

Before The
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

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

Docket No. C2004-1

OFFICE OF THE CONSUMER ADVOCATE
INITIAL BRIEF
(December 23, 2004)

Introduction

Time Warner, Conde Nast, Newsweek, Reader's Digest, and TV Guide (TW et al.) filed a Complaint with the Commission on January 12, 2004, for the purpose of transforming the Periodicals' rate structure to reflect cost differences based upon the sack, bundle, and pallet characteristics of mailings, as well as their entry points.¹ TW et al. urge the Commission to establish price signals that will influence mailers to prepare their mail in the most efficient manner, thereby reducing the total cost of handling Periodicals.² The Complainants propose a rate structure that shifts the pricing mechanism from pieces and pounds to separate container charges (i.e., bundles, sacks, and pallets); level of presortation; entry point; and machinability.³ The unzoned editorial rate structure would be eliminated in favor of one that reflects the distance mail travels and its entry at downstream facilities.

¹ Complaint of Time Warner Inc. et al. Concerning Periodicals Rates (Complaint) at 6.

² Id. at 6 - 7.

³ Id. at 7.

The Complainants acknowledge that the Postal Rate Commission has generally eschewed such a price structure owing to its interpretation of sections 101(a) and 3622(b)(8) of the Act as favoring "the widespread dissemination of information" as a means of "bind[ing] the Nation," and its concerns for the welfare of small, high-editorial publications.⁴ The Complainants allege that (1) inexpensive, private, long-haul transportation rates and the (2) "proliferation of inexpensive means of communication and a previously unimaginable diversity of information sources that are entirely independent of geography" are conditions that should cause the Commission to reverse its earlier position.⁵

The Office of the Consumer Advocate (OCA) believes that the chief policy issue that the Commission should resolve should be articulated differently: *should cost efficiencies of the type proposed by the Complainants outweigh the Congressional policy of favoring particular mail matter that has educational, cultural, scientific, and informational value to the recipient?* OCA does not challenge the Complainants' implication that the rate structure they advocate may result in a total increase in the volume of Periodicals mail, in particular high volume publications with the ability to presort finely large volumes of mail that can be entered at downstream facilities. The sacrifice that would have to be made to accomplish this result is the likely demise of many small publications that could not achieve the efficiencies that the Complainants propose and therefore would be faced with devastating price increases. The Complainants fail to address the toll that a democracy pays when the dissemination of

⁴ Id. at 9.

⁵ Id. at 10 – 11.

news, information, and opinion becomes increasingly concentrated in the hands of a small number of media giants. The need to preserve diverse points of view is not less pressing today than it was at the time of postal reorganization; it is *more* pressing. The current phenomenon of oligopolistic control of media channels makes it more imperative than ever to ensure that small, independent publications continue to survive and circulate their ideas in the general population.

OCA Recommendation

OCA recommends to the Commission that it take steps to estimate any “excess” costs that are the result of Congress’ policy to promote the nationwide distribution of educational, scientific, cultural, and informational mail matter and treat these costs in the manner of Alaska air transportation costs – as costs attributable to a statutory mandate rather than the specific elements of service for the underlying class. The treatment that follows from this determination is to shift the “excess” costs of low-volume Periodicals from the attributable cost pool for Periodicals into the institutional cost pool for recovery from all mailers.

Preserving the Dissemination of Diverse, Independent Views Is Essential to a Democracy

The concentration of media channels in the hands of a small number of media conglomerates has produced a crisis that has been discussed extensively in recent years. The detrimental effect of this concentration on our democratic system is addressed in an article written by Ted Turner, “My Beef with Big Media:”⁶

In the media, as in any industry, big corporations play a vital role, but so do small, emerging ones. When you lose small businesses, you lose big ideas. . . . they are independent thinkers . . . they have to innovate.

⁶ Washington Monthly, July/August 2004.

By contrast,

Large corporations are more profit-focused and risk-averse.

