

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

REPLY 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.

January 10, 2005

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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 reply brief in this proceeding.

**A. ABM, McGraw-Hill, NNA, and the Postal Service offer extensive spurious parallels with earlier, much different cases but neglect the proposals and evidence developed in the present docket.**

Much new information has been brought to light in this docket, including new cost information, data on the characteristics of large, medium, and small publications, and detailed analyses of specific mail-preparation practices that impose large, unnecessary costs on the postal system--practices that in most cases could easily be changed but that are widely followed because current rates do not discourage them. Additionally, a far fuller factual, historical, legal, and analytical record than ever before has been developed concerning preferential rates for editorial matter, the unzoned editorial pound charge (EPC), and the bearing of

sections 101(a) and 3622(b)(8) on these matters.<sup>1</sup> The Commission's stated objective of developing as complete a record as possible on the issues presented in this proceeding<sup>2</sup> has indeed been realized.

Some of the new information runs counter to conventional wisdom. For example, the assumption that most of the many thousands of very small publications are similar to medium-size publications of the type published by most American Business Media (ABM) members--just smaller and even more likely to be made worse off by rate de-averaging--turns out to be completely untrue. In fact, those very small publications, most of which appear to be directed primarily to a local readership, have characteristics that are fundamentally different from the nationally distributed, medium-size, requester publications that ABM mostly represents. Similarly, the record evidence of impact of the proposed rates on a variety of publications--despite the sweeping generalizations by ABM, McGraw-Hill, and National Newspaper Association (NNA) witnesses, unsupported by data, analysis, or even example--has dealt a serious blow to the perception, promoted by ABM and others, that small and medium-size publications without access to comailing or co-palletization services would have no way of adapting to more cost-based rates.<sup>3</sup>

Opponents of the proposed changes, even after being warned by the Presiding Officer that their testimony concerning impact was so seriously lacking in substantiation as to risk being given little or no weight, have not come forward with

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<sup>1</sup> See Initial Brief of Time Warner Inc. Et Al. (December 23, 2004) at 43-60; and Complainants' Memorandum of Law and Policy Relating to the Editorial Pound Charge for Periodicals (December 1, 2004).

<sup>2</sup> Order No. 1399, Order on Periodicals Rate Complaint (issued March 26, 2004), at 14.

<sup>3</sup> See especially TW et al.-RT-2 at 6-26: Tr. 5/1545-65; and Comments of Time Warner Inc. et al. Witness Halstein Stralberg on the Characteristics of Very Small Periodicals, In 'Response of Time Warner Inc. et al. to NOI No. 1 (December 8, 2004).

additional data or responsive, much less expert, analysis. Instead, they have been content to repeat the unsubstantiated generalizations of their witnesses as if these statements had not been both eviscerated on the record by Stralberg's rebuttal and singled out by the Presiding Officer for their grossly inadequate foundation.<sup>4</sup>

The only other response they have to a wealth of new information and analysis is to ask the Commission to ignore this new evidence and simply restate its rulings on earlier, much different proposals whose defects are not replicated in this docket. References to Docket No. MC95-1, along with suggestions that its proposals closely parallel those in the present docket, abound throughout the ABM/McGraw Hill Brief (37 references altogether). Even the Postal Service (Brief at 15), which prepared and sponsored the MC95-1 proposal, now cites the Commission's Decision in that docket as an argument against the completely different proposal presented by Complainants in this case. Similarly, ABM and McGraw-Hill rely on statements from the Commission's Opinion in Docket No. MC91-3 (making 20 references to that case in their Joint Brief) to draw false and misleading parallels with the current case.

Here are some of the falsehoods that ABM, McGraw-Hill, and others try to propagate, followed by the facts as demonstrated on the record of this docket:

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<sup>4</sup> See Presiding Officer's Ruling No. C2004-1/16, Ruling On Complainants' Motions To Compel And Request For Declaratory Order (Issued October 28, 2004) at 2:

[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.

See also Initial Brief of Time Warner Inc. Et Al. (December 23, 2004) at 64-67.

1. *That Complainants propose or endorse equal implicit cost coverages that would shift institutional costs from large to small mailers.*

ABM and McGraw-Hill claim that "witness Mitchell has sought in the current proceeding to defend the concept of equal implicit cost coverages" and suggest that the present Complaint is a Trojan Horse intended to bring about the result that "each mail piece shall pay an equal *percentage* markup for institutional costs," a result that was rejected by the Commission in Docket No. MC95-1. ABM/MH Int. Br. at 19. Both the express claim and the implication are false. Examination of the sole reference ABM and McGraw-Hill provide for this assertion reveals that it rests on a complete distortion of what Mitchell said.<sup>5</sup> And had ABM and McGraw-Hill ever directly inquired how the proposal would affect institutional cost contributions, Complainants would gladly have explained, as discussed further below, that, in line with accepted ratemaking principles, they take them substantially in the direction of equal *per-piece* contributions, not equal *percentage* contributions.

The Commission has a long and well documented history of recognizing costs and then recognizing as well the nature and importance of worksharing differences between the categories, consistent with the importance of the signals involved and with notions of fairness, including consideration of relative per-piece contributions across the Periodicals subclass, efficient component pricing, and

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<sup>5</sup> ABM and McGraw-Hill cite an interrogatory response (at Tr. 3/1023) in which Mitchell confirmed that so long as the coverage for the subclass proper is not below 100%, it is sometimes viewed as acceptable for the (implicit) coverages on components of that subclass to be below 100%, and therefore not to cover their costs. That is simply an accurate statement of Commission policy and practice over many years. In the same response, Mitchell quotes the Commission's description of its own procedure, which he says his testimony in this case is in agreement with: "The Commission *begins the rate design process* assuming equal implicit markups. This is a neutral *starting position* which seems to be implied by § 3622(b)(1), a fair and equitable schedule." PRC, Op. R2000-1, ¶15533 (p. 390) (emphasis supplied). How ABM and McGraw-Hill reason from a simple reference to what the Commission says it uses only as a starting position to an endorsement by Complainants of it as an ending position is a mystery that ABM and McGraw-Hill do not trouble to explain.

lowest combined cost.<sup>6</sup> In the same way, Mitchell begins with costs and then proceeds to focus most of his testimony on these other factors and how they should be recognized. His application of them does not vary from the policies established by existing Commission precedents.

2. *That the present proposal to include cost-based charges for the use of bundles, sacks, pallets, and non-machinable format is somehow fundamentally different from the current scheme of worksharing discounts.*

The rates proposed in this Complaint are all displayed as separate charges, so that each mailing pays piece charges, bundle charges, pound charges, and sack and/or pallet charges. But the differences among any of these charges, such as the differences among the piece charges or among the sack charges, reflect costs in the same way as discounts traditionally have, and are therefore appropriately viewed as discounts of the traditional kind. The established policy that a discount should not exceed the estimated costs avoided, which the Commission stressed in its MC95-1 Opinion, is met by all charges and implied discounts in the proposed rates.<sup>7</sup>

Thus when the Postal Service argues that "Mitchell proposes to reduce cost averaging across the Outside County subclass, by basing rates for pallets, sacks, and bundles directly on costs, rather than relying on worksharing discounts" (Br. at 9), it is making a false distinction. The rates proposed by Mitchell recognize costs in exactly the same way as do the current rates. All appropriate cost differences are recognized through rate differences that are equivalent to discounts, and all rate

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<sup>6</sup> See PRC Op. MC95-1, ¶¶ 3074-79 (pp. III-29-31).

<sup>7</sup> The Commission has made exceptions to this policy for some of the discounts in the current rates, e.g., some of the flats automation discounts.

differences are designed to send efficient price signals to mailers<sup>8</sup> and to move toward a situation where the pieces make the same contribution to institutional costs. Even worksharing activities that involve tradeoffs between rate elements like piece charges and bundle charges are in effect provided discounts, based appropriately on costs.<sup>9</sup>

It is fundamental to all rate design processes, including those used by the Commission, that unless a decision is made to place a markup on the appropriate cost difference (or to use a benchmark to calculate a cost avoidance, which is not done in Periodicals), there is no difference between deaveraging and discounting. This is emphatically true under the rates proposed by the Complainants, the logic for and the characteristics of which are discussed in considerable detail in Mitchell's testimony.

