all outside county Periodicals.<sup>23</sup>
- (6) An expansion of Tang's sample, at the Commission's request, to 251 publications, including 101 "small" (less than 15,000 circulation) and 100 "medium" (between 15,000 and 100,000 circulation) publications.<sup>24</sup>

In response to an interrogatory from the complainants, Tang provided a great deal of additional information about the mailing characteristics of each of these publications.<sup>25</sup>

- (6) Much detailed information about the characteristics and mailing practices of the *Cameron Observer*, a small weekly newspaper in western Missouri that Crews described as "typical" for small newspapers, provided by NNA witness Crews in response to several interrogatories.<sup>26</sup>
- (7) Additional information provided by witness Tang in response to NOI No. 1, breaking down the universe of publications that she had characterized as "small" into four subcategories by size, where the smallest, those with circulation under 1,000, turned out to be by far the largest in terms of the number of titles (15,152 with mean circulation equal to only 224).<sup>27</sup>

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<sup>22</sup> Response to TRW et al./ABM-4(b): Tr. 6/1826-27; see also library references TW et al. LR-8, LR-9, and LR-10 (all subject to protective conditions).

<sup>23</sup> USPS-RT-2 at 2-7: Tr. 6/2226-31. Tang confirmed with respect to her analysis, as ABM's witnesses did with respect to Bradfield's Ex. LB-1, that it assumed that the publications represented would make no change in their mailing practices under the proposed rates. Response to TW et al./USPS-RT2-19: Tr. 6/2213.

<sup>24</sup> Response of Tang to POIR No. 2: Tr. 6/2237-51.

<sup>25</sup> Response to TW et al./USPS-RT2-13: Tr. 6/2204-06: USPS LR-1/C2004-1.

<sup>26</sup> TW et al./NNA-T2-1-6 and 8-10: Tr. 6/2002-21.

<sup>27</sup> Response of United States Postal Service Witness Tang to Notice of Inquiry No. 1 Concerning Periodicals Data, filed December 1, 2004.

Some surprisingly clear conclusions became possible on the basis of this information.

Stralberg concluded that, *assuming no change in mailing practices*, most, though by no means all, small and medium sized publications would pay higher postage if the proposed rates were to be implemented. A few would pay much higher postage, 80-90% in some cases.<sup>28</sup> But Stralberg was able to demonstrate that such large increases are directly correlated with highly inefficient mailing practices that affected mailers could change simply by deciding to do so. Practically without exception, the high postage increases that would occur for a few publications are a direct result of mailing in very low-volume sacks, an extremely wasteful practice that appears to have taken hold among many mailers because current regulations permit it and current rates do not discourage it. TW et al.-RT-2 at 26: Tr. 5/ 1565.

The widespread practice of using sacks with only a single bundle or a few pieces is rooted in a belief, apparently encouraged by some postal managers who have no better answer to complaints about poor Periodicals service, that this will lead to faster delivery. Id. at 23-24: Tr. 5/1562-63. But in addition to being a very costly way to achieve improved service, there is no evidence that it works, or indeed that it has any effect beyond causing additional work for postal employees, which can only increase the likelihood of significant delays. As Stralberg points out, the only study that has been done of whether high-presort, low-volume sacks help speed delivery arrived at the conclusion that the opposite is true.<sup>29</sup> Stralberg's

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<sup>28</sup> TW et al.-RT-2 at 9-17: Tr. 5/1548-56.

<sup>29</sup> TW et al.-RT-2 at 24-25: Tr. 5/1563-64.

presents a detailed analysis of the flow of mail entered in sacks with different sack presort levels, which confirms that the practice is almost always counterproductive.<sup>30</sup>

What emerges from Stralberg's careful analysis is that there are considerable cost savings to be realized simply by changing the practice of mailing in very low-volume sacks, but that the practice will continue unabated if mailers are excused of all responsibility for the costs imposed on the Postal Service by using so many sacks and putting so little in them.

Stralberg's results disprove the notion that only those small and medium sized publications with access to co-mailing, co-palletization, and pool dropshipping services would be able to adjust to and benefit from the rates proposed by Complainants. It is true that such services are becoming increasingly available to more and more mailers, and their availability would no doubt increase substantially were the proposed rates to take effect. See section D below. Mailers who are able to take advantage of such services may have more to gain than those who are not. But even without such services, there is every reason to believe that mailers, with appropriate adjustments in mailing practices, would be able to avoid the large increases opponents of the proposed changes claim they would experience, and in most cases could even achieve lower postage than at present.

In approaching the analysis of the large amounts of data available from Tang and from the ABM mail.dat files, Stralberg observed that the Complainants' proposal in this docket can be viewed as consisting of two fairly distinct components, namely: (1) the introduction of separate per-bundle, per-sack, and per-pallet charges, with

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<sup>30</sup> Id. at 23-26; Tr. 5/1562-65. Stralberg also points out that since the Postal Service's systems for sorting and handling flats and bundles are superior to its slow and damage-prone sack-handling methods, it makes no sense for a single bundle or a few flats pieces to travel through the system in a separate sack. It is better if they travel as flats or bundles: "that is how First Class flats travel through the system, and there seem to be relatively few complaints about their service."

corresponding reduction in revenues drawn from piece and pound rates, along with recognition of flats machinability; and (2) the proposed zoning of the editorial pound rates.

In order to enhance the understanding of how different types of mailers would respond to and be affected by each of these components, Stralberg developed an alternative rate schedule with an unzoned editorial pound rate but which is otherwise identical to Mitchell's proposed rates. TW et al.-RT-2 at 4-5: Tr. 5/1543-44. His results show a high likelihood that if the proposed rate schedule were to be implemented, but retaining the unzoned editorial rate, most small, medium and large publications would be able to reduce their postage, if not immediately then after some period of readjustment. When zoning of the editorial rate is included, fewer publications might be able to benefit in the short run, but in the long run there is little doubt that the move to a zoned editorial pound rate would benefit the class as a whole as well as most of its members. See section E below.

Because Tang had reported that "small" publications would be the worst off under the proposed rates, Stralberg focused on that subcategory within her sample and addressed the question Tang herself had not addressed, namely: how it is possible that some "small" publications could face postage increases of almost 90% while other equally "small" publications face postage decreases of almost 16%? TW et al.-RT-2 at 7: Tr. 5/1546.

As shown in Stralberg's tabulation of pertinent characteristics of Tang's small publications, the dominant reason why some of these publications would experience very high postage increases is the use of very low-volume sacks. Id. at Table A-1: Tr. 5/1573. Practically all the double-digit increases for Tang's "small" publications are associated with use of sacks containing little more than a single bundle. Except for publications that engage in this highly wasteful practice, Stralberg's Table A-1 indicates that a majority of small, low-density publications would in fact pay lower

postage under the unzoned editorial pound rate alternative to the proposed rates than they currently pay. When zoned pound rates are included, there are more whose postage would increase, but there are also many whose postage would decrease, by as much as 17 percent.

Stralberg analyzed in a similar manner mail.dat files (dating to 2001) for 154 ABM publications. He found that more than half of these would pay *lower* postage than they do today if the proposed rates were implemented without the zoned editorial pound rates. Since these publications are mostly distributed nationwide and do little dropshipping, however, 85% would pay higher rates when the zoned editorial pound rate is included. Consistent with earlier observations, the publications that would experience very large increases are, in practically all cases, the ones that use low-volume “skin sacks.” If the ABM publications that rely heavily on “skin sacks” were to abandon that practice, the proposed rates without editorial zoning would either lower their postage or cause a small increase.

Stralberg’s analysis of the small Missouri newspaper (outside county circulation: 364) that witness Crews termed typical of such newspapers revealed yet another case of a publication using far more sacks than necessary, based on a misguided belief that this will somehow lead to faster service.<sup>31</sup>

Thus Stralberg was able to show that the single characteristic of low-volume sack usage explains most of the high increases that Tang and ABM's witnesses claim would be experienced by many small publications. Such increases will not

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<sup>31</sup> Crews acknowledged in response to interrogatories that: (1) the *Cameron Observer* uses nine mixed ADC sacks to mail 81 copies destined out-of-state; (2) that mailing them in one sack instead of nine would make no difference in their time to delivery; and (3) that if the proposed rates were implemented, they would be mailed in one sack rather than nine. Response to TW et al./NNA-T2-8: Tr. 6/2018-19.

occur in practice, because small publications, given cost-based price signals in the form of per-sack charges, will not continue to use so many small sacks.