* * * * *

Unless we have a climate that will allow more independent media companies to survive, a dangerously high percentage of what we see – and what we don't see – will be shaped by the profit motives and political interests of large, publicly traded conglomerates. The economy will suffer, and so will the quality of our public life. Let me be clear: As a business proposition, consolidation makes sense. The moguls behind the mergers are acting in their corporate interests and playing by the rules. We just shouldn't have those rules. They make sense for a corporation. But for a society, it's like overfishing the oceans.

* * * * *

When media companies dominate their markets, it undercuts our democracy. Justice Hugo Black, in a landmark media-ownership case in 1945, wrote: "The First Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."

* * * * *

A smaller press is less capable of holding our leaders accountable.

* * * * *

When Viacom merged two news stations it owned in Los Angeles [a] Viacom executive in charge told *The Los Angeles business Journal*: "In this duopoly, we should be able to control the news in the marketplace."

* * * * *

Disney recently provoked an uproar when it prevented its subsidiary Miramax from distributing Michael Moore's film *Fahrenheit 9/11*. As a senior Disney executive told *The New York Times*: "It's not in the interest of any major corporation to be dragged into a highly charged partisan political battle." Follow the logic, and you can see what lies ahead: If the only media companies are major corporations, controversial and dissenting views may not be aired at all.

* * * * *

The role of the government ought to be like the role of a referee in boxing, keeping the big guys from killing the little guys.

* * * * *

At this late stage, media companies have grown so large and powerful, and their dominance has become so detrimental to the survival of small, emerging companies

Mr. Turner's concerns are echoed in an editorial appearing in *Business Week*⁷

Ownership of the media has become concentrated in the hands of a few giants. So while there are more outlets, there are fewer truly independent voices.

* * * * *

[P]reserving limits on media ownership should be part of a broader project to make sure that Americans of diverse backgrounds and beliefs can hear, debate, and ultimately understand one another. The health of American democracy is at stake.

Victor Navasky, publisher and editorial director of *The Nation*, presented testimony on behalf of American Business Press (ABP),⁸ that articulated essentially the same concerns quoted above:

[I]n 1979, Congress established reduced rates for newspapers and magazines which, because they were understood as critical to the enlightenment of the Republic, were never expected to pave their own way.

For nearly two centuries this philosophy prevailed. Only in recent decades has the notion that dissemination of independent opinion is essential to make democracy work begun to give way to bottom-line considerations.

During oral cross-examination, Mr. Navasky testified:

[T]he founders of this country had a lively – active respect for the dissemination of opinion. And in that context the Second-Class Mail was established. [13762]

Huge corporations – conglomeritization has a number of impacts. One is to homogenize the messages of its subsidiaries. [13768]

⁷ The editorial is entitled, "The Dangers of Media Mergers – There are more media outlets, but fewer truly independent voices," July 12, 2004.

⁸ ABP-RT-7 at 3, Docket No. MC95-1, Tr. 30/13734.

Richard Clurman did a book on Time where he found that the growth of the magazine had destroyed some of the old values that used to prevail there. [13769]

[I]f you take the Murdoch empire as emblematic, there is a – in the media community, there seems to be a lowest common denominator that goes with size. When you attempt to appeal to a mass audience, it is inevitable. [13770]

The logic of [George Washington’s] values . . . is to have a Second Class that doesn’t attempt to distinguish among all these journals, but gives them the benefit of a rate which enables the public . . . who is going to be the beneficiary of these policies . . . make the maximum dissemination of ideas, intelligence, and policy discussion. [13774]

The Navasky testimony has the same potency today that it did in 1995.

In testimony filed in Docket No. R90-1, ABP witness Kielbowicz testified that⁹ a 1913 Supreme Court decision “confirmed that the purpose of second class is to serve the public interest by permitting diverse private opinions to be disseminated” Dr. Kielbowicz summed up the history of Congress’ view of Periodicals:¹⁰ “First, editorial content determines the character of second-class mail. Second, the rate design enacted in 1917 was intended to assure readers’ access to public information regardless of location.” Furthermore, zoned editorial rates “*discourage* the broadest dissemination of informational material rather than encourage it.”¹¹

During oral cross-examination by National Newspaper Association (NNA) counsel, TW et al witness Gordon agreed that, with respect to print media, the number of newspapers is declining in the United States and has been for some time.¹²

⁹ ABP-RT-3 at 8.