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<sup>8</sup> These signals are consistent with the notion of lowest combined cost and relate not only to the traditional worksharing activities of presorting, prebarcoding, dropshipping, and containerization, but also to piece weight, machinability, bundle and container makeup, and even the selection of a printing location. An example of inefficiency in the current signals relating to printing location, but not in those proposed, is provided by APWU. Since its publication *APWU Postal Worker* is 100 percent editorial, it can print and mail currently at any location and its postage is essentially the same. But the average haul and the costs of transporting the publication are not invariant with location. Thus, while it and other publications like it, including in some degree local and regional publications, are free to select locations with a high average haul, someone else must pay the costs associated with those decisions. This is neither fair nor designed to help bring about the efficient use of the nation's transportation resources. In effect, a great deal of transportation cost can be incurred needlessly. See APWU Br. At 3, APWU/TW et al.-T1-3 at Tr. 3/1001, and Mitchell's discussion specifically at Tr. 3/819 ff.

<sup>9</sup> For example, part of the dropship discount is given in the pound rates and another part is given in the container rates, which vary with entry point. This is necessary in order to recognize costs more appropriately and to assure that actual savings are not larger than the discount.

When these issues are understood properly, it is clear that the proposed rates contain discounts developed in the traditional way and aligned both with costs and with other principles of section 3622(b) in ways that are recognized and espoused regularly by the Commission. Ironically, they also appear to be aligned with the stated preferences of parties such as ABM, McGraw-Hill, and NNA, which say that they oppose deaveraging but support discounts.

The American Postal Workers Union's (APWU's) assertion (Int. Br. at 2) that "the complaint proposes a radical departure from the current methodology for determining rates," based on the impression that the Commission calculates Periodicals worksharing discounts by measuring cost avoidances from the cost of a "benchmark" piece, is simply ill-informed. A benchmark reference has been used for certain discounts in First Class Mail but has not been used in Periodicals.

3. *That the present proposal distributes institutional costs in a way that departs from the principles of MC95-1.*

As though the proposal in this case embodied or reflected the view that "each mail piece should pay an equal *percentage* markup for institutional costs" (Br. at 19)--a position that ABM and McGraw-Hill correctly say the Commission "emphatically" rejected in Docket No. MC95-1 in favor of an approach where "the pieces in a subclass tend to make the same contribution to institutional costs" (Br. at 18 [quoting PRC Op. MC95-1 at ¶¶ 2076-77])--ABM and McGraw-Hill proceed to provide a litany of every ratemaking procedure, value, and principle approved by the Commission in MC95-1, and to assert that Mitchell's rate design contradicts or departs from them. According to ABM and McGraw-Hill, the current proposal contradicts the principles of:

- "recognizing cost differences through rate categories instead of subclasses";
- "recognizing cost distinctions through discounts";
- "[sending] 'technically efficient' price signals . . . to mailers";
- "cost-based pricing";
- "productive efficiency";
- "workshare discounts";
- "accurate productive efficiency signals . . . undistorted by any markup";
- "the established discount approach";
- "the goal of the lowest joint mailer/Postal Service cost";
- "creating discount categories";
- "discounts from overall subclass rates that signal to mailers the Postal Service's costs of producing the workshare component."

ABM/MH Br. at 18-21; see also 5-6 and 16-17.

In view of the fact that this Complaint *does not* propose new subclasses, *does not* propose discounts or other signals that are excessive, *does* focus on the economic efficiency of the signals provided, *does* support worksharing, *is* cost-based, and *does not* mark up any cost difference or cost avoidance, it is difficult to understand what divergence ABM and McGraw-Hill see in this case from the principles listed above that were approved in Docket No. MC95-1, or how treatment of institutional costs differs from their treatment in MC95-1. All of the incentives provided are cost-based, are provided through discounts or equivalent rate differences, and are focused on alternatives that mailers face on a daily basis. The per-piece and the proportionate contributions are aligned with notions of lowest combined costs and with all of the guidance supported by the Commission in MC95-1 and in other opinions.

Perhaps ABM's and McGraw-Hill's impression that the Complainants' proposal contains inappropriate distribution of institutional costs, a theme they repeat over and over, can be explained by their belief that "Bottom-up-cost-based rates within a subclass (i.e., 'deaveraged' rates) would tend to have equal percentage markups" and that "Mitchell has sought in the current proceeding to defend the concept of equal implicit cost coverages" (i.e., equal percentage markups). In fact, cost-based rates do not tend to have equal percentage markups *unless a markup is put on the cost differences*, and this has been done *nowhere* in the proposal. Similarly, as explained above (at 4 & n. 5 and 5-6 & n. 8), Mitchell has *not* defended equal implicit cost coverages, and his rate design does not reflect that approach.

The fact is that Mitchell did not even *start* with equal implicit markups; his entire rate design is consistent with and guided by notions of efficient component pricing and lowest combined cost. These are the principles that the Commission espoused in Docket No. MC95-1, an approach that it said results in equal per-piece

markups. This means, among other things, that no piece is relieved of its per-piece contribution when it becomes workshared and that the proportionate markups on the less-workshared pieces are *lower* than for the workshared pieces.<sup>10</sup>

The proposed rates are not deficient in any of the regards suggested; in fact, one of their strengths is their alignment with Commission principles, which are widely accepted as applicable in regulatory settings. There is simply no sense in which any institutional costs are inappropriately shifted.

4. That “only about 560 of 26,000 periodicals will benefit from the recommended discounts” (ABM/MH Int. Br. at 12 [quoting PRC Op. MC91-3 at ¶ 1003]).

Whether or not such a statement was true of the MC91-3 pallet discount proposal, it is clearly not true of the Complainants’ proposal in this case. Nor is a remotely accurate picture of the truth conveyed by ABM and McGraw-Hill’s many similar statements that refer to “double-digit rate increases” for “many thousands” of small publications (e.g., Br. at 7), while ignoring the evidence of record that: (1) many very small publications will immediately benefit from the proposed rates; (2) many thousands more will be able to benefit after making some rather simple changes in mail preparation; and (3) many (perhaps thousands) of publications will be able to benefit from the increased availability of comailing, co-palletization, and pool shipment services that cost based-rates will bring.

The other side of the same coin is their argument that they have borne the “brunt” of excessive Periodicals cost increases in the past, so that it is both unfair and ungrateful for Complainants to expect them to do more. ABM/MH at 3. They base this argument on witness Schaefer having shown that *Business Week*, a large publication owned by McGraw-Hill, has had a lower per-piece postage increase

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<sup>10</sup> See PRC Op. MC95-1, ¶¶ 3063-80 (pp. III-25-31) and 5236-45 (pp. V-100-04).

since 1985 than *Engineering News* and other medium-sized publications also owned by McGraw-Hill. Tr. 6/1925-30. But there are several problems with this superficially appealing argument.

The disparities in past rate increases experienced by Periodicals mailers have been due primarily to structural changes, such as the creation of presort tiers or pallet discounts (i.e., to rate improvements recommended by the Commission), and to the fact that some mailers, at great cost to themselves, have invested in improved ways of preparing their mail, rather than to any extent to which the Postal Service's cost increases for Periodicals were borne more by some mailers than others.

Schaefer's comparison made no adjustment for changes in either the piece characteristics, mail preparation, or dropshipping practices of the various McGraw-Hill publications that might have affected his comparison. During the time period Schaefer chose to analyze, large mailers made very large investments in then untested technologies such as selective binding, which resulted in significant increases in carrier route presortation. They also responded, especially in recent years, to the dropship discounts that began to be offered for the first time in 1985. Today, many large and medium-sized publications (but very few ABM publications) dropship to the DSCF and DADC to a degree that might have seemed unthinkable in 1985. But they cannot do so without incurring some non-postal costs. It is meaningless to compare just the postage costs of mailers who do more worksharing and dropshipping with those who do less, without also considering the non-postal costs associated with worksharing and dropshipping.

Technological advances in the form of, for example, selective binding, comailing, and the development of a private transportation network that today carries many publications close to their destination at costs lower than the Postal Service's transportation costs, were pioneered by relatively few mailers but are

today rapidly becoming more accessible to much smaller publications which should be able to benefit from them. For example, as reported by witness O'Brien, one printer has already begun to offer comailing not only to its own clients but to publications printed anywhere. Tr. 6/1440. If the rates proposed by Complainants (or a similar set of rates) are implemented, many medium-sized and even small publications will have strong incentives and opportunities to benefit from these developments.

It is true that presort discounts have increased over the years. But the reason they have increased is that the earlier models used to estimate presort-related savings were inaccurate and that the Commission approved newer and more accurate models. And while higher presort discounts may mostly have benefited large mailers, barcode discounts mostly help those whose mail is less presorted. Likewise, the technological advancement presented by the AFSM-100 machines does not help carrier route presorted mail but rather the mail with the least amount of presort.

In any case, the proposal in this case stands on its own merits, regardless of any disagreements that ABM and McGraw-Hill may have with the worksharing and dropshipping incentives that the Commission has approved in the past.