Another factor identified by Stralberg as a contributor to the higher postage that some (large and small) publications would experience under the proposed rates is non-machinability. Unlike excessive use of skin sacks, a non-machinable format is something that many publications might find difficult to change, at least in the short run. Nevertheless, formats can be and often have been changed. And as Stralberg points out in discussing the non-machinable formats used by some ABM publications: "it seems only fair that they should pay the extra costs that such formats cause because of their incompatibility with the AFSM-100 machines." TW et al.-RT-2 at 17: Tr. 5/1556.

The additional information on small publications made available by Tang in her response to NOI No. 1 shed further light on the likely impact of the proposed rates on the majority of Periodicals, which are small. Until that set of data was filed, there was no reason to think that the circulations of the 25,000 or so Periodicals publications with "circulation under 15,000" were other than fairly uniformly distributed between 0 and 15,000. But Tang's data revealed this not to be the case at all. In fact, more than half of these publications, 15,152 of them, have circulations under 1,000, with a mean circulation of only 242. In further comments on these data, Tang indicated that 35% of these 15,152 very small publications are the outside county components of in-county publications, about half of which may be newspapers. Furthermore, of an additional 6,821 publications with a circulation under 5,000 (and a mean circulation of 2,081), Tang indicates that 46% have an in-county component.

In comments on Tang's latest data (Response of Time Warner Inc. et al. to NOI No. 1 [December 8, 2004]), Stralberg noted that, given the zone distribution indicated for the 15,152 smallest publications, they would collectively pay *less*

postage under zoned editorial pound rates than they do now. An average editorial pound for these small publications would pay 9.2% less if the rates were zoned.<sup>32</sup> For the next and second largest group, with circulation between 1,000 and 5,000, the average editorial pound rate would be roughly the same whether the rates were zoned or not.

It is impossible to determine with certainty how many of these very small publications would experience respectively higher and lower postage under the zoning of editorial pound rates. But Stralberg has demonstrated that it is likely that most of them would pay less. And as Stralberg comments, “the current system of an unzoned editorial pound rate denies [many thousands of very small publications] recognition of the fact that they impose few transportation costs on the Postal Service, thereby negating part of the editorial benefit they would otherwise receive.”

**Cite.**

Section III.E below further substantiates the widely unrecognized fact that the current unzoned editorial pound rate harms at least as many small publications as it helps.

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<sup>32</sup> Strictly speaking, Stralberg’s conclusions apply to the 82% (12,425) of the 15,152 for which zone distribution is known. Tang indicates in her latest response that “a lot” of the remaining 18%, which have no advertising, are academic journals, whose distribution generally is nationwide. She did not indicate whether “a lot” means 20% or 80%. But academic journals in general are available on and subscribed to on the Internet to a much greater extent than most Periodicals, and the per-copy costs of producing such journals dwarfs the postage differentials at issue in this case. It is therefore doubtful that the Commission needs be concerned about the zoning of editorial rates for such publications, and any such concern should not deprive the whole Periodicals subclass of the cost savings and beneficial rates that would be effected by the rate structure changes proposed by Complainants..

**D. The Unsubstantiated Assertions of ABM and McGraw-Hill that Smaller Publications Cannot Alter their Current Mailing Practices Were Refuted**

There will be numerous ways in which mailers can receive help to adjust to the proposed cost-based rates and make the most out of the opportunities they present.

Witnesses Schick (TW et al.-T-4) and O'Brien (TW et al.-RT-1) have documented the growing array of options available to Periodicals mailers in the form of comailing, co-palletization, and pool shipping services, all of which will allow mailers to bypass more of the postal network and take better advantage of cost-based rates. O'Brien and Stralberg have explained how mailers of any size, whether or not they have access to those services, can easily modify their current mailing practices to avoid large increases that otherwise might result from the new rates, and in many cases even reduce their postage bill. Stralberg has explained the numerous opportunities for further cost reduction that the new rate incentives, combined with less restrictive postal regulations, will offer, and the role of mailing software providers in making these opportunities accessible to all publishers.

Witness Schick, the Director of Postal Affairs at Quad/Graphics, Inc., described his company's role in the development of the comailing and pool shipping services that today are offered by a number of printers. Quad Graphics pioneered the technique of comailing and today provides comailing services to about 120 Periodicals, with circulation volumes as low as 1,500 per issue and as large as over half a million. Quad also markets comailing equipment for use by other printers. Schick explains how comailing provides the ability to also co-palletize, besides facilitating the combining of Periodicals in pool shipments.

Schick also explains how artificial restrictions in today's rate structure limit the services that can be provided to Periodicals by his and other companies:

I firmly believe that in a cost-based rate structure where there are natural incentives to create finer sorts, fewer packages and containers (with greater incentives placed on pallets), and more dropshipments, we will see more printers and other mailers making investments in technology, software, and processes designed to create the lowest cost mail while creating the most efficient production process. The net result will be the “lowest combined costs” for the preparer of the mail and the Postal Service.

TW et al.-T-4 at 11: Tr. 2/348.

In particular, Schick explains how the current unzoned editorial pound rate is limiting his ability to offer pool shipping service to Periodicals. Referring to Quad’s operation he comments: “today the majority of Standard Mail, Bound Printed Matter, and Package Services (Parcel Select being 100% dropship) are already utilizing drop shipment, while Periodicals are lagging far behind.” Id. at 13: Tr. 2/350.

Opponents of rate reform like to argue that only very large printers servicing very large customers can afford services such as co-mailing and that such services therefore are not a relevant option for most Periodicals. ABM-T-1 at 2: Tr. 6/1722. But Schick made it clear that comailing today is much more available than it was 15 years ago:

Comailing can be done on much of the existing equipment that is found in every printer’s plant today. If a printer has selective binding capabilities, they can comail. The amount of comailing is limited, but it can be done. Comailing can be done on polywrapping equipment that is being used by the majority of printers today, although there may be a need for modifications. Equipment built specifically for comailing is readily available from a number of different vendors today. The software to drive the comail process is essentially the same as that being used for selective binding. Comailing operations also require the same ancillary equipment (strappers and shrink wrappers) that would be used on a binding line.

Response to ABM/TW et al.-T4-57: Tr. 2/433.

O’Brien describes a number of recent developments, including several that occurred after the filing of Schick’s testimony, which clearly demonstrate how the

industry is changing and how services that in the past may have been offered only by a few large printers are becoming more and more common because the industry already has come to expect that cost-based Periodicals rates will become a reality:

Clearly, both small and large printers are developing the capacity to co-mail, co-palletize, and drop ship in anticipation of more cost based rates. In addition, small printers have several drop shipping pools available to them from companies like R.R. Donnelley and Fairrington. There is no excuse for any printer to not move forward in these areas

TW et al.-RT-1 (O'Brien) at 16: Tr. 5/1440.

Some of the very recent developments cited by O'Brien that show the extent to which the industry is on the move are:

- A recent (August 2004) announcement from Quebecor World Logistics that it will expand its comailing line and begin to accept for comailing publications that have been printed at other printers. This is believed to be an industry first. O'Brien also mentions that some of Time Inc.'s smallest titles, which are printed at Brown Printing, will be comailed by Quebecor.
- Development of comailing capability by Fry Communications, a small family owned printing business, using "a state of the art co-mailer purchased from Quad Graphics. Fry also uses Donnelley Logistics Services to drop ship its customers' products into the Postal Service system."
- Development of a co-palletization pool for small-circulation publishing clients at Publishers Press, another small family-owned printer.
- Expansion to include comailing and co-palletization capabilities at Perry Judd, a medium-sized printer.
- Establishment of co-palletization and pool shipping services for publishing clients by Fairrington Transportation, an independent transportation vendor.

Additionally, O'Brien refers to "confidential conversations with representatives of two companies that are planning to enter the co-mail business if the proposed rate structure change is approved and implemented. One company is in the process of securing financing and the other is seeking internal approval of its business plan."

O'Brien continues:

Clearly, the industry is positioning itself in anticipation of a more rational rate structure for Periodicals. These important developments run 180 degrees counter to witness Cavnar's statement that co-palletization and co-mailing "will not be available to many periodicals for a number of reasons."

TW et al.-RT-1 at 16: Tr. 5/1440.

O'Brien debunks another issue raised by ABM and McGraw-Hill witnesses, namely that small publications would find themselves unable to participate in comailing programs because they are locked into long-term contracts with printers who do not offer such services. O'Brien points out that printing contracts only cover printing and binding, not distribution, and that in his 30 years of experience in the publishing industry he has "never seen a printing contract stipulating that the publisher must distribute its publications through the printer's network." *Id.* at 13: Tr. 5/1437. As an example, he refers to his recent experience in negotiating to have some Time Inc. publications that are printed by Brown Printing comailed and distributed by Quebecor World.