¹⁰ Id. at 21.

¹¹ Id. (emphasis in original).

¹² Tr. 3/756.

McGraw-Hill (MH) witness Schaefer testifies that the radical de-averaging of Periodicals costs and rates is designed to: “provide a relatively few large publications with an enormous windfall (with no change in their mailing practices) while exposing thousands of smaller publication to correspondingly large rate increases”¹³ Witness Schaefer presents specific examples of this effect – its largest publication, *Business Week*, would see its rates reduced by approximately 11%,¹⁴ while two of McGraw-Hill’s smaller publications, *Dodge* and *Standard & Poor’s*, would be expected to suffer increases of approximately 50%.¹⁵ Nearly all of McGraw-Hill’s publications would incur substantial rate increases under the proposed rates, with most of the increases well into double digits.¹⁶

TW et al. Reliance on the MOAA Opinion

To support its Complaint, TW et al. relies heavily on the assessment of the Court of Appeals for the District of Columbia in *Mail Order Assoc. of America*, 2 F. 3d 408, 436¹⁷ (D.C. Cir. 1993) (“MOAA”) that

The trouble with the [Commission’s] argument is that both the advantaged and the disadvantaged publications supply these informational benefits. The Commission gave no reason why it considered the educational, cultural, scientific, and informational value of local publications such as *The 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, as the First

¹³ MH-T-1 at 2.

¹⁴ MH-T-1 at 5.

¹⁵ MH-T-1 at 6.

¹⁶ MH-T-1 at 6.

¹⁷ Citations omitted.

Amendment limits the content based distinctions that the government may make even in a proprietary capacity.

The Court evidenced a concern that rate averaging to provide financial support to long haul publications necessarily produced higher prices for local and dropshipped publications. Therefore, the overarching goal of promoting educational, cultural, scientific, and informational content was not necessarily satisfied by excluding the cost distinctions of short-distance/high-volume mailstreams versus long-haul/small-volume mailstreams. As stated by the Court, “education, information, etc. are on both sides of the trade off[;] the argument lends no support to the Commission's outcome.” The Court reasoned that:¹⁸

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.

The Court upheld the Commission’s rejection of zoned editorial rates, however, finding that it could be justified on the ground of binding the nation together under 39 U.S.C. §101(a). Time Warner et al. attempt to weaken the geographic basis for the Commission’s policy, particularly with the testimony of witness Gordon that the Internet gives even low-volume, financially weak purveyors of information and opinion the opportunity to reach a wide audience at low cost: “For the first time since the 1830’s, it has become cheap to enter the news business. All one needs is a personal computer, an Internet Service Provider, and a webpage design.”¹⁹ Witness Gordon adds: “Today, great events are broadcast live on dozens of TV channels.” His core conclusion is:²⁰

¹⁸ 2 F. 3d at 436.

¹⁹ Tr. 3/626 (TW et al T-3 at 12).

²⁰ Id. at 13, and 627, respectively.

The United States, the third largest nation in the world in terms of geography, has become one vast neighborhood, where everyone can be “talked” to across the back fence. There is no longer the slightest chance that setting postal rates for editorial content in Periodicals class mail by zones to reflect actual costs would cause the country to be divided by these zones.

This position is further developed in Complainants’ Memorandum of Law and Policy Relating to the Editorial Pound Charge for Periodicals²¹ at 46.