5. *That the MC95-1 decision justifies denial of the Complainants' proposal on the ground of insufficient cost data (ABM/MH Int. Br. at 23).*

Besides being irrelevant because the Commission will not recommend specific rates in this docket and newer cost data will be used to develop the rates eventually adopted in a future rate case, this reference to MC95-1 is also irrelevant because it concerns the lack of IOCS-type cost data adequate to support the

separate subclasses proposed in that case.<sup>11</sup> While ABM and McGraw-Hill continue nine years later to argue against the establishment of separate Periodicals subclasses, no proposal for such a separation is present in this docket.

Stralberg and Mitchell have amply demonstrated (1) that data currently gathered by the Postal Service show that "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); (2) that these cost drivers are substantially within the control of mailers and therefore appropriately reflected in rates; and (3) that because they are not currently reflected in rates, there is often "no way mailers can make efficient decisions" (id.). Mitchell discusses all of the signals proposed and explains their relationship to costs, their consistency with guidelines followed regularly by the Commission, and their potential importance in influencing mailer behavior.

6. *That the current proposal would "conflict with the operational efficiency of the Postal Service" (ABM/MH Br. at 11).*

There is absolutely no evidence to indicate that this is the case. Nor is it a claim that the Postal Service has seen fit to make. On the contrary, the record is replete with evidence that the current proposal would generate considerable new efficiencies in the processing of Periodicals.

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<sup>11</sup> PRC Op. MC95-1, ¶¶ 4253-91 (pp. IV-115-32).

**B. The complex links between the costs of pieces, bundles, and containers were studied in depth by Stralberg. That such links exist is not “problematic” but is the reason why cost-based rates such as those proposed are necessary.**

While the Postal Service has not seen fit actually to claim that any proposal of the Complainants would pose any operational problem, or that any potential problem it can think of could not be dealt with adequately through quite straightforward DMM revisions, it has tried to stir up such an implication without asserting it. And ABM and McGraw-Hill have not been backward about seizing on the Postal Service’s ominous-sounding but ultimately noncommittal and uninformative statements.

The Postal Service refers to Stralberg’s having confirmed that the costs of containers, bundles, and pieces are “causally linked,” and it contends that this makes “problematic” the development of separate rates. ABM and McGraw-Hill make a similar claim and contend that Complainants have not considered the effect of reduced sack presort levels should mailers consolidate to use fewer sacks. Br. at 10-11.

Of course, there do exist causal links between the costs of containers, bundles, and pieces. For example, as Stralberg explains in the response that the Postal Service refers to (USPS/TW et al.-T2-14: Tr. 1/188-89), the cost of sorting a bundle depends on the presort level of the container it came in. It is precisely because of the complex relationships between these things, which Stralberg analyzed in detail in his direct testimony, that a rate structure focused exclusively on pieces, ignoring the use of bundles, sacks, and pallets, can never provide accurate, cost-based signals. As Stralberg further explained, the purpose of his analysis was precisely to provide the more cost-based price signals needed.

For the Postal Service to say that such demonstrated causal linkages make the development of separate rates "problematic" is to fail to distinguish these

linkages from the many similar linkages that have already been made the basis of specific rates. *All* the costs that go into rate design are "problematic" in this sense: this is only to say that rate design is inevitably a complicated business. In short, the Postal Service's claim, because it applies to *every* significant input into rate design--at least as a basis for objecting to the use of any particular input--is vacuous.<sup>12</sup>

ABM and McGraw-Hill make much of Postal Service witness Miller having included sack weight in a long list of "cost drivers."<sup>13</sup> They envisage a scenario wherein sacks would get heavier and heavier, adding huge costs that Complainants allegedly have not considered. But, as explained below, rational mailers will not make such choices, because they will find that excessively large sacks are not economical.

ABM and McGraw-Hill are simply wrong in alleging that Stralberg did not analyze the effect of reduced sack presort levels if multiple small sacks are consolidated into fewer, larger sacks. Br. at 27. The purpose of sack and pallet rates that vary with both presort level and entry point, and bundle rates that vary with both bundle and container presort level, is to allow mailers to make choices *that are aligned with Postal Service costs*. Use of fewer sacks will indeed yield lower sack charges, but if it reduces presort levels it will lead to higher bundle charges. The proposed rates would encourage mailers to make appropriate choices that balance piece, bundle, and container costs in order to achieve the lowest overall costs. Tr. 1/25, 5/1569-70.

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<sup>12</sup> It is equally true that there are "causal links" between pieces and pounds: e.g., heavy pieces cost more to handle than light ones, just as pieces carried in many small sacks cost more to process than if they were in a few larger sacks, other factors being equal. By the Postal Service's and ABM's twisted logic, these facts would make it "problematic" to have separate rates for pieces and pounds.

<sup>13</sup> Tr. 6/2157. Miller listed 23 factors that he said can influence Periodicals flats costs. He later admitted that there are many other factors, including very important factors such as bundle and container presort level, shape, distance, address quality, etc., that he had not included in his list. Tr. 6/2134.

Stralberg's testimony devoted considerable attention to the question of identifying weight-related costs. He pointed out that many mail processing operations are affected by weight, although the precise percentage is often difficult to identify. Tr. 1/54-56. He identified *specific components* of piece- and bundle-processing that are *predominantly weight-related*. Tr. 1/26-27, 29. However, regarding container costs, he also showed that there are clearly major components of the handling of sacks wherein costs are incurred on a *per-container* basis, such as sorting the sack, opening it, shaking out its content and making sure the last piece is out, and recycling the sack for future use. Tr. 1/23-24. Similarly with pallets: only *some* of the components of handling costs are related to weight; the forklift that handles the pallet moves it the same distance regardless of its weight, and its speed of movement is generally constrained by platform congestion rather than by the weight of the pallet it is carrying.

Should the Postal Service actually argue, or should the Commission find, that some of the sack/pallet-related costs in Stralberg's model should be considered partly weight-related, that would indicate somewhat lower container charges and higher pound charges than those proposed by the Complainants. But it would not alter the fact that excessive use of "skin sacks" currently imposes large unnecessary costs on the postal system. Removing those costs through better mail preparation would benefit the Postal Service as well as Periodicals class and the publications involved.

- C. The Commission should rely on Stralberg's thoroughly documented analysis of the impact of the proposed rates on the type of publications represented by ABM rather than on Bradfield's unsubstantiated, undocumented, and unspecific claims.**

Stralberg was able to show that even Bradfield's highly incomplete and inadequately documented Exhibit LB-1 indicates that the use of skin sacks is the

predominant reason why some publications, absent changes in mailing practices, would experience high increases under the proposed rates. His carefully documented analysis, and the conclusions it led to, are very different from the unsubstantiated opinions presented by Bradfield and frequently relied on by other ABM witnesses as well as the ABM/McGraw-Hill Brief (at 2, 7) and the OCA Brief (at 10-11).

Stralberg demonstrated that, in fact, apart from the aspect of the Complainants' proposal that would zone the editorial pound rates, the proposal would benefit more than half of the publications on which ABM was willing to make even partial or dated information available. And he showed that for most of those that would not benefit, the reason can be traced to either excessive use of skin sacks or the use of a non-machinable format.<sup>14</sup> In fact, one might think that ABM,

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<sup>14</sup> Exhibit C-1 in Stralberg's rebuttal testimony (Tr. 5/1579-81), as fully documented in library references TW et al. LR-9 and LR-10, reveals that among the 154 ABM publications whose mail.dat files he was able to analyze:

- 27 had non-machinable format--nine of those because of piece weight in excess of 1.25 lb., the rest because of extra width. Those 27 would experience higher postage.
- Another 28 used very low-volume sacks, with the average number of bundles per sack varying from one to 1.63. Three of these 28 were over 90% palletized and would experience lower rates despite having some low-volume sacks. The rest would experience higher postage, the highest increase being 82.4% and the second highest 69.25%. Among the 28 using low-volume sacks, there were one quarterly, eight monthlies, and four biweeklies: i.e., at least one-third and possibly as much as one-half of them cannot plausibly argue that the use of low volume sacks is necessitated by time-sensitivity.
- Of the remaining 99, only one would have a double-digit increase (of 14.65%). Under the alternative without zoned editorial rates, 76 of the 99 would experience *lower* postage, another 11 would have increases *under one percent*, and the remaining 12 would have increases up to 8.16%, as can be seen by comparing the last two columns in Table C-1 at Tr. 5/1579-81.