Even with all the industry developments described above under way, and the practical certainty that the growth of available options will accelerate sharply if it becomes known that cost-based rates will be a reality, there obviously are many small- and medium-sized publications that for some time will remain without access to comailing, co-palletization, and dropshipping. But the rebuttal testimonies of O'Brien and Stralberg demonstrate that there are also several things mailers of any size can do immediately to avoid large increases that otherwise might result from the proposed rates.

As described in section III.C, Stralberg identified the use of low-volume sacks as the primary reason why some publications would face high postage increases. Eliminate the excessive use of very low-volume sacks, which after all is practiced only by a relatively small minority of Periodicals mailers, and the large increases

alleged by opponents of the rates simply will not occur. O'Brien explained why changing the sack minimum parameter in a fulfillment program in order to shift to the use of fuller sacks is a trivial matter, and why it is even more so in the case of someone preparing a very small sacked mailing manually.<sup>33</sup>

Stralberg identified non-machinability as another factor that would cause higher postage under the proposed rates. The current allowable height and width for machinable Periodicals are by no means excessively confining; for example, a tabloid-size publication such as *Advertising Age* qualifies as machinable.<sup>34</sup> Moreover the existing regulations for weight and thickness have not yet caught up with the capabilities of the AFSM-100 machines and could be further liberalized.<sup>35</sup> Whether a mailer who uses a non-machinable format would want to change is something the mailer must decide, but there is no reason to believe, and no allegation on the record, that the choice is not usually within the mailer's control.<sup>36</sup>

But avoiding small sacks and non-machinable format are only two of the ways mailers could reduce postage under the proposed rates. The proposed rate structure would open up a number of opportunities to individual mailers, printers, software developers, and others involved in preparing Periodicals mailings for entry into the postal system.

As Stralberg explains, the new rate structure, combined with the appropriate changes in mail preparation regulations, would offer mailers a wide range of

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<sup>33</sup> TW et al.-RT-1 at 8: Tr. 5/1432.

<sup>34</sup> Tr. 5/1516; TW et al.-RT-2 at 17 & n. 15: Tr. 5/1556.

<sup>35</sup> Response to ABM/TW et al.-T2-9: Tr. 1/85; TW et al.-RT-2 at 3 n. 1: Tr. 5/1542.

<sup>36</sup> For example, Stralberg reports finding a number of ABM-member Periodicals that were non-machinable not because of weight or thickness but because they have a 16" width, which is four more inches than the width the AFSM-100 machines can handle. If these publications adopted a

[footnote continues on next page]

opportunities to modify their mail preparation in ways that reduce costs. For example, whereas Periodicals mailers currently are limited by the six-piece per bundle minimum, they would be free to use different bundle minimums for different situations; lower bundle sizes may be desirable for non-machinable flats. Another possibility is that the optimal bundle size may differ depending on the presort level of the pallet on which the bundle is going to be carried.<sup>37</sup>

Opponents of the proposed changes, particularly McGraw-Hill witness Schaefer, have argued that all of these options will make things too difficult for small mailers, who will not know how to “optimize” their mailing in order to take advantage of the new opportunities.<sup>38</sup> But in reality, as Stralberg points out, the proposed rates also “remov[e] a whole lot of complexity in the current rate structure.” Tr. 1/277. Increasing the sack minimum to avoid skin sacks and other changes that would reduce mailing costs further are relatively simple and require only information “that every mailer who prepares his mailings [already] has to keep account of.”<sup>39</sup> For the most part, however, as Stralberg also points out, the task of reducing postal costs and individual mailer postage will rest with developers of mailing software, who will rewrite their software to maximize the opportunities the new rates offer. Tr. 1/138.

Given these opportunities, it is shortsighted to judge them only by what a given publication might pay the day after the rates take effect. The five individual complainants in their responses to POIR No. 1 (Tr. 6/2087-96), witness O’Brien in his rebuttal testimony, and US News & World Report, L.P. (U.S. News) in the

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machinable format, the percentage of ABM-member publications that actually benefit from the proposed rates would increase substantially. TW et al.-RT-2 at 15-16: Tr. 5/1554-55.

<sup>37</sup> TW et al.-T-2 at 7-8: Tr. 1/25-26.

<sup>38</sup> MH-T-1 at 24-25: Tr. 6/1942-43.

<sup>39</sup> Tr. 1/138, 278; see generally Tr. 1/278-83.

testimony of witness Armstrong (USNews-T-1: Tr. 6/2114 ff.) have offered many examples of how publications would modify their mailing practices to take advantage of opportunities presented by the proposed rates. Opponents, on the other hand, have offered no new ideas, only complaints about the difficulties that they say they, and other publications they claim to represent, might face under the proposed rates. In fact, if the proposed rates, or other similar rates, become a reality, they will exercise their creativity to improve their mailing practices and take advantage of them.

**E. The Record Strongly Supports the Conclusions that the Unzoned EPC Does Not Currently Serve the Purposes Traditionally Ascribed to It and that It Imposes Costs on the Periodicals Subclass Far Greater than its Benefits, and the Record is Devoid of Evidence that the Unzoned EPC is Necessary to the Continued Existence or Success of *Any* Identifiable Category or Type of Publication**

Complainants have raised a number of questions regarding any continuing justification for an unzoned editorial pound charge (EPC). Key among these are: (1) whether the unzoned EPC in fact was originated in the War Revenue Act of 1917 for the considered purpose of promoting national cohesion by insuring the widespread dissemination of information throughout the nation; (2) whether it was then carried forward for that same purpose by successive congresses into the era of postal reorganization; (3) whether, even if it was so originated and perpetuated, it continues to serve that purpose today; and (4) if not, what effects it does have today on the nation, the nation's postal system, the publishing industry, and the Periodicals mail subclass.

The first of these questions is addressed extensively in the Complainants' Memorandum of Law and Policy Relating to the Editorial Pound Charge for Periodicals (filed December 1, 2004) (Memorandum of Law). The third has been the subject of testimony by various witnesses (Mitchell, Stralberg, Schick, and

O'Brien) and is addressed in subsections 2 and 3 below. The second--whether, assuming that the unzoned EPC was enacted in 1917 to foster national cohesion and promote the widespread dissemination and accessibility of information, it still effects those purposes today--was the subject of testimony by John Steele Gordon, "an accomplished historian of American business and a columnist for American Heritage magazine."<sup>40</sup>

Our Memorandum of Law concluded that, in nearly all respects, the historical purpose and meaning of the unzoned EPC are fraught with uncertainty and ambiguity. We concluded, for example:

- that the creation of a bifurcated zoned advertising/unzoned editorial rate in the Act of 1917 was, like most highly controversial legislative enactments, the product of complex circumstances, conflicting political pressures, and uncertain objectives (Memorandum of Law at 12-15);
- that the chief, and only clear, purpose of the enactment was to curtail the enormous costs of the then-existing rate preference for periodical publications (which majorities of both houses believed not to be justified by the public benefits created), by bringing rates for periodicals more into line with the Post Office's costs to handle and transport them (id. at 12-15 and 22 n. 21);
- that, far from being seen as a victory for national cohesion and a blow to sectionalism, the enactment appeared at the time, and continues to appear from the perspective of history, a victory for "the rural and small-town press" and "rural Americans" seeking to "stave off the incursions of an aggrandizing national culture that they found unsettling," a victory that "ultimately capitalized on tensions between small and mass retailers, among regions, and between rural and urban culture--schisms that overlapped and reinforced one another";<sup>41</sup>

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<sup>40</sup> *Washington Post*, Book World, December 19, 2004, at 6.

<sup>41</sup> Memorandum of Law at 20-21 (quoting Richard B. Kielbowicz, "Postal Subsidies for the Press and the Business of Mass Culture, 1880-1920," *Business History Review* 64 [Autumn 1990], 451, 478, 451, 488).

- that many of today's beneficiaries of the unzoned EPC did not qualify for second-class rates at the time the Act was passed or for a considerable period thereafter (e.g., requester publications, which were granted eligibility for second-class rates only in 1980) (id. at 38).