TW et al. Evidence and Intervenor Counter-Evidence

Witness Gordon’s stark declarations that coverage of news, information, and opinion on the Internet and television are as good as, or better, than what is available through printed publications, were eroded through written and oral cross-examination, and the testimony of other intervenors. In written cross-examination, witness Gordon was forced to concede that “it is often difficult to assess the timeliness and accuracy of information found in any medium, including websites.”²² Also, he concedes that television programming is not an adequate substitute for many business publications,²³ nor was he able to cite any internet news group that furnished depth of coverage equivalent to that supplied by a long list of American Business Media (ABM) member publications.²⁴ Unlike mail delivery, which is provided to virtually every household and business in the United States, universal access to the Internet is not yet a reality.²⁵ This problem is exacerbated by the fact that the areas of the nation with the poorest access

²¹ Filed on December 1, 2004.

²² Tr. 3/651 (witness Gordon’s response to interrogatory ABM/TW et al.T3-19).

²³ Tr. 3/665 (witness Gordon’s response to interrogatory ABM/TW et al.T3-33).

²⁴ Tr. 3/679 (witness Gordon’s response to interrogatory ABM/TW et al.T3-48).

²⁵ Tr. 3/783-85.

to the Internet – rural regions – also would become the most expensive to mail to under the TW et al. proposed rate structure.²⁶

Oral cross-examination of witness Gordon produced evidence that Internet publishing that does not have a hard-copy revenue stream to finance editorial operations is unlikely to provide the thoroughness and quality of informational, educational, scientific, and cultural content in printed publications that Congress has long favored.²⁷ More importantly, ABM witness Cavnar, who has vastly greater experience in the print industry than witness Gordon,²⁸ testifies that the revenues from a publication's hardcopy sales are generally the platform atop which Internet access is added incrementally. For many publications, if the hardcopy publication goes out of business, the publication's website disappears with it.²⁹

ABM witness Bradfield testifies that “the more than \$3 per sack charge proposed would be devastating to many small publications.”³⁰ This statement is supported by estimates made by several ABM members who indicated they would suffer rate increases in excess of 50%, with an unweighted average of 13% across all members who provided estimates.³¹ It should be borne in mind that increases of this magnitude would be intensified by overall rate increase levels in the double digits that projected for

²⁶ Testimony of witness Cavnar, ABM-T-1 at 18.

²⁷ See Tr. 3/754 – 55. See also *id.* at 687 (witness Gordon's response to interrogatory NNA/TW et al. T-3-11).

²⁸ Contrast ABM-T-1 at 2, with Tr. 3/660 (response of witness Gordon to interrogatory ABM/TW et al.-T3-28).

²⁹ ABM –T-1 at 17.

³⁰ ABM-T-2 at 3.

³¹ *Id.* at 6.

the next omnibus rate case. Summarizing written cross-examination of TW et al. witness Schick, witness Bradfield testifies that daily and weekly publications, as well as many small publications, would not be able to participate in co-mail programs in an effort to avoid the proposed devastating rate increases.³² McGraw-Hill witness Schaefer gives a detailed explanation of the production, printing, and transportation constraints on two of its weekly publications – *Aviation Week* and *Business Week*.³³ It does not appear feasible for these weekly publications to print economically at additional locations; nor is it feasible for them to participate in new co-mailing or co-palletization programs without eviscerating one of the publications' most vital features – timely delivery of late-breaking news.³⁴

Furthermore, the current rate schedule already accounts, to a large extent, for cost differences between large publications and small.³⁵ ABM witness Garvey presents a comparison of the rates paid by several of TW's publications, *Time*, *Sports Illustrated*, *People*, and *Entertainment Weekly*, with Crain Publication's *Advertising Age's Creativity*.³⁶ The per-copy characteristics of *Advertising Age's Creativity* are similar to those of the TW publications, with one important exception: TW's publications are high volume and can benefit from the array of discounts offered to highly workshared publications under the current rate schedule, while *Advertising Age's Creativity* cannot.

³² Id. at 13.

³³ MH-T-1 at 21-22.

³⁴ Id. at 21 – 22.

³⁵ ABM-T-2 at 8.

³⁶ ABM-T-3 at 11.