In other words, apart from the relatively few ABM publications that either use excessively small sacks or are non-machinable, the vast majority would benefit from the proposal to introduce separate charges for bundles, sacks, pallets, and non-machinability. Because these publications, *unlike the*

had it adequately analyzed the Complainants' proposals, should be in favor of these changes and the opportunities they would open up to its members.

Most ABM publications are nationally distributed, unlike the majority of very small (circulation under 1,000) publications, but do no dropshipping and would therefore pay more under zoned editorial pound rates.

It would appear that many of the medium-sized ABM publications ought to be able to take advantage of the increasing availability of pool shipping as well as comailing and co-palletization, thus turning the zoning of editorial pound rates to their advantage as well.

**D. Stralberg and O'Brien substantiated their claims that it is easy for mailers to change sack minimums and that doing so would yield the rate benefits they predict, whereas ABM and McGraw-Hill failed to provide any evidence supporting their contrary assertions.**

ABM argues that “[i]f it were really so simple to eliminate postal costs [by changing sack minimums], one wonders why the Postal Service has not long ago taken the very simple action of *setting* higher sack minimums through its rulemaking authority.” Br. at 26. The fact is that such higher minimums are already in effect for Standard sacks, and probably would be for Periodicals sacks as well, were it not for pressure by publishers who believe skin sacks are the only way to improve service. In any case, we are not in favor of such minimums, because, as Stralberg has pointed out, no minimum is optimal in all situations. It is better to provide mailers with appropriate price signals and let them make the decision about how large to make the sacks they use.

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*substantial majority of very small publications reported on by witness Tang, are generally nationally distributed titles that do not currently dropship at this time, however, most would pay more under zoned editorial rates.*

ABM also argues that reducing skin sacks is “far from simple.” *Id.* In fact, reducing skin sacks is indeed simple, as Stralberg fully explained and O'Brien demonstrated. Tr. 5/1552, 1432.

Building on a predicate that they know to be inaccurate, ABM and McGraw-Hill also level the following charge:

Despite seemingly ample data, Stralberg never undertook to quantify *how much* “less severe” the rate increase would be if affected publications changed their sack minimums from 6 to 24 pieces.

Br. at 27. But, in fact, *no* such data were available to Stralberg. As both Stralberg and O'Brien explained during cross-examination by ABM, and Stralberg explained again in response to a recent ABM interrogatory, it is not possible to run an alternative to a fulfillment program without access to the data that the original program used, which would include the list of addresses to which copies of a publications are to be mailed.<sup>15</sup> If, as it appears, ABM and McGraw-Hill's reference is to Bradfield's Exhibit LB-1, Stralberg had only the information contained in the exhibit itself and in one spreadsheet provided by ABM containing partial supporting data.<sup>16</sup> The spreadsheet did include specifications of sack minimums used, but not at the necessary level of detail that might be found, for example, in mail.dat files. If the reference is to the dated ABM mail.dat files that Stralberg did analyze, those files contained no information on the sack minimums or any other fulfillment program parameters used in generating them.

However, It was not necessary for Stralberg to perform the precise comparative test described by ABM and McGraw-Hill in order to find extensive and

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<sup>15</sup> Tr 5/1455-56, 1588-99, and response to ABM/TW et al.-8 (filed December 8, 2004).

<sup>16</sup> Spreadsheet 1f1sg01!.xls, included in TW et al. library reference 7, originally provided by ABM counsel.

consistent evidence in the data that were available showing the correctness of his finding that the use of small sacks is a major cause of extremely high costs among small and medium-sized publications, and that the reduction of unnecessary sacks is a realistic and effective way of avoiding severe rate impacts for most such mailers. Tr. 5/1548,1551-52. ABM and McGraw-Hill provided in response an endless stream of assertions, and no evidence whatsoever that the conclusions produced by Stralberg's analyses were wrong.

**E. For all its rhetorical flair, NNA's brief is riddled with inconsistency, logical contortion, and misrepresentation of the record.**

There are many inconsistencies in the NNA brief. Before addressing these, however, we wish to acknowledge that the service received by newspapers that must travel far from their origin often leaves much to be desired and that in the vast majority of such cases alternatives such as comailing, co-palletization, and pooled dropshipping are not practical alternatives. Moreover, we recognize that it is unrealistic to expect the publishers of these newspapers to be experts on postal operations or the cost and service consequences of different ways of preparing their copies for mailing, and that they therefore have had little choice other than to accept the often questionable advice given by postmasters and postal managers who themselves may have little understanding of cost incurrence.

Yet it is clear from the record in this docket (1) that the mail preparation chosen by at least some of these newspapers imposes very high costs on the Postal Service; and (2) that there are very simple ways to control these costs that will not adversely impact service, and may even improve it.

NNA members typically submit a large portion of their mail at in-county rates. Another significant portion is destined to neighboring counties, has fairly high density, and does not require long-haul transportation. But they also send a few

copies to remote destinations, including to the so-called "snowbirds." Tr 5/1558. Those copies, being few and going to dispersed places, obviously cannot achieve any significant degree of presortation. *All of NNA's concern in this docket has centered on the quest for a safe and economical way to get those copies, the tiniest portion of the entire Periodicals mailstream, to their destinations.*

NNA offered (through witness Crews) one specific example of a "typical" small newspaper and "typical" subscribers of that newspaper that it alleged would be particularly hurt by the proposed rates. However, Stralberg showed that NNA's beliefs even about the "typical" example it chose to offer are ill-founded, that this newspaper's problem is that it uses far too many sacks, and that consolidating into fewer sacks would not hurt its service at all. Tr. 5/1560-1. Acknowledging this fact, NNA now concedes in its Brief (at 13) that "this particular publisher's assumption may be wrong," but then proceeds to describe its own example as an "anecdote" and refuses to acknowledge that it may apply in many other similar situations. *Id.* But of course it is not an anecdote but an actual, concrete example, the only example for which detailed information was made available for analysis on the record by NNA. Moreover, Stralberg did not show that the publisher's assumption "may be" wrong but rather that it *is* wrong, as evidenced by the fact that NNA's witness acknowledged that this is so.<sup>17</sup>

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<sup>17</sup> See Tr. 6/2018-20, where Crews acknowledges that he does *not* believe that the newspaper, by entering nine pieces each in nine mixed-ADC sacks as it currently does, receives any better service than if it entered those 81 pieces in a single mixed-ADC sack, and explains the reason for this needlessly wasteful mailing practice with the following statement:

The publisher's circulation specialist advised that these sortations *were originally set up by state to try to achieve the most direct transportation route and downstream processing as possible.*

*Id.* at 2020 (emphasis added).

What is more striking about NNA's response is the obstinacy with which it holds to its position in the face of contrary evidence, to the point of arguing that the most important thing is what its members believe rather than what the actual facts are. Thus, it says of this publisher:

Whether the expectation of promised service is realistic or not as a result of the sacking practices may be subject to debate, but this publisher set up the sacking practice to achieve the most direct processing possible.

Br. at 13. Where the issue is whether NNA is correct in its belief that such practices are necessary to receive better service, that statement is a transparent non sequitur. And it is a non sequitur that NNA instantly universalized and to which it tenaciously adhered for the rest of its Brief:

But the anecdote [i.e., the fact that NNA's example demonstrated the opposite of what NNA claimed] doesn't deny the reality of many publishers who have built their sacking practices over the years, usually on the advice of Postal Service operations managers, to achieve direct transportation and downstream processing for service purposes.

Id. That assertion is, of course, impossible to disagree with. No revelation about current realities could possibly "deny the reality of" the past beliefs of many publishers over the years. On the other hand, no tradition of past belief can justify ignoring hard, uncontroverted evidence that current facts are otherwise.

NNA complains that its members are stuck with sacks until the Postal Service provides "an alternative," presumably some other type of container. Br. at 13, 20. But NNA cannot seriously believe that using some other container in the way some of its members now use sacks, putting only a few pieces in each container, would eliminate the huge costs associated with this practice.<sup>18</sup> Holding out for some kind

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<sup>18</sup> Sacks, after all, do have the advantage that they collapse to take only a little more space than the mail that is in them. A stiff type of container, such as a tub, would occupy much more space to carry just a few pieces per container.

of magic bullet that neither NNA nor anyone else has been able to conceptualize at any level, however general, does not address the current facts but simply tries to wish them away.