The efficacy of the unzoned EPC in promoting the results it is claimed to promote--national cohesion; widespread dissemination of information--or forestalling the consequences it is claimed to forestall--the development of sectionalism or regionalism, particularly of a sectional or regional press; inaccessibility of published information to people who reside at distant locations--has always been more an article of faith than an established fact. The most obvious reason for this is that none of the key terms has ever been defined. Does "bind[ing] the Nation" (§ 101(a)) imply assisting the cause of national market and press institutions, social and geographical mobility, "assimilation," and "mass culture," as against the forces of sectionalism, localism, sectarianism, and "division"? Or does "bind[ing] the Nation" imply assisting the cause of local and family loyalties, individual values, upright character, honest toil, cultural rootedness, distinctive ethnic, local, and regional self-identification, and "diversity" as against the forces of "homogenization," rootlessness, "alienation," and "the lowest common denominator"? Is apprehensiveness about "division" the same thing as apprehensiveness about "diversity"? Is antipathy to "mass culture" the same thing as antipathy to social tolerance? Those questions are likely unanswerable, but all that matters for the purpose here is that they certainly have not been answered--not by Congress in 1917, or by succeeding congresses, and not by the Commission. Nor, we submit, are they questions to which it is possible to formulate an answer that can command wide agreement or acceptance.

The term "widespread dissemination of information" poses the same dilemma. It has never been clearly defined, and it appears not to be susceptible to

clear definition. This was the dilemma confronted by the Court of Appeals in *Mail Order Ass'n. of America v. United States Postal Service*, 2 F.3d 408, 437 (D.C. Cir. 1993) (*MOAA*), when it observed that "[t]he Commission appears to have relied primarily upon two provisions of the Act in determining that the goal of fostering 'widespread dissemination of information' justified rejection of a zoned EPC" but then concluded that the two provisions in question imply two different, mutually inconsistent meanings of "widespread dissemination of information." The Court was unable to find in section 3622(b)(8), which requires consideration of the ECSI value of mail matter to the recipient, any authorization for discriminating among types of editorial matter on grounds such as the distance it is transported by the Postal Service:

The Commission gave no reason why it considered the educational, cultural, scientific, and informational value of local publications such as *The Washingtonian*, 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.

Id. Indeed, the Court found that the only sense of "widespread dissemination" that is consistent with (b)(8) is "the generic interest in spreading information" and that this interest "may cut the other way" (i.e., against an unzoned EPC):

Because the divergence from cost principles has the probable tendency of increasing overall costs of distribution, and thereby reducing the market-clearing level of distribution, it may diminish the flow of information.

Id. The Court then turned to the other provision, "§ 101(a)'s mandate that the USPS 'bind the nation together through the personal, educational, literary and business correspondence of the people'" and found it to be not inconsistent with *a quite different sense* of "widespread dissemination":

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.

This, then, is the single policy justification for an unzoned EPC left standing by *MOAA*. The question immediately raised, therefore, is: does the unzoned EPC in fact effectuate the purpose of "increasing the nationwide distribution of units of information"? As indicated in our Memorandum of Law, the Court considered that question within the framework of a highly deferential standard of review. It reached directly into the transcript of the case on review to find testimony on the record, not cited in the Commission's Recommended Opinion, that "a zoned EPC would threaten the existence of [certain] nationwide publications" (*id.*), and it reached back to the Commission's decision thirteen years earlier in Docket No. R77-1 in order to find an asserted nexus between these alleged facts and the policy objective it had found to be permissible under § 101(a):

in the 1977 rate proceeding the Commission stated that "what shifts the balance decisively against [a zoned EPC] ... is the prospect of detrimental impact upon small publications which are mailed to the distant zones."

Id. at 436-37 (quoting PRC Op. R77-1 at 350). By weaving these strands together, the Court found that it was able to sustain the Commission's decision to maintain an unzoned EPC:

By raising the cost of sending such periodicals across the nation to potentially prohibitive levels, a zoned EPC would interfere with long-distance transmission of information and therefore could be viewed as inconsistent with the congressional purpose of "binding the nation" together.

Id.

As we observed in our Memorandum of Law (at 45), under the deferential standard of review it was bound to apply,

[t]he 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.

As we further stated (at 46):

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.

That commitment is fulfilled in subsection 3 below.

There are, however, two broader levels at which we believe "it has become increasingly evident that events have overtaken the Commission's original analysis of 'widespread dissemination of editorial information'." *Id.* The first is that the analysis takes the Postal Service's system of zones as its frame of reference. As our Memorandum stated:

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.

*Id.* That issue has already been treated in some detail and is further elucidated in subsection 2 below.

The second broader level at which events have overtaken the Commission's original analysis has to do with the development of communications media in the United States in the 20th and early 21st centuries and is the subject of the following subsection.

**1. Gordon's testimony confirms that the unzoned EPC no longer plays a significant role in promoting national cohesion or has an appreciable impact on the nationwide distribution and accessibility of information**

Witness Gordon (TW et al.-T-3) testified not as an expert on postal rates and classifications or their history but as an expert on the history of American business and technology. After reviewing the development, spread, and eventual universalization of various new media of communication during the 20th century, he concluded 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 unity or cohesion. *Id.* at 13: Tr. 3/627; see also Tr. 3/688.

Gordon also described the astonishing pace of growth 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 concluded that "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." Tr. 3/624, 784, 626. In connection with the growth of the Internet, Gordon particularly addressed an issue that is especially relevant to arguments for continuation of the unzoned EPC, namely the rate at which the Internet has been displacing print media as the primary source of highly technical or specialized information. That issue has special importance because the argument has often been made before that modern communications and transportation technologies have undermined the role of the unzoned EPC in assuring "widespread dissemination of information," and the reply has come back that those technologies--telephone, radio, television, the automobile, air travel--do not approach the effectiveness of the printed word for communicating highly technical, specialized, or voluminous information. See Memorandum of Law at 28-32. According to Gordon, in the fifteen years since the Commission last considered

the question, that situation has changed profoundly. As we stated in our Memorandum of Law:

Gordon . . . 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. 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.

Memorandum at 35 (citing Tr. 3/620-26, 680-82, 691, 697).

Opponents of the proposed changes, through witness Cavnar (ABM-T-1), assail Gordon's testimony, mainly by changing the subject. According to Cavnar:

Through witness Gordon, the complainants *claim* to be addressing the limited question of whether a flat editorial rate is still necessary to assure that the nation is bound together by the wide distribution of periodicals. I believe that Gordon's testimony goes well beyond that issue.

Id. at 12: Tr. 6/1732 (emphasis added). Cavnar then proceeds to attack Gordon's testimony on the basis of opinions extracted on cross-examination respecting the quite distinct issue of whether the Periodicals subclass ought to be a beneficiary of a rate preference on account of its editorial content. Gordon's written testimony says nothing at all on the subject, and his very first interrogatory response was the following:

ABM/TW et al.-T3-1. In light of your testimony concerning changes in the communications media and elsewhere since 1917, and your conclusion that zoning the editorial pound rate will not "cause the country to be divided by these zones," please state whether you believe that Periodicals should be granted a postal rate preference to reflect the educational, cultural, scientific and informational value of Periodicals' editorial content and, (b) if so, setting forth all of the reasons why.

## Response

I have not formed an opinion on the question.

Tr. 3/634.

In view of his written testimony and the quoted response, it is clear that Gordon did not "go" to the ECSI issue. Rather, ABM and McGraw-Hill insisted on taking him there. It is the position of the Complainants that the issue of whether "Periodicals should be granted a postal rate preference to reflect the educational, cultural, scientific and informational value of Periodicals' editorial content" was addressed dispositively by Congress when it added subsection (b)(8) to section 3622 of title 39 in the Postal Reorganization Act Amendments of 1976, and so that the matter is not, and cannot be, at issue in this or any other Commission proceeding unless and until Congress amends the existing law.<sup>42</sup>

Having changed the subject from the continuing efficacy of the unzoned EPC in achieving the objective of binding the nation and assuring widespread dissemination of information, which is what Gordon's testimony addresses, to the justification for a classwide rate preference based on ECSI value, which his testimony does not address, and about which he claimed no expertise and expressly stated he had "formed no opinion," Cavnar proceeds to distort the record even on that subject.

We will not pause over such transparent, outrageous distortions as Cavnar's description of Gordon as a "witness who believes that periodicals are obsolete and that the print medium . . . is no longer necessary" (Tr. 3/1732) (information that would probably come as news to the publishers of the twenty-four periodicals

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<sup>42</sup> See Response of Time Warner, Conde Nast, Newsweek, Reader's Digest, and TV Guide to ABM/TW et al.-T3-2, Redirected from Witness Gordon: Tr. 4/1382-85; and Memorandum of Law at 41-44.

Gordon states he reads regularly and the publisher of his books, the sixth of which, *An Empire of Wealth: The Epic Story of American Economic Power*, was issued by HarperCollins subsequent to his hearing).<sup>43</sup> Let us look instead of the exchange of which Cavnar writes condescendingly:

I know that after this exchange received some publicity in the trade press, a spokesperson for Time Warner explained that Gordon misspoke and that he was confused between the rate preference received by periodicals for their ECSI value, which was the subject of the questions, and the flat editorial pound rate, which the complainants oppose.