This results in a postage tab for *Advertising Age's Creativity* that is 66% higher than the average for the cited TW publications. The TW et al. proposed rate structure would drive that difference to 184% by furnishing discounts to the TW publications that would be financed by a 48% increase in *Advertising Age's Creativity's* (and other low volume publications') rates. Ironically, the sharp cost increases experienced by Periodicals, so bitterly complained of by TW et al., have largely been borne by small publications, not large ones.³⁷

OCA Recommendation to Fashion and Apply an Alaska Air-Style Solution

It is OCA's position that the specific social policies articulated in subpart (8) of §3622 and the more general authority to apply "other factors as the Commission may deem appropriate" in subpart (9) (and subpart (6) of §3623) should be used to preserve a Periodicals rate structure that promotes the wide dissemination of ideas, information, and opinion by small, nationwide publications that might be driven out of business by the strictly cost-based pricing scheme proposed by TW et al. Rejection of the TW et al. proposed rate structure is a sound, defensible course of action for the Commission. OCA urges the Commission to do so, or to give serious consideration to another option that OCA believes may promote the goals cited by the *MOAA* Court, i.e., an overall increase in the level of Periodicals circulation, while preserving the vital role that small publications serve today – the dissemination of diverse and independent ideas and information that are essential to the effective operation of a democracy.

OCA looks to the Commission's pioneering treatment of Alaska air costs in Docket No. R90-1 as precedent for applying a similar costing approach in the Periodicals class. The parallel that the Commission faced for parcel post – recovery of

³⁷ MH-T-1 at 8 – 11.

destructively high Alaska air transportation costs solely from other parcel post mailers – and the current dilemma – recovery of above-average processing and transportation costs allegedly caused by inefficient low-volume Periodicals mailers solely from other Periodicals mailers – should lead to a parallel costing approach. In Docket No. R90-1, the Commission observed that the costs of the Alaska bypass program were far higher than the parcel post rates being charged.³⁸ In fact, the use of air transportation for an ostensibly ground transportation service was unexpected, but also unavoidable. The Alaska air service operated at a loss, but could not be abandoned because of the Postal Service’s statutory obligation to provide universal mail service, regardless of whether it is economically efficient.³⁹

Dr. Haldi further elaborated that costs that cannot be recovered through pricing nor reduced by abandoning particular services are “inescapable” and therefore must be subsidized by taxpayers or other parts of the enterprise.⁴⁰ Dr. Haldi testified that there are good reasons for not charging the entire amount of an inherent subsidy to a relatively narrow subclass. Allocating the costs to a small subclass can be counterproductive by forcing the subclass rates far above marginal costs for items not receiving the expensive treatment.⁴¹ The concern for excessive parcel post rates was that the Postal Service would lose significant volume to its competitors, leaving behind only the costliest mail. The concern for the Periodicals subclass is different – it is that expressed by the *MOAA* Court, i.e, that the overall level of Periodicals mailed may be

³⁸ Docket No. R90-1, para. 3723.

³⁹ Id., para. 3745, citing the testimony of Nashua witness Haldi.

⁴⁰ Id., para. 3746.

⁴¹ Id., para. 3746.

depressed by charging rates to high volume Periodicals that are higher than their marginal costs. As the Court stated, divergence from cost principles has the probable tendency of increasing overall costs of distribution and may diminish the flow of information.⁴²

The question that must be posed is, why has the Commission long favored an unzoned editorial rate and eschewed wholly bottom-line oriented rates? The answer is that Congress' policy, as articulated in the Postal Reorganization Act, is to favor educational, cultural, scientific, and informational value mail matter, as well as to bind the nation together. The Commission interprets these dual objectives as a policy that favors the broad dissemination of printed publications to all areas of the nation, whether they are far apart, or rural in character. OCA has argued in the first pages of the instant brief that broad dissemination should also be applied as encompassing the broad dissemination of independent, diverse, sometimes minority, opinions and ideas. It should include access by diverse cultural, political, educational, scientific, and business groups across the nation to transmit news and information that might otherwise never be able to be communicated via a rate structure that focuses solely on the bottom line.