NNA reports great service improvement in a few cases where its members are allowed to enter their outbound mail in tubs but then (1) falsely implies that Stralberg suggested that if tubs were “available for widespread use in the system” their problems would be solved, and (2) heaps scorn on that suggestion which, of course, Stralberg never remotely entertained. As Stralberg in fact pointed out, the tubs in question are mixed-ADC tubs, and “stuffing” outbound mail in a few such tubs is no different in terms of subsequent treatment by the Postal Service from stuffing it in a few mixed-ADC sacks. Tr. 5/1561.<sup>19</sup> Given that this practice, where encouraged by the Postal Service, has apparently *improved* service, NNA should consider the possibility that use of many low-volume, high-presort sacks may be part of the cause of its service problems, not part of the solution.<sup>20</sup>

Having rightly dismissed the use of tubs as promising major strides in processing its members' mailings, and wrongly dismissed the use of fewer skin sacks despite unrebutted evidence of the efficacy of that measure in reducing costs without adversely affecting service (on the apparent grounds that its members choose to believe what they choose to believe), and having made any change in behavior on its part conditional on the invention of some kind of magic bullet (in the form of an as yet unimagined container) by the Postal Service, NNA is not left with

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<sup>19</sup> The *Atchinson Mail* also uses one SCF tub, which as Stralberg points out is an economic alternative to putting copies for the local SCF area into a number of 5-digit or 3-digit sacks with a few pieces in each. Note also that Stralberg agrees that use of tubs in the limited way in which it has been described for the *Atchinson Mail* may be a good idea when agreeable to local postal managers, but in no way does he suggest widespread use of tubs in the way some newspapers now use sacks.

<sup>20</sup> See Tr. 5/1493-94 (O'Brien) and 6/1781 (McGarvy), referring to results of a study performed by the Postal Service at Carol Stream, Illinois.

much to offer by way of improving the state of affairs for the Periodicals subclass. It writes (Br. at 6):

NNA urges the Commission to use this case to point to opportunities for the Postal Service to design rates that will urge mailers to use its services wisely, but to create incentives, not penalties, where realistic choices are available. Where the Postal Service is unwilling or unable to develop realistic choices, there should be no penalty for a mailer's failure to use them.

But the most obvious and very realistic alternative to the use of many sacks containing only a few pieces in each is to use fewer sacks with more pieces in each. In the one example for which detailed data were in the end made available, NNA's witness Crews ended up admitting that such consolidation, despite what he (no doubt sincerely) had thought, would not affect service.

But, as always, NNA comes back to truculent insistence that when it believes that something is so because it believes it is so, it is always right. It states:

NNA has concluded that newspapers are not able to do what complainants want them to do, price signal or no price signal— unless they simply eliminate some of their mail. Tr. 6/2072-2073.

Br. at 7.

On the pages cited by NNA, instead of examples of such newspapers, all one discovers, unsurprisingly, is that NNA did indeed conclude what it says it concluded. Similarly, NNA confidently asserts:

Why do they use small volume sacks? Because they must.

Id. When one probes for the reason that they "must," as always, it comes down to the statement that they must because they *believe* they must:

Stralberg says there is no firm evidence that skin sacks lead to faster delivery, but there is also no firm evidence that it does not, *and the widespread use of them would indicate mailers believe otherwise.*

Id. at 8 (emphasis added).

T-W [sic] witness Mitchell also *acknowledges* that publishers using larger numbers of sacks *believe they are doing so for service*.

Id. (emphasis added).

Nor is NNA able to give any reasonable explanation why the record is empty of evidence for these beliefs. NNA put on two witnesses. Mr. Crews, whose announced purpose was “to discuss how the proposed rates would affect newspapers in a generally rural state like Missouri” (Tr. 6/2025), devoted roughly half his testimony to a discussion of the *Cameron Observer*, which he called an “excellent example” for his purpose.” Id. at 2027. Yet when asked whether he had tried to estimate how much the *Observer’s* postage would change under the proposed rates, his answer was: “No.” Id. at 2002-03. When asked whether he had tried to analyze how the *Observer* might change its mailing practices if the proposed rates were adopted, his answer was also: “No.” Id. As things turned out, he was so misinformed regarding the first and so uninformed regarding the second as to render his testimony on the subject, especially after Stralberg pointed out and he acknowledged his misconceptions, completely undependable. Tr. 6/2018, 2020, 2021.

This has not dampened NNA's estimation of his testimony, however, for on brief it continues to repeat the assertion, now proved fanciful, that “Crews examines the impact [of the proposed rates] upon several Missouri newspapers that he considers fairly typical of small newspapers that use the mail to reach readers.” Br. at 12. Examining the impact of the proposed rates on those newspapers is precisely what Crews confirmed, in the interrogatory response quoted above, that he made no attempt to do. And, not content with wholesale mischaracterization of his testimony, NNA proffers equally egregious mischaracterization at the retail level. For instance, the following are, verbatim: (1) NNA’s description in its Brief of Crews’

testimony concerning the *Cameron Observer*; and (2) interrogatory TW et al./NNA-T2-1(b) to Crews, and his response, in full:

He [Crews] explains the options this newspaper [the *Observer*] would have for distribution of its outside county copies if the complainants' rates were in effect.

NNA Br. at 12.

TW et al./NNA-T2-1(b). Did you try to analyze ways that the *Observer* might adjust to a new set of rates by changing its mailing practices?"

Response. No.

Tr. 6/2002, 2003.

Apparently, Stralberg's use of actual, detailed data about the mailing practices of the *Cameron Observer*, resulting in the witness's acknowledgment of his own previous failure to know the facts or to understand their significance, has caused, in NNA's view, yet another after-the-fact transubstantiation of what it formerly believed to be concrete information about its members into mere "anecdote," for NNA now exchanges its confident assurance that "the mailers are the ones with the daily, weekly and monthly obligation to get their products to subscribers, and who have the experience to know what works and what does not," for a decidedly more diffident attitude:

The fact is that by their very size, the mailstream's smaller stakeholders are not in a very good position to provide anything but anecdotal data—and it may be precisely why they become invisible or insignificant to well-intended postal experts like witnesses O'Brien and Stralberg.

Br. at 16. Smallness, to the point of having only a few hundred outside-county copies, should make precise data collection very easy. The proprietors of *Cameron Observer* and *Atchinson Mail* were able to provide detailed information when Crews asked them. He just didn't bother asking them before we asked him.

But we will pass over the impenetrable reasoning behind the notion that smallness makes data collection impracticable in order to draw attention to NNA's assertion about the mailstream's smaller stakeholders being "invisible" to "well-intended" postal experts like Stralberg and O'Brien. Stralberg is the *only* witness in this case whose attention to the information provided by NNA, such as it was, extended beyond using it as an occasion for mere opining. Instead, he performed careful analysis of the data that were made available and the possibilities raised by those data under varying assumptions about future rates.

The same qualities--careful attention to the facts, meticulous analysis, specific, clearly explained, fully documented and verifiable conclusions--marked Stralberg's analysis of the far more extensive and challenging data supplied by ABM and especially by Postal Service witness Tang. *No witness* in this entire case other than Stralberg took the trouble actually to perform an analysis, rather than merely venture a guess, about the impact of the proposed rates on a variety of publications.<sup>21</sup>

NNA is thus in error when it states that witness Tang's testimony succeeded in

[d]emonstrating the disproportionate impact upon smaller publications [which] was the purpose of USPS Rebuttal witness Tang's testimony.

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<sup>21</sup> See TW et al. Initial Brief at 28 n. 18, 29 n. 20, and 30 n. 23. Given that record, and Stralberg's decades of meticulous research, often brilliant analysis, and unvarying forthrightness in his numerous appearances before the Commission, NNA's further statement that "It is easy for Stralberg to say these small publications could simply stop doing what they do, and even if they go out of business, their demise at least saves his client money" (Br. at 17) is scurrilous, offensive, and unworthy of its author and its sponsor.

Br. at 16. As Tang candidly acknowledged, she did not inquire into how any publication or type of publication would respond to the proposed changes.<sup>22</sup> Indeed, NNA's own description of what Tang allegedly "demonstrated" gives away the game:

that the proposed changes *might not* affect volume much, but *could have* a huge effect on the use of mail by periodicals [and that] [a]s many as 20,000 publications *could be* negatively impacted.

Br. at 16 (emphasis added). That is in fact an accurate description of the things Tang said, and there is not a "demonstration," or even a view as to probability, to be found in the bunch.

NNA is likewise in error when it states, "As McGraw Hill witness Schaefer notes, large publications do benefit from the complainants' proposed rates, even as the smaller ones within the same companies are adversely affected" (Br. at 17)-- unless by "notes" it means "supposes." Schaefer confirmed that he gave no consideration to how the many publications owned by his company would respond to the proposed rates, and of course McGraw-Hill, like ABM, refused to provide any current or representative mail.dat files, even under protective conditions, that would enable others to consider the matter.<sup>23</sup>

**F. NNA and OCA have done everything conceivable with Gordon's testimony, except read it.**

In its treatment of witness Gordon, NNA at least manages to be entertaining, offering a burlesque of his testimony that soars so far beyond the actual issue he addressed that it doesn't even mention it. Gordon's testimony addressed whether

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<sup>22</sup> Resp. to TW et al./USPS-RT-2-19: Tr. 6/2213.