Any witness can become confused, and I do not wish to hold Mr. Gordon to a higher standard than I hope will be applied to me when I appear for cross-examination.

ABM-T-1 at 13: Tr. 6/1733. The exchange itself reveals that the issues of a rate preference based on § 101(a), for the purpose of "binding the nation," and a rate preference based on § 3622(b)(8) (one of the factors used by the Commission in setting classwide markups), in recognition of "educational, cultural, scientific, and informational value to the *recipient* of mail matter" (emphasis added), were thoroughly confounded by counsel and witness alike:

Q You don't believe that it's superfluous and unjustifiable for periodicals to enjoy lower rates because they have editorial content?

A I think it is far less necessary now. I think I'm not at all sure that it accomplishes or helps to accomplish in any significant way the object.

Q Well, I think you just told me two things. You said you don't think it superfluous and unjustifiable, but then I think you went on to say that it's pretty much superfluous and unjustifiable.

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<sup>43</sup> Response to ABM/TW et al.-T3-3: Tr. 3/635; TW et al.-T-3 at 1-2: Tr. 3/611-12.

Let me ask you again. Is a rate preference for periodicals based on ECSI value superfluous and unjustifiable?

A I think, yes, a rate preference is. I think the object of binding the nation together intellectually and culturally is a great social good.

Q But the rate preference for periodicals doesn't contribute to that good?

A Not any more I don't think.

Id.

Having generously conceded that "[a]ny witness can become confused," Cavnar proceeds to show his less generous side:

I find the defense of Mr. Gordon and the attempt to explain away his views simply demonstrates that he lacks the perspective and experience to offer views on postal rates, given other exchanges during his cross-examination.

Id. These "other exchanges," however, reveal not a lack of perspective but a difference of opinion. Cavnar chides Gordon for saying in "response to *written* cross-examination, where he had the advantage of having his responses at least reviewed by counsel and others, [that] he agreed with the proposition that 'Periodicals bind the nation together by providing a common source of information,' " but "when alone on the witness stand" agreeing that "Periodicals are less important in binding the nation together than they once were" (id. at 14: Tr. 6/1734 [emphasis in original]). But these two answers are, of course, entirely consistent with one another. Moreover, Cavnar's riposte to the statements that he says reflect a lack of "perspective" is a perfect non-sequitur:

Make no mistake about the fact that American Business Media and I vehemently disagree with Mr. Gordon. We believe . . . that reflection of ECSI value in rates continues to be important to maintenance of a "healthy, vibrant, and diverse" Periodicals class.

Id. That is a different subject. It is true that Cavnar and Gordon disagree. But what they disagree about is whether the preference for editorial matter currently makes a necessary or important contribution to the goal of "binding the nation," not whether the ECSI preference is "important to maintenance of a 'healthy, vibrant, and diverse' Periodicals class," a subject about which Gordon was not asked, and did not express, an opinion.

Cavnar's studied attempt to confound the issue of the ECSI preference with the issue of zoning the EPC reaches its highest pitch in the following remarkable assertion:

From the focus of their testimony, it would be fair to conclude that the complainants view ECSI value and its role in setting rates more narrowly than American Business Media and I do. They seem to think that it's relevant only to the issue of whether or not the flat editorial pound rate should be retained.

Id. at 19: Tr. 6/1739. This gets things exactly backwards. It is Cavnar and ABM who "seem to think that [ECSI value is] relevant only to the issue of whether or not the flat editorial pound rate should be retained." The Complainants, in agreement with the Court in *MOAA*, think that the ECSI provision is *irrelevant* to the policy of maintaining an unzoned editorial rate. We believe that the ECSI provision justifies providing no less benefit to editorial matter than it now receives, which is what our proposed rates would do. Unlike ABM, however, we fail to find in the ECSI provision any hint of a justification for a differential editorial preference based on the distance that editorial matter is carried in Postal Service trucks.

Cavnar also tries to rebut Gordon's testimony on a subject Gordon actually does address, the significance of the growth of the Internet for any continuing utility of the unzoned EPC in assuring the widespread dissemination of information or its equal accessibility irrespective of geographical location. In a similar vein to his caricature of Gordon as someone who "believes that periodicals are obsolete and

that the print medium . . . is no longer necessary," Cavnar describes Gordon as having "simplistic views about everything being available on line." Tr. 6/1735. Gordon, of course, expressed no such view, and Cavnar's attempted refutations of the views he did express hardly inspire confidence or evince a mastery of the subject. For example, Cavnar relies on witness Mitchell for the proposition that "in general, publishers' web sites do not contain the entire publication." Tr. 6/1736 (quoting Tr. 3/1137). What Mitchell in fact said was that his "experience in general has been that websites *often* don't include the entire publications." Tr. 3/1137 (emphasis added). More important is that Mitchell claims neither extensive experience in nor expert knowledge of the subject.

**2. Contrary to widespread perception, zoning of the editorial pound charge will benefit the majority of small, high-editorial periodicals and extend opportunities for change to all such Periodicals help some small, high-editorial publications but harm others**

Proponents of the unzoned EPC like to argue that it supports small, high-editorial content publications, thereby maintaining the diversity and vibrancy of the Periodicals class. Conversely, they would argue that zoning the editorial content, the way advertising content is zoned, would only help the very large publications that are able to dropship, while it would harm the thousands of small publications of diverse editorial content that must rely on the Postal Service for transportation.

Information that has become available in this docket, much of it for the first time, shows more clearly than ever before how fundamentally wrong this position is. First of all, as has been strongly indicated by the data on very small publications that witness Tang provided, and by Stralberg's further analysis of that data, most of the very small publications are local and would pay *less* postage if the editorial pound rates were zoned in the manner proposed by witness Mitchell. Secondly, while there clearly are many small nationally distributed publications with high editorial contents that initially would pay higher postage under zoned editorial pound rates,

these publications are unable, under the current rate structure, to take advantage of the rapidly increasing availability of pooled dropshipping as well as comailing and co-palletization services.

As mentioned in Section III.C., Tang's data on small Periodicals show that most of them are very small indeed, with 15,152--more than half of all Periodicals having circulation under 1,000--with a median circulation of 224 and a mean of 307. Furthermore, these publications have higher editorial content than the larger size categories, with 57% having less than 10% advertising content.<sup>44</sup> As Stralberg's analysis shows, an average editorial pound in this size category would pay 9.2% less under zoned editorial pound rates than if the editorial pound rate were to remain unzoned. This information is still not enough to determine precisely how many of the 15,152 would pay less and how many would pay more under the zoned alternative, but clearly it is very likely that the ones who would pay less are in a clear majority. Stated differently, the mostly local small publications that in fact are being denied the full editorial benefit, in some cases even paying more than if there were no editorial benefit at all, clearly outnumber the nationally distributed small publications that benefit from the present scheme.

As Tang's data also show, most of the rest of the publications with circulations below 15,000 are in the next smallest size category, with circulations between 1,000 and 5,000 and a median circulation of only 2,081. Stralberg's results indicate that roughly half of this group would also immediately pay less with zoned editorial pound rates, while the other half would pay more.

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<sup>44</sup> However, only 18% had no advertising content, since Tang was able to specify the zone distribution for the rest.

It is true that Stralberg's results for the 15,152 very small publications strictly speaking apply only to the 82% of those publications for which Tang was able to specify zone percentages. Tang has later indicated that many of the remaining 18% are nationally distributed academic journals. But obviously there are also many local church-related and other very small publications that have no advertising and therefore would not specify zone percentages. So even if we assume that as many as half of the 18% are nationally distributed journals, the result of Stralberg's analysis would remain the same: i.e., there are more small, high-editorial publications that are being harmed by the present scheme with an unzoned editorial pound rate than are benefitting from it.

Now let us examine more closely the case of very small but nationally distributed publications with high editorial contents, presumably the main remaining *raison d'être* for the unzoned editorial pound rate, and presumably, according to Tang's latest comments, mostly academic journals.

The fact is that most nationally distributed Periodicals, including academic journals, are produced and shipped from printing plants that also produce many other similar Periodicals. The growing availability of comailing, co-palletization and pool dropshipping described by witnesses O'Brien and Schick should eventually also extend to such plants, or these Periodicals will inevitably have the option of switching to plants that do provide such services. But that cannot happen as long as the unzoned editorial pound rate remains in force, because there will be absolutely no incentive to change the current practice. In that sense, high editorial publications are being held hostage--at a time when great opportunities for change are available--by the very scheme that was supposed to help them. As witness Schick pointed out, Periodicals lag far behind other classes in taking advantage of dropshipping services and may eventually end up paying for parts of the postal transportation system that other mail classes no longer use. And in fact, it may be

only the periodicals with high editorial contents and national distribution that end up using those parts of the expensive postal transportation system.