TW et al. have not proven that viable alternatives exist to the distribution of low-volume Periodicals under a subsidized rate structure; but that does not necessarily lead to the conclusion that responsibility for the desirable social policy goal of broad dissemination of ideas should rest solely with high volume Periodicals. If important social policies prevent structuring the Periodicals subclass along the lines of strict economic efficiency, then the Commission should consider identifying that portion of

⁴² 2 F. 3d 436, quoted *supra*.

Periodicals costs that results from satisfying that important social imperative. The Commission might wish to approach the costing exercise in a manner similar to its cost estimates for Alaska air: charge the low volume Periodicals rates that economically efficient publications pay, and costs above that – that might drive small publications entirely out of circulation – should be viewed as institutional costs to be borne primarily by other classes of mail, not primarily from other, high-volume, Periodicals.

If high-volume Periodicals are relieved of their responsibility for shouldering the “excess” costs of low-volume Periodicals, then, as the *MOAA* Court pointed out, there will likely be more high-volume Periodicals in circulation because of the tendency to charge them lower rates. Low-volume Periodicals will not be driven out of business because they will not be forced to pay the full amount of the costs they impose on the postal system as a result of their inability operate at the highest levels of efficiency. The Commission would not be favoring any particular Periodicals, which the *MOAA* Court warned could violate the First Amendment. Rather, the welfare of *all* ESCI mail matter would be preserved and enhanced by contributions from the widest group of mailers over which this Commission has authority – the entire mailing community. As Dr. Haldi pointed out in Docket No. R90-1, taxpayers, more than ratepayers should properly bear the excess costs produced by preservation of diverse, independent points of view. Naturally, this is outside of the powers delegated to the Commission by Congress under the PRA. The next best alternative is to charge excess costs to the broadest community over which the Commission does exercise authority – postal ratepayers. If the Commission has the power to shield parcel post ratepayers from the excess cost of

Alaska air, it surely can exercise its powers similarly for the benefit of recipients of ESCI mail matter and the broad, democratic ideals of the nation as a whole.

The analysis engaged in by the Commission that led it to treat Alaska air costs as institutional should be followed in this case as well. The Commission viewed the process as one in which it would look at the root cause for the excess cost or the “true causal connection.”⁴³ In the case of Alaska air, the Commission determined that the cause of the cost was the Postal Service’s universal service obligation. Attributing the air costs to other parcel post users resulted in “over-attribution.”⁴⁴ If the excess costs are due to a statutory mandate, then they should not be considered attributable to the host class.⁴⁵ Congress imposed a universal service obligation on the Postal Service and the Commission found *that* to be the root cause of the Alaska air costs.⁴⁶ Likewise, the special value Congress placed on ESCI mail matter is the root cause of maintaining a unzoned editorial rate and extended averaging in the Periodicals class. Consequently, the Commission should attempt, in a future proceeding, to estimate the amount of cost caused by that statutory policy.

Although the total amount of excess cost has not been calculated in this proceeding, OCA believes that incorporating the sum into the institutional cost pool will have a *de minimis* effect on the rates of other postal ratepayers, including First Class. OCA recommends to the Commission that it instruct the Postal Service to submit testimony in the next rate case that estimates the amount of extra cost that is generated

⁴³ Docket No. R90-1, para. 3760.

⁴⁴ Id., paras. 3756 – 58.

⁴⁵ Id., paras. 3767 -69.

⁴⁶ Id., para. 3769.

in the processing and transportation of low-volume Periodicals. Once that figure has been determined, OCA recommends shifting the amount out of the attributable costs to be recovered from Periodicals and into the institutional cost pool, to be recovered from all ratepayers.

Respectfully submitted,

SHELLEY S. DREIFUSS
Director
Office of the Consumer Advocate

1333 H Street, N.W.
Washington, D.C. 20268-0001
(202) 789-6830; Fax (202) 789-6819
e-mail: dreifusss@prc.gov
-mail:dreifusss@prc.gov