<sup>23</sup> Response to TW et al./MH-4(c): Tr. 6/1984-85. The five Complainants all furnished, without any request for protective conditions, all requested data concerning all of their publications. See, e.g., Response to ABM/TW et al.-T1-3: Tr. 1/112-31.

the historical circumstances that may have justified an unzoned editorial rate in 1917, when Congress created the current zoned advertising/unzoned editorial rate structure, continue to obtain in the early years of the 21st century, or whether, as Gordon put it, there continues to be any 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.” Tr. 3/627. Gordon’s conclusion, which appears to Complainants to state a more-or-less obvious, pedestrian fact, is that there “is not the slightest chance” that zoning the editorial pound rate for Periodicals would today cause the nation to dissolve into sectionalism . . . a concern that belongs to an age long past.” Id.

NNA, however, virtually ignoring Gordon’s written testimony, seizes on a few incautiously honest answers he gave on cross-examination in order to paint this highly-regarded historian of business and technology who is the author of six books on the subject, a long-time columnist for that notoriously disestablishmentarian--nay, incendiary--journal *American Heritage*, a former staff member to New York Congressmen Herman Badillo and Robert Garcia, and someone whose avocations and interests run to such lowbrow, anti-intellectual channels as genealogy and the history of banking, as a sworn enemy of the written word and all it stands for and as a champion of ignorance, philistinism, and a return to feudalism, when only the rich had books and they were chained to desks. They see Gordon as harboring a special hatred for periodicals, especially small ones (and most especially weekly newspapers, perhaps based on the fact that the only newspapers he seems ever to write for are those soul-destroying urban behemoths the *New York Times*, the *Wall Street Journal*, and the *Washington Post*).

So disturbed is NNA by Gordon’s alleged “disdain for periodicals mail” (Br. at 17) that they are affronted even by his appearance in behalf of “some of the largest periodical publishers in the world” (id.). The shameful sin of which Gordon is guilty

and which is the occasion for all this trumped-up alarm, is that he is neither a professional witness nor an expert on postal affairs, and hence has never been schooled in the pieties that NNA thinks essential for a proper Commission witness. Thus, when asked in an interrogatory whether he favors a postal rate preference for Periodicals mail, his answer, like (one supposes) that of a substantial portion of perfectly thoughtful and well-educated Americans who have no particular interest in or even awareness of Periodicals postal rates, was:

I have not formed an opinion on the question.

Tr. 3/634. Whereupon, ladies screamed, grown men fainted, children were removed to a safe distance, and the gaiety of nations was eclipsed.

It strikes Complainants that there are very few places on earth where this answer would be taken, ipso facto, as evidence of mental or spiritual depravity. Moreover, since the issue is (1) not within the scope of Gordon's testimony, which consists of historical observation, not policy analysis; (2) not raised in this case; and (3) widely thought to be, under current law, not within the Commission's jurisdiction (having been dispositively addressed by Congress when it added subsection 3622(b)(8) to title 39 in the Postal Reorganization Act Amendments of 1976), we see no reason that the Commission--at least as respects Mr. Gordon--should be one of those places.

Gordon's less consequential sin--but one that nevertheless was made the pretext for a silly ruckus in one of two publishing industry journals--was to become momentarily confused on cross-examination about the distinction between the editorial preference authorized by Congress in 1917 and maintained today under the authority of §101(a), and the editorial preference created in 1976 and maintained under the authority of §3622(b)(8). We mean not the least disrespect to the Commission when we point out that the D. C. Circuit Court of Appeals decided in 1993 that the Commission itself, having had almost 20 years to consider the issue,

had failed to get that distinction straight (nor, contrary to the impression ABM would create, did the Court itself have an easy time disentangling the complicated stands of those two similar, interrelated policy provisions).

Complainants must insist, however, that what Gordon actually said, for all the apparent horror of NNA, was not, as NNA suggests, that he disdains printed periodicals and would take delight in their disappearance from the earth, but something rather more modest: namely, that “while the object of binding the nation together intellectually and culturally is a great social good,” he is “not at all sure” that a postal rate preference for periodicals is currently necessary to the accomplishment of that objective.

One reason, among a number of technological and social developments spanning the 20th century, that Gordon gave for this conclusion was the increasingly widespread availability of information on the Internet. His written testimony did not focus especially on business and technical information in this regard, although when ABM made that topic the center of its interest in Gordon, he made it quite clear that he thinks the Internet is especially good at making just this type of information available.

It is difficult to imagine how anyone involved in the practice of law or government, or in producing a newspaper, could have the slightest doubt concerning the correctness of that observation. However, by redefining the issue and mischaracterizing what Gordon said about it, both ABM and NNA have managed to conjure up an apparent conflict of visions. According to them, Gordon believes you can keep up your skills as a brain surgeon by hanging out in Internet chat rooms. According to them also, the contents of such journals as *Neurology* and the *Proceedings of the Mayo Clinic* cannot be deemed trustworthy unless they are printed on paper and arrive by mail. For example, Cavnar states:

I strenuously disagree with the notion that, because Mr. Gordon's Google search for the type of information contained in Automotive News, Fire Engineering, Mayo Clinic Proceedings, and the New England Journal of Medicine produced, for example in the case of Automotive News, more than half a million hits, information of the kind and quality that appears in that publication is available on any of them or even all of them combined (Tr. 771-79).

Tr. 6/1736-37.

What is curious about this statement is that in every instance mentioned, the *number one* Google hit was the website of the publication itself. Is Cavnar asserting that *Mayo Clinic Proceedings* and the other publications mentioned do not have on *their own* websites "information of the kind and quality that appears in that publication"? And if so, on what is he basing that assertion? He reproaches Gordon, who performed his Google searches as a test on the day before his July 12 hearing, for "not bother[ing] to look at any of the sites to which Google directed him to determine the nature of their content." *Id.* at 1737. Did Cavnar look them up before his testimony was filed on September 9--59 days later--to verify either that those websites do not contain "information of the kind and quality" that appears in the corresponding printed publication, or that they "do not contain the entire publication"? Apparently not.

Neither Complainants nor Gordon has ever remotely suggested that everything contained in printed publications has been superseded by material on the Internet, that access to the Internet is universal, that periodical publications make no significant contribution to the cultural, social and political life of the nation, or that widespread access to periodical publications is less than a compelling public value. What we have said, quite simply, are two modest things: (1) that the unzoned editorial rate cannot be shown, on the evidence currently available, to substantially contribute to the degree to which access to periodicals (large, small, or otherwise) is widespread; and (2) that the phenomenal growth of other media since 1917, along

with a variety of other developments that have vastly reduced the cost and increased the general opportunity to communicate, travel, or send information in myriad forms (including printed) all over the nation, have substantially lessened the centrality of mailed periodicals as an instrument for "binding the nation" in the ways that concerned Congress in 1917.

OCA's treatment of Gordon's testimony is less interesting but no less fanciful. It sets out (at 9) to show that "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" over the course of the proceeding. Gordon made no such declarations. This is hardly important, however, because OCA's rebuttal would be inadequate to its task no matter what Gordon had said. It refutes his supposed declarations thus.

First, it states:

In written cross-examination, Gordon was forced to concede that "it is often difficult to assess the timeliness and accuracy of information found in any medium, including websites."

Br. at 9. That response to the question whether it is difficult to assess the accuracy and timeliness of information on websites is self-evidently a *refusal* to concede that websites are different from other media, such as periodical publications in this respect. OCA goes on:

Also, he concedes that television programming is not an adequate substitute for many business publications; 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.

Id. Again, since he never said or implied otherwise in the first place, OCA's characterization of these statements as "concessions" is baseless.

What Gordon did say, in response to interrogatories asking whether he thought information "of the kind and quality" contained in four particular ABM

publications is available on the Internet, was that he believed it was. He demonstrated that fact when challenged on oral cross-examination by showing that a Google search under each of the four titles revealed that *the publications themselves* were available on line. Even after that demonstration, ABM's witness Cavnar continued to assert that equivalent information was *not* available on line, apparently on the puzzling ground that the searches which turned up the publications themselves also turned up a wealth of related sites.