There are other reasons why we believe the Commission should not be overly concerned with the impact on nationally distributed academic journals. First, such journals, perhaps more than any other category of Periodicals, tend to be available in totality on the Internet, which is the most suitable (and preferred) medium for exchange of ideas and information between scientists, teachers, and students of narrowly defined academic disciplines. Secondly, producing the hardcopy version of such journals, precisely because they are small, tend to have high per-copy costs, which dwarf whatever postal costs such journals might pay.

**3. No publication or type of publication has been identified whose existence would be endangered or whose subscriber distribution would be affected by zoning the EPC**

A particular purpose of the unzoned EPC has been to help assure that information available in one part of the country is available on similar terms in all parts of the country, that is, to assure that information is equally accessible and that persons desirous of receiving a publication, but who happen to be located in a distant postal zone, are not rejected as subscribers. Mitchell testified that an unzoned EPC is unnecessary to this purpose. He argues that publishers, seeing a low marginal cost of printing<sup>45</sup> and mailing another copy, even if the full weight of the publication is zoned, would not reject any subscribers based on where they are located.

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<sup>45</sup> No participant has argued that the marginal cost of printing an additional copy is not low, in line with Mitchell's estimates, and no participant has supplied information on the marginal costs in its printing contracts.

The model in Mitchell's Appendix A formalizes this argument. Mitchell there points out that publishers face a reality in which many costs are fixed and argues that decisions made under such conditions would be expected to recognize that fixity.<sup>46</sup> Specifically, nearly all of their costs of developing editorial material, a large proportion of their printing costs, and almost all their overhead costs are likely to be fixed with respect to marginal variations in the number of subscribers. This is true for subscriber and requester publications. Additional subscribers or requesters can be accommodated by paying a low marginal printing cost, the additional postage, and any account maintenance costs. Under these circumstances, publishers would not find it profitable to reject subscribers or requesters on the basis solely of the portion of postage associated with the change from an unzoned to a zoned EPC.

Mitchell's model assumes that, over time, economic realities will tend to bring circulation and advertising rates into alignment. In other words, there is a profitability associated with subscribers and requesters, which is why the publisher is in business, and on an incremental basis this profitability tends to extend to subscribers in all postal zones. Postage differentials of the magnitude at issue in this proceeding simply are not large enough to justify the costs to publishers of administering differential postage rates by zone and therefore would not bring about discrimination against distant subscribers.

No participant has questioned Mitchell's assumptions about the fixity of certain costs, the low marginal cost of printing, or the role of discounts from published advertising rates. Nor has any participant presented a contrary account of how decisions are made concerning basic business models or zones of subscribers.

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<sup>46</sup> Mitchell does not deny that firms sometimes make decisions that are misaligned with the objective of being profitable, by recognizing fixed costs in the wrong way.

No participant has produced a single example of differential subscription pricing or other discrimination among subscribers or requesters based on postal zones in either the current or the proposed rates. No qualified subscriber or requester in a high zone would be precluded from receiving any publication available to others as a consequence of the rate-structure changes proposed in this docket.<sup>47</sup>

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<sup>47</sup> Several arguments have been presented that do *not* challenge Mitchell's model. Specifically, see Cavnar's discussion of the "cushion" often kept between actual circulation and promised circulation (Tr. 6/1728) and his acknowledgment that factors other than circulation also affect advertising rates (Tr. 6/1728 ff.).

**IV. NO ADVERSARY OF THE PROPOSED CHANGES ANALYZED OR PRESENTED EVIDENCE OF THEIR LIKELY IMPACT ON ANY PUBLICATION**

**A. No ABM Witness Presented, or Purported to Present, Analysis of the Likely Impact of the Proposed Rates on Any Publication**

ABM presented three witnesses, Cavnar (ABM-T-1), Bradfield (ABM-T-2), and McGarvy (ABM-T-3), each of whom works professionally in the area of business publishing and each of whom makes various assertions about the detrimental impact the proposed rates would allegedly have on some substantial portion of Periodicals mailers. Cavnar, for example, states: "at the rates proposed, I believe many Periodicals mailers would see their rates increase above the Standard rates." ABM-T-1 at 21: Tr. 6/1741. McGarvy testifies:

I know from the study we and a few other American Business Media members did of the impact of the proposed rates, the results of which were provided to Time Warner in discovery and provided as an exhibit to Lou Bradfield's testimony, that rate increases of 50% and more under the proposed rates would not be rare.

ABM-T-3 at 6: Tr. 6/1780. And Bradfield, the titular sponsor of Exhibit LB-1, a table that purports to be "a calculation of the impact of the Time Warner [sic] proposed rates" on 153 publications owned by five ABM members, states that "there is . . . no doubt that of the 25,000 or so outside-county Periodicals in the mail (Tr. 1041), a good number would be staring at increases of the type portrayed at the upper end of the range on my exhibit [i.e., approximately 80 percent] with no reasonable opportunity to change their mailing practices." ABM-T-2 at 6: Tr. 6/1691. When the Complainants sought to discover the factual basis for these assertions, they discovered that there was none.

When Cavnar was asked the basis for his statement that "many Periodicals mailers would see their rates increase above the Standard rates," he replied: "My

statement is not based upon analysis of any particular titles but upon my own experience in the industry." Response to TW et al./ABM-T1-8: Tr. 6/1714. He made the even stronger claim that 15% of 25,000 Periodicals were likely to pay more than Standard rates. He based this on the observation that in Bradfield's Exhibit LB-1, 15% of ABM publications are shown with increases over 20% and that in his experience Standard rates are about 20% higher than those for Periodicals. But as Stralberg points out, publications would experience this kind of increase only if they continue to use very low-volume sacks, a practice that is not allowed for Standard mail. Current DMM regulations for Standard flats submitted in sacks require that each sack contain either 150 pieces or 15 pounds. Such a requirement would simply disallow the types of sacks that would cause some Periodicals to experience high increases under the proposed rates. TW et al.-RT2 at 13. Cavnar did not deny any of these facts when they were presented to him in a further interrogatory, but neither did he retract his original claim.

When McGarvy was asked the basis for her asserted "know[ledge] . . . that rate increases of 50% and more . . . would not be rare," she confirmed that the "study" on which she based the statement was Bradfield's Exhibit LB-1, about which we will have more to say presently. Tr. 6/1759. However, she also confirmed in the same interrogatory response that Exhibit LB-1 "assume[s] no change in mailing practice"--i.e., that it assumes away the very point at issue--and that her testimony "does not report the results of any study, by yourself or others, of the ability of any publication or group of publications to adapt their mailing practices to the proposed rate changes." Id. In another response to a question asking about a reference in her testimony to mailers "who, due to their size, their business models or other factors would not be able to avoid large, crippling increases" under the proposed rates, she confirmed that her testimony "does not identify a single mailer who would not be able to avoid large, crippling increases under the rates proposed." Response

to TW et al./ABM-T3-12: Tr. 6/1776. Nor was she able to identify a single such mailer in her response.

When Bradfield was asked, regarding his having "no doubt that of the 25,000 or so outside-county Periodicals . . . a good number would be staring at increases . . . at the upper end of the range on my exhibit [80 percent] with no reasonable opportunity to change their mailing practices," whether he had "done any analysis to substantiate this claim," he answered "No." Response to TW et al./ABM-T2-4: Tr. 1675. When asked whether he had "done any analysis to determine how the increases would change if [those mailers] could change their mailing behavior," he answered "I have not." When asked "how many publications is 'a good number,'" he answered, "I have no specific number in mind. The thought I meant to convey is . . . enough . . . to be of concern to the Commission." Id.

In fact, these witnesses never supported their allegations about the impact of the proposed rates with a single example, much less an analysis, of the impact on *any* publication or group of publications. Each of them claimed to rely on "experience in the industry," not "analysis," as the basis for their opinions. Tr. 6/1714 (Cavnar); 1675 (Bradfield); 1757 (McGarvy). However, none was able or willing to identify any *particular* experience that would lead to the conclusions they expressed. It was clear, however, that whatever experience they might have been referring to, it was not experience with the publications of their own employer. Cavnar, whose employer is Hanley Wood, stated: "We have not calculated the impact of the proposed rate on any [Hanley Wood] titles" (Tr. 6/1708); and "Please note that my testimony makes no statement regarding impact of the proposed rates on Hanley Wood publications, whether adverse or favorable" (id. at 1709). Bradfield, whose employer is VNU, was asked whether he had "conducted any analyses to determine if any changes in mailing behavior could be made to mitigate

the impact of the proposed rates upon the VNU publications"; he answered "No." Id. at 1674.