As previously indicated, NNA's Brief turns this serious issue into a farce and Gordon into a bogeyman, as an extract from NNA's discussion will amply confirm:

Gordon's apparent intent was to provide the Commission comfort that if the small publications did go out of business, the world would not come to an end. There is always, after all, the Internet.

Br. at 17, ll. 21-23

He has never subscribed to one, and knows nothing about them, including whether they have websites or are replaceable by electronic means. Tr. 3/743. His testimony as proof that newspapers could disappear from the mailstream without harm to the information available to the public, or even historians like himself, is worth about as much effort as he put into it—none.

Br. at 19, ll. 10-15. These statements, which do not accurately describe anything that Gordon said or implied, constitute an entertaining but fundamentally dishonest account of his testimony.

Having painted the Complainants and their witnesses as the black-hearted villains in a simplistic melodrama, NNA ties itself to the nearest railroad track and seeks the Commission's sympathy for what it tries to portray as the pathetic plight of the newspaper industry. Thus, witness Stralberg, for whom "[I]t is easy . . . to say these small publications could simply stop doing what they do" but who doesn't really mind if they go out of business as long as "their demise at least saves his client money," is countered by the arrival of a heroic champion on a white horse:

One might assume if [small publications] thought that they would [survive the onrushing train of the proposed rates], American Business Media, representing small periodicals, would not have been sent into the battle for some of them in this docket.

Br. at 17.

Surely it is rather late in the day to discover that ABM “represents small periodicals,” when we had thought it represented (mostly medium-size) *business* periodicals, about 80% of which are requesters (Tr. 6/1716), and also to discover that it has been “sent into the battle by some of them” (i.e., small periodicals), when all along we believed ABM appeared in this case in behalf of its own membership.

In any event, this new role in which ABM now tries to cast itself makes great sense. It explains why ABM has been unwilling to provide data on its own members since it has been summoned into this case to defend some other group of unnamed “small publications.” And it also explains why those small publications are both nameless and unrepresented by data, since they are so frightened by Complainants that they must summon ABM to do battle in their stead. This explains, for example, why not a single one of the “many thousands” of publications that supposedly will meet their demise if the Complainants are allowed to have their way has been identified on the record:

Complainants do not consider [their] fears meaningful because no publisher has performed a ritual sacrifice on the witness stand. . . .

O’Brien wants the Commission to insist that a business broadcast its imminent demise—no doubt creating a self-fulfilling prophecy.

Br. at 19.

The reasoning here is topsy-turvy. If the main argument against the proposed changes is that their adoption would cause the demise of “thousands” of publications, and if individual publications could help stop their adoption by

demonstrating that they would in fact be put out of business, why should they be so unable to say so? If even a small part of what ABM and NNA say, and may even believe, on this subject were true, why would such publishers not be flocking to the Commission to say "These rates would put me out of business"? How will saying this harm them if the rates are not adopted? How will keeping silent have benefited them if the rates are adopted? Among all the alleged "thousands" of diverse, independent, vibrant voices we are told will be snuffed out, why is none willing to come forward and tell the Commission *how* it will be ruined if Complainants' proposals are adopted?

Of course, there is zero evidence on the record about the relative affluence of the publications represented by ABM and NNA, either individually or as a type, and those represented by Complainants. Size is not the same thing as affluence, as the demise of *Life*, *Look*, the *Saturday Evening Post*, *Colliers* and a host of other very large magazines and newspapers over many years attests. If either NNA or ABM wished to present evidence that its member publishers are other than affluent, it had every opportunity to do so.

**G. ABM and McGraw-Hill have given fair warning of the untrustworthiness of their representations of evidence and authority.**

Earlier sections of this brief have reviewed a representative sample of ABM's and McGraw-Hill's persistent mischaracterizations of the record and misapplications of Commission precedent. Of the legal analysis that Complainants presented in their Memorandum of Law and Policy Relating to the Editorial Pound Charge for Periodicals (December 1, 2004), ABM and McGraw-Hill say almost nothing in their initial brief, stating that, "[s]ince the Memorandum is part of the Complainants' initial brief" (Br. at 32 n. 27), they will hold their fire for the reply brief.

Because it will then be too late for Complainants to draw attention to misstatements of applicable legal authority by ABM and McGraw-Hill, we draw attention now to the fact that the discussion of the *MOAA* case in their initial brief, although extremely short, provides ample evidence that their representations of legal authority should not be trusted. In just a page and a half of discussion, captioned (implausibly, to anyone familiar with the *MOAA* opinion) "The Court of Appeals Has Broadly Endorsed the Commission's Approach," ABM and McGraw-Hill provide a miniature textbook on the art of selective quotation.

Half of that discussion is given over to a lengthy quotation from a part of *MOAA* in which the Court paraphrases the Commission's reasoning, which is represented as, and through the careful use of ellipses made to appear, a statement of the Court's own views. Br. at 39. The misrepresentation embodied in that long quotation is crystallized in a sentence that introduces it and contains a much shorter quotation from the Court's opinion. ABM and McGraw-Hill write:

The Court accordingly found that the Commission had properly framed the issue before it as a choice between "'economic' considerations on the one hand and 'public policy' considerations on the other." *Id.* at 435-36.

ABM/MH Br. at 38 (quoting 2 F.3d at 435 [the internal page citation is incorrect]).

We suppose it is possible that when ABM and McGraw-Hill say the Court "found that the Commission had properly framed the issue" all they mean is that the Court found the Commission framed the issue in a way that did not constitute reversible error. A slightly fuller quotation of the same passage, however, suggests to a near certainty that creating the misimpression that the Court was indicating *agreement with or approval of* the way in which the Commission framed the issue is precisely what ABM and McGraw-Hill intended. The full sentence from the Court's opinion is:

The Commission framed the question as a choice between *what it viewed as* "economic" considerations on the one hand and "public policy" considerations on the other.

2 F.3d at 435 (emphasis added).

Again, it is not a metaphysical impossibility that the author of that part of the *MOAA* opinion merely expressed himself carelessly (although it is not something he is particularly known for) when--intending to "Broadly Endorse[ ] the Commission's Approach"--he *both* used the telltale qualifier "what it viewed as" *and* put "scare quotes" (i.e., quotation marks implying the speaker's wish to disassociate himself from the sense in which a word is being used) around the words "economic" and "public policy." But, unfortunately for any aspiring proponent of that view, the Court returned to the point about a page further on in its discussion, where it said the following:

Indeed, the Commission did not dispute the economic arguments in favor of a zoned EPC. Rather, it decided that the *so-called* public policy considerations outweighed them. Our review is limited to determining whether there is anything arbitrary or capricious in its choice.

2 F.3d at 436 (emphasis added).

Complainants do not think that there is any real possibility that the Commission will interpret those statements by the Court as a broad endorsement of its analysis of the EPC issue in Docket No. R90-1. However, given the standard of faithfulness in representing legal authority displayed by ABM and McGraw-Hill in their initial brief, where what they say is subject to verification and comment, we would prefer not to think about what might turn up in their reply brief, where they promise to deal with these same matters "in greater detail." Br. at 32 n. 27.

**H. Based on an imaginary "crisis" threatening the availability of "news, information, and opinion" (Br. at 2-3), OCA proposes that the Commission violate the plain language of the Act, defy the holding of MOAA, and abandon its most fundamental ratemaking precedents.**

OCA's Brief primarily addresses issues related to ECSI and to the proposal to discontinue the unzoned editorial pound charge, which Complainants allege no longer serves the objectives that are adduced in its justification. OCA states:

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?*

Br. at 2. There are problems with articulating the policy issue in this way: (1) it loads the question so as to permit only one answer; (2) it plants in the question a false assumption about the Complainants' proposals; (3) it relies on a misapplication of the cost factors of § 3622 of the Act; and (4) it relies on an interpretation of § 3622(b)(8) that was rejected by the Court in *MOAA v. USPS*, 2 F.3d 408, 434-37 (D.C. Cir. 1993) (*MOAA*).

1. *Loading the question.* OCA's formulation assumes that the Act expresses a "congressional policy" with respect to whether the EPC should be zoned. If the Act did such a thing, that would be the end of the matter. But it does not.
2. *False assumption about Complainants' proposal.* OCA's articulation assumes that our proposal diminishes the recognition of ECSI value that is in the current Periodicals rate structure. In fact the proposal maintains exactly the current level of editorial benefit.
3. *Misapplication of the cost factors of § 3622.* As it does also in its proposal to treat ECSI recognition as an institutional cost, OCA here simply ignores the fact that § 3622(b)(8) is one of the markup factors used for setting classwide cost coverages, not a freestanding authorization to create benefits for whatever "particular mail matter" the Commission chooses outside the ordinary ratemaking guidelines of the Act.