Apparently the *only* witness for a participant adverse to the proposed changes who ever analyzed the impact of the proposed rates on any publication was McGarvy, who stated that she had performed such an analysis upon the publications of her employer, Crain Communications. Tr. 6/1753. Unfortunately, when the Complainants' requested the results of those analyses, ABM objected to providing them on grounds of attorney work product privilege and commercial sensitivity. Thus, no analysis of the impact of the proposed rates on any publication by any ABM witness appears in the record.

**B. ABM's Witnesses' Failure to Investigate the Probable Impact of the Proposed Rates, Their Vague, Unsubstantiated, Suppositious Assertions About Impact, and their Reliance on the Slipshod, Undocumented, Unverifiable Exhibit LB-1 Should Lead the Commission to Give Little or No Weight to ABM's Testimony Regarding Impact**

When Complainants sought through discovery actual data that any of ABM's witnesses might have relied on in reaching their conclusions about impact, they met a stone wall. Objections were raised to providing either actual mailing data that any witness had considered or representative data for the publications of the witness's employer.

But what of Exhibit LB-1, the table that Bradfield, its titular sponsor, said represented "a calculation of the impact of the Time Warner [sic] proposed rates" on 153 publications owned by five ABM members and that both Bradfield and McGarvy expressly cited as the basis for their extravagant claims about the alleged harmful impact of the proposed rates? As already noted, both Bradfield and McGarvy confirmed that LB-1 simply assumed that no change in mailing practices would occur under the proposed rates. In so doing, it assumed away the question it

purported to address. Remarkably, when the Complainants requested the data which that exhibit purported to represent and analyze, for the purpose of conducting their own analysis of how the proposed rates would affect those publications, ABM objected to disclosure, asserting that its witnesses had not addressed the issue of impact and that the impact of the proposed rates "on those [153] publications, or even all American Business Media publications" was not an issue in the case.<sup>48</sup>

After reviewing the testimony in question, the Presiding Officer dismissed that assertion emphatically.<sup>49</sup> Since the requested materials were in the custody of non-participants, however, compelling their production was not a viable option. The Presiding Officer therefore ruled as follows with respect to the representative data requested from Bradfield and McGarvy:

Complainants' interest in obtaining the requested data is understandable, but VNU's non-participant status generally limits the reach of discovery requests. . . . I will not require production of the requested data. At the same time, data and statements that are unsupported leave open the possibility that

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<sup>48</sup> See "Objection of American Business Media to Requests for Production: Time Warner et al./ABM-T3-2, Time Warner et al./ABM-T3-3" (stating, at 3. that McGarvy's testimony "does not deal with the impact [of the proposed rates] on Crain Communications or anyone else"); "Objection of American Business Media to Request for Production: Time Warner et al./ABM-T1-3"; and "Objection of American Business Media to Requests for Production: Time Warner et al./ABM-T2-3, Time Warner et al./ABM-T2-9" (all filed September 23, 2004).

<sup>49</sup> Presiding Officer's Ruling No. C2004-1/16 Presiding Officer's Ruling On Complainants' Motions To Compel And Request For Declaratory Order (Issued October 28, 2004) at 1-2 :

I find that the Exhibit LB-1 and related testimony in issue here are replete with elements that address "impact." . . . Arguments to the contrary are not persuasive, as evidenced by the numerous citations Complainants have provided.

See also *id.* at 9:

As Complainants' pleading makes clear, ABM's argument that witness McGarvy does not address impact cannot be supported by a plain reading of her testimony.

this material will be given little or no weight, or that an adverse inference will be drawn from the lack of support. . . .

A reading of the McGarvy testimony as a whole reveals that it addresses impact, and arguments to the contrary are not persuasive. As for production of the requested data, Crain Communications' status as a non-party generally limits the reach of discovery. This does not mean that data and statements lacking adequate record support will be accorded any weight; instead, an adverse inference may be drawn from its absence. Given ABM's stated awareness of this consequence, I will not require production of the requested data.

POR C2004-1/16 at 10, 11-12.

The requested data on which LB-1 was based turned out to be unavailable for different reasons. The exhibit turned out to be an assemblage of summaries of information provided by ABM members to ABM's counsel. "No witness was directly involved in the analysis of all 153 publications," and most of the data that had been analyzed (mail.dat files) and the detailed results of the analysis (Excel spreadsheets) had been destroyed, making verification, replication, or even a general assessment of the methodology of the analysis impossible. Tr. 6/1886. The Presiding Officer, observing that "[t]his exhibit, as Complainants note, purports to represent the impact of the Complainants' proposed rates on a sample of Periodical publications published by ABM members," concluded:

[I]n the absence of sufficient supporting data to allow replication and analysis of certain ABM evidence, ABM and supporters of its position are placed on notice that the Commission may draw an adverse inference as to the support Exhibit LB-1 provides for any impact-related claims made by ABM or its witnesses.

Id. at 2.

ABM has done nothing since Presiding Officer's Ruling C2004-1/16 was issued on October 28, 2004, to supplement the record or cure any deficiencies in the foundation for its witnesses' assertions about the impact of the proposed rates. If there were no other testimony on the record regarding impact, the testimony of

ABM's witnesses would merit little weight. In view of the valuable data that has been provided by the Postal Service and the careful, fully documented analysis of that and other data by witness Stralberg, it deserves none.

**C. The Assertions of Witnesses Heath and Crews Concerning Rate Impact were Based on Unexamined Assumptions that Stralberg Showed to be Incorrect**

NNA witnesses Crews and Heath both exemplify the belief that disastrous service delays will occur if small mailers abandon the practice of entering mail in very low-volume sacks. Because they believe that use of large numbers of low-volume sacks is absolutely necessary to achieve adequate service, while realizing that the service they get in this way is sometimes not at all adequate, they are horrified at the idea of actually having to pay for the costs that this type of practice imposes on the Postal Service.

The NNA type of newspapers that Crews and Heath represent typically have most of their copies addressed to the county of origin, for which they pay relatively low in-county rates. Most of the rest of the copies go to neighboring counties. But they also mail some copies to distant locations. These volumes have very low density, and mailing them in low-volume 5-digit, 3-digit, or even ADC sacks (which often would end up having two or three pieces in each sack) can be very costly, especially if one is forced to pay for it oneself instead of having the Postal Service pick up the costs and spreading them among all Periodicals.

Crews, to illustrate what he believed would be the devastating impact of the proposed rates on the *Cameron Observer*, chose to focus on its seven most distant subscribers, located in postal zone 7 relative to the Observer's home base. He speculates that these subscribers would share in the extra cost of an ADC sack, i.e., \$3.25 or 46 cents per subscriber per issue. He further speculates that

If the proposed rates in this case were put into effect along with new rates from the next omnibus rate case, it is easy to imagine an additional \$20 surcharge on these subscriptions. That surcharge would probably cost the newspaper most of those readers, and those readers their hometown newspaper.

But Crews admits in response to interrogatories that he failed in several ways to think the matter through before reaching these conclusions. He admits that he did not consider the possibility that added sack charges might be offset by lower charges on pieces and pounds. Response to TW et al./NNA-T2-1c: Tr. 6/2003. When asked what the additional cost would be if instead of traveling in an ADC sack the copies to the seven zone 7 subscribers were submitted in a mixed ADC sack along with other copies traveling to distant zones, he admits that the 46 cents per subscriber per issue would drop to 2.2 cents

if all retained their subscriptions. However, experience would suggest the service would be so slow and unpredictable that the publisher would not likely be able to retain those subscribers. Most likely, then, the cost would be zero, as that mail would cease to exist.

Response to TW et al./NNA-T2-2e: Tr. 6/2006.<sup>50</sup>

But the “experience” Crews refers to does not appear to include checking one’s facts first. In response to further interrogatories, Crews admits that, in fact,

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<sup>50</sup> While Crews suggests that the Commission and the Postal Service should be very concerned that people like the *Cameron Observer’s* zone-seven readers continue at all costs (to the Postal Service) to receive their home town newspaper, Crews seems to indicate that the hometown newspapers themselves don’t really care that much. In response to an interrogatory question as to whether he thought the *Observer* would still charge those subscribers extra if the extra costs of mailing to them were offset by lower postage rates for its most local copies, Crews responded: “Most small newspapers consider the pieces mailed to distant subscribers to be primarily a service. These readers are not significant to local advertisers. But they are important to the newspaper’s mission of being a primary information provider for its area. And many local newspapers are the sole source of news for former residents. So they try to do what they can. But most of them charge an out of town subscription rate, so they can pass on all or most of the extra postage charge incurred by serving these readers. I would expect most of our publishers to continue that policy, regardless of what happens to the rest of their postage bills.” Response to TW et al./NNA-T2-1d: Tr. 6/2003.

the *Observer* already uses mixed ADC sacks to mail the copies for its seven zone 7 subscribers, evidently without the catastrophic consequences that Crews thought would follow from such a practice.