4. *Disregard of MOAA.* By saying that the Commission should maintain the unzoned EPC on the basis of § 3622(b)(8), OCA is inviting the Commission to disregard *MOAA's* conclusion (2 F.3d at 436) that the provision in question provides no support for the policy in question.

OCA offers its proposal to treat the "'excess' costs of low-volume Periodicals" as systemwide institutional costs in order to avoid the danger that by simply maintaining the existing editorial rate structure, the Commission would favor "particular Periodicals, which the *MOAA* Court warned could violate the First Amendment." Br. at 15. While we agree with OCA that the existing rate structure raises this possibility, we do not believe that OCA's asserted parallel between this proposal and the Commission's treatment of Alaska Air costs in the Docket No. R90-1 case is apt. There the Commission found that certain costs were causally related to the universal service obligation of § 101. To extend that species of analysis to the § 3622(b) factors, which have always been understood as governing the *distribution* of costs among the classes rather than the *categorization* of costs as attributable or institution, would take the Commission down an uncharted path whose legal permissibility is at best uncertain, and which, even were it permissible, would entail a potential for unforeseen consequences that warrant the most serious and careful consideration.

The inference that OCA's proposal is not based on careful consideration is reinforced by the reflection that it is entirely unresponsive to the issues raised and the record built in this case--suggesting that OCA actually believes its own party line that Complainants' sole interest is in getting postage reductions for themselves, no matter how--so that dealing with existing inefficiencies simply by taking the costs of subsidizing them from someone else's pocket would be an acceptable result.

OCA's proposal to subsidize inefficiencies indefinitely in order to make sure no one will ever have to change anything implies that it has no belief in the value of giving mailers incentives to help themselves. Its apparent belief that small

publications would have no way of adapting and in many cases benefiting from the proposed rates--OCA states that small publications "could not achieve the efficiencies that complainants propose and therefore would face devastating price increases" (Br. at 2)--suggests that it has completely ignored the extensive record evidence regarding the types of relatively simple efficiencies, such as using not quite as many sacks, that would be effective in avoiding large rate increases for the overwhelming majority of the mailers it professes concern for.

Given OCA's appreciation of the First Amendment issues raised by the MOAA opinion, its headlong plunge elsewhere in its Brief into political science, pop sociology, and social engineering is disappointing. According to OCA:

The Complainants fail to address the toll that a democracy pays when the dissemination of news, information, and opinion becomes increasingly concentrated in the hands of a small number of media giants. . . . 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. . . . 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.

Br. at 2-3.

Statements like these force us to wonder where OCA has been for the last half century, during which media "giants" have been *losing* their share of the market in every known medium of communication, and competing sources of information (and means of transmitting, receiving, storing, and creating information) have been proliferating at a rate unprecedented in history. Instead of the old menu of CBS, ABC, NBC, two or three local TV channels, and the local newspaper, consumers of information now have in addition CNN I and II, C-Span I, II, and III, PBS, MSNBC, Fox, Fox Cable, not improbably the BBC, a Spanish language TV news station, C-Span Radio, NPR, daily delivery in much of the country of two or three major national newspapers, along with on-line access in over half the country's households

to most of the nation's major newspapers, most of its journals of opinion and scholarly journals (a number of the former of which put out far more information on line than in print and have *daily* on-line editions), all of the nation's federal courts and agencies, and many of its major libraries. The terms "Indie," "VCR," "CD," "cell phone," "fax," "download," "printout," "TIVO," "cable," "browser," "DVD," "walkman," "web," "conference call," "video conference," "satellite hookup," and many more have flooded into our vocabulary. And as all this has occurred, books and magazines have flourished as well.

As OCA proceeds to trot out authorities for its bizarre view, it becomes clear what its real complaint is: not that there are fewer outlets of information, but that OCA does not approve of the public's choices among those outlets. Thus OCA quotes *Business Week* for the proposition that "while there are more outlets, there are fewer truly independent voices." This is plain nonsense. The proprietors and employees of small publications are no more independent of the tastes and desires of their audience and advertisers than those of large ones (unless like *The Nation*, for example, they have a private source of income).<sup>24</sup>

Victor Navasky, then publisher and editorial director of *The Nation*, testified in this regard in Docket No. R90-1, and his testimony is OCA's chief exhibit of the "independent opinion" that they, and he, regard as "essential to make democracy work" (Br. at 5), including such sentiments as the following:

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

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<sup>24</sup> "The Nation comes from a long tradition of patronage by the sympathetic wealthy, the current caretaker being Arthur Carter, founder of a Wall Street firm that became the forerunner of Shearson Lehman/American Express. Each year Carter's losses from the Nation--far from the lure for mainstream advertising--climb into the six figures." *Los Angeles Times*, December 28, 1990, at E1.

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]

Br. at 5-6. OCA might also have added, to round out the picture, Navasky's statements that "Journals of opinion as a category are *by definition* more reflective than daily newspapers" and "have been deeded something of a monopoly on the generation and testing of new ideas."<sup>25</sup> Or it might even have gone to Navasky's home turf to find a slightly fuller statement of the same view:

[T]he mass media, with its links to advertising, consumer marketing and big finance, serves as an instrument of social control reinforcing the status quo.

.....  
[W]e [journals of opinion] are not, by and large, organs for political or literary establishments but journals of dissent, inquiry and unconformity.<sup>26</sup>

Navasky (and OCA) are, of course, perfectly entitled to prefer one type of publication to the other and to believe that an "attempt to appeal to a mass audience" is inevitably an attempt to exploit, narcotize, and control them. Others are entitled to believe that these views evince a disdain for popular culture and mainstream tastes and values--"the lowest common denominator"-- that sits ill with the self-appointed role of champion of the common people and steward of democratic values. The issue of which side is right--or more right--is not what matters for the purposes of the present discussion. What matters is to recognize that educational, cultural, scientific, and informational value is, to borrow the words

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<sup>25</sup> Docket No. R90-1, ABP-RT-7 at 9.

<sup>26</sup> "The Role of the Critical Journal," *The Nation* (June 8, 1985), 698, 701.

of the MOAA Court, "on both sides of the trade-off." 2 F.3d 408, 436. Yet Mr. Navasky was telling the Commission, and the OCA apparently agrees, that it must choose which side it is on, and that the Act provides it with a basis for doing so. Complainants do not agree.

The point can perhaps best be made by recalling a legendary brouhaha in the world of New York publishing and politics known, according to the *Los Angeles Times*, as the "Susan Sontag Incident." It occurred in the winter of 1982 at New York's Town Hall at a rally sponsored by *The Nation* to celebrate the success of the Solidarity movement in Poland. Among those in attendance were Gore Vidal, Pete Seeger, Kurt Vonnegut Jr. (who sang a Polish song to the tune of "Are You From Dixie?"), and Miss Sontag, who took the podium and addressed the following words to the assembly:

"Imagine, if you will, someone who read only the *Reader's Digest* between 1950 and 1970, and someone in the same period who read only the *Nation* or the *New Statesman*. Which reader would have been better informed about the realities of Communism? The answer, I think, should give us pause. Can it be that our enemies were right?"<sup>27</sup>

As the *Los Angeles Times* continued the narrative:

Intellectually, all hell broke loose. . . . The now defunct *Soho News* ran Sontag's speech with five pages of replies from intellectuals in the United States and Europe. . . .

Id. In a piece that spring in *Harper's*, Walter Goodman reviewed conditions on the battlefield and described the casualties:

Particularly irksome to several of Sontag's critics was her reference to the *Reader's Digest*, a magazine nobody reads apart from its 30 million subscribers. . . . [T]o utter a kind word about the *Digest* was stupefying; the magazine is not

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<sup>27</sup> Quoted in the *Los Angeles Times*, December 28, 1990, at E2.

merely reaction[ary], it is also lower middlebrow. It runs articles about pets.

Quoted in id.

As we said above, the issue of which side is right--or more right--does not matter to the legitimate issues in this proceeding, because it is not a decision of the type that the Commission can appropriately make, or should wish to make. This, at least, is how we interpret the *MOAA* Court's warning about First Amendment concerns attending the designing of Periodicals rates. Complainants view their proposal as, above all, evenhanded, based on neutral, objective criteria of value. They do not have, or even represent, a monopoly on any of the values implicit in the concept of ECSI. They do not disagree with aspirations for a "diverse" or "vibrant" Periodicals subclass. However, they do not accept that those aspirations are synonymous with a rate structure skewed in favor of small, diffusely distributed publications on the theory that their editorial content possesses some greater or more needed ECSI value than that of other Periodicals publications.

Respectfully submitted,

s/

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