Crews also admits, in the end, that the *Observer* in fact uses nine mixed ADC sacks, containing a total of 81 copies, for each issue. He also admits that using nine different sacks for this purpose really makes no sense, since putting them all in one sack would result in exactly the same type of processing by the Postal Service. And, finally, he admits that were the proposed rates to go into effect, the nine sacks would be reduced to one, resulting in fewer Postal Service costs but no reduction in service. Response to TW et al./NNA-T2-8: Tr. 6/2018-19.<sup>51</sup>

As Stralberg has pointed out, the concern expressed by Crews and Heath about the service consequences if high-volume, low presort sacks are used instead of low-volume high presort sacks is inconsistent with the enthusiasm shown by both for arrangements whereby small newspapers are allowed to enter their outgoing copies in tubs, rather than in sacks. They both indicate that use of tubs eliminates the service problems experienced with sacks.

But as Stralberg demonstrates, relying partly on confirmation through an institutional Postal Service response, the use of a tube to enter flats to distant locations, as Crews reports is being done for another small Missouri newspaper, the *Atchinson County Mail*, is in fact equivalent, in terms of postal processing and transportation steps, to entering those copies in a mixed ADC sack. And entering its copies to cities served by the local SCF in an SCF tub, as the *Atchinson County Mail* also does, would be equivalent to eliminating the large number of 5-digit sacks that

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<sup>51</sup> Crews' response to TW et al./NNA-T2-5a (Tr. 6/2012) shows that a large number of sacks also are being used by the *Observer* for the more local mail. For example, two sacks are sent to the city of Cameron, one with two and one with three copies.

according to Crews are being used by the *Cameron Observer* and replacing them with a single SCF sack. Since the *Atchinson County Mail* is reported to have much fewer service problems after this practice started, it confirms, if anything, that the use of many small low-volume sacks, far from reducing service problem may be causing more such problems. TW et al.-RT2 at 21-22: Tr. 5/1561-62.

## **V. COMMISSION ACTION REQUESTED BY COMPLAINANTS**

The Complaint of Time Warner Inc. et al. (at 21) stated the following request for relief:

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

The Commission granted the requested hearing, expressing in its order doing so the hope that the proceeding "should result in the most complete and balanced record possible for analyzing the issues raised by Complainants" (Order No. 1399 at 14), and it has afforded the fullest opportunity for the development of such a record. Witness O'Brien expressed in his testimony the appreciation of the Complainants for the Commission's willingness to provide a forum "for analyzing the issues we have raised, which are of fundamental importance to all Periodicals class mailers." TW et al.-RT-1 at 6: Tr. 5/1430.

The Commission's Order No. 1399 also explained that "practical considerations" had led it "to conclude that this inquiry should not result in the recommendation of specific rates." Id. at 12. Instead, it said,

[i]f this Complaint is found to be justified, the most proper course of action for the Commission will be to recommend to the Governors classification changes that describe and define a rate structure more consistent with the policies of the Act. This will allow the Postal Service to develop in the first instance rates designed to fairly implement the new rate structure.

Id. at 12, 13.

That conclusion, which the Complainants understand and to which they do not take exception, requires only that our original request for relief be amended to request a decision recommending a "cost-based Periodicals Outside County *rate structure* that more fully reflects differences in operational and cost-causing characteristics within the Periodicals Outside County subclass, that discontinues the policy of maintaining an unzoned editorial pound rate, and that promotes more efficient methods of mail preparation and entry by sending mailers better price signals." The details of that rate structure are set out fully in the testimony of witnesses Mitchell and Stralberg, and we will not attempt to rehearse them here.

We do wish, however, to amplify our request for relief in four respects.

First, we urge the Commission to recommend strongly to the Postal Service that it take *substantial* steps in the near term toward the more efficient Periodicals rate-structure we propose. As discussed above, both *understanding* of Periodicals costs and *opportunities* to reduce those costs through better mailing practices have grown dramatically in recent years. As we stated in our Complaint (at 4-5), however, those opportunities have been pursued only slowly and haltingly, while the efficiency of the Periodicals subclass has steadily deteriorated:

The need for . . . reform, and the deficiencies that underlie that need, have grown increasingly evident over the last two decades. . . . The Commission has agreed with mailers that important questions surrounding Periodicals mail processing operations and the attribution and distribution of costs to Periodicals are unresolved and have remained so for too long. It has responded to mailers' concerns about these questions by mitigating their impact through successive reductions in Periodicals cost coverage. But with coverage barely above 100

percent since the R97-1 rates went into effect, virtually no leeway remains for the Commission to shield mailers in this way from the problems of the subclass or deficiencies in its rate structure.

Modest changes that are opposed by no one, because they make demands on no one, are simply inadequate to the circumstances we face.

Second, we wish to make clear that we understand fully that the Postal Service is not a private business but a public enterprise conducted for the benefit of the people. If that were not so, the recognition of ECSI value, which is the predicate for the existence of the Periodicals subclass, would disappear, to the detriment of all participants in this case and of the nation. We recognize that economic efficiency and cost recognition are not the only statutory ratemaking policies that the Commission must take into consideration, and that we, like all Periodicals mailers, greatly benefit from the fact that this is so. But we also recognize that in the era of a self-sustaining Postal Service when every subclass must ultimately pay its own way, opportunities are greatly magnified for mailers within a subclass to improve their own lot by acting collectively to make their part of the postal system work more efficiently, and the penalties for failing to do so are magnified as well. If the Commission is not satisfied that the changes in rate structure that we propose would be beneficial to the Periodicals subclass as a whole, as we strongly believe is the case, then it should not, and we are certain would not, recommend those changes.

Third, there has been a great deal of testimony in this case, chiefly from ABM, that the proposed changes would be unfair, draconian, broadly destructive to the majority of Periodicals publications because it is impossible for them to adopt more efficient mailing practices, and that the proposed changes are unnecessary because they are already adopting more efficient mailing practices at maximum

speed without requiring superfluous rate incentives for doing so.<sup>52</sup> The Complainants take it as a given that in any proceeding in which implementation of rate changes is a possible outcome, the Commission will give due consideration to the evidence and arguments presented to it for some degree of mitigation, or some period of adjustment. However, based on the record of this proceeding, we urge the Commission to defer that issue until a case with real rate consequences is before it. This docket, we believe, presents an opportunity for the Commission to assess the quality of the evidence presented to it in support of such claims, which consists almost entirely of generalized assertions about unspecified consequences to unidentified publications, and which is entirely barren of the careful analysis of specific data and the furnishing of specific instances and concrete examples that has characterized the evidence presented by the Complainants. The best use to which the record made by the adversaries of the proposed changes can be put is as an occasion for the Commission to comment on the kind and quality of evidence it would hope to receive in a future proceeding in support of any requests for mitigation, delay, or gradual implementation of the proposed rate structure.

Fourth and finally, we urge the Commission to take the extensive evidence and argument we have presented concerning the history and continuing utility of an unzoned editorial pound rate, along with the highly equivocal opinion of the Court of Appeals in *MOAA v. USPS*, as an occasion to seriously reconsider that issue. As a question of policy and informed judgment, the issue is essentially legislative rather than judicial in character, the kind of issue upon which an agency's discretion to reconsider and change its previous policies is at its zenith. We believe we have

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<sup>52</sup> See, e.g., ABM-T-1 (Cavnar) at 25: Tr. 6.1745; ABM-T-2 (Bradfield) at 12, 16: Tr. 6/1697, 1701; ABM-T-3 (McGarvy) at 3: Tr. 6/1777..

documented in our Memorandum of Law and Policy that the issue is conceptually challenging and carries with it a complex, ambiguous, even convoluted history. On such matters, and especially where a policy has been so widely controversial among not only private parties but coordinate governmental actors such as the OOC and the Postal Service,<sup>53</sup> we believe that a serious, thorough reconsideration of existing policy will not undermine but enhance an agency's stature.<sup>54</sup>

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<sup>53</sup> Elimination of the unzoned editorial pound rate was proposed by the OOC (since renamed OCA) in Docket No. MC76-2 and by the Postal Service in Dockets No. R77-1, R80-1, and R90-1.

<sup>54</sup> See *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 863-64 (1984) ("An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.").

Respectfully submitted,

s/

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