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

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COMPLAINT OF TIME WARNER INC. et al.
CONCERNING PERIODICALS RATES Docket No. C2004-1

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**JOINT REPLY BRIEF OF**
**AMERICAN BUSINESS MEDIA AND**
**THE McGRAW-HILL COMPANIES, INC.**

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## PRELIMINARY STATEMENT

Complainants Time Warner et al. have proposed what their own witness Stralberg has characterized as "radical changes," as opposed to "studies and measured changes." Tr. 5/1587. Most other parties to this proceeding have echoed that characterization. According to the Postal Service, Complainants propose "drastic changes" on a par with those rejected in Docket No. MC95-1.[1] The Office of the Consumer Advocate as well as the American Postal Workers Union view Complainants' proposals as "radical,"[2] as do American Business Media and The McGraw-Hill Companies.

One consequence of the radical de-averaging proposed by Complainants would be severe adverse rate impact on thousands of smaller mailers (as we demonstrate below) in order to fund enormous windfall savings for larger mailers — totaling over $60 million per year in the case of Complainants, who already pay the lowest postage per

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[1] Brief of the United States Postal Service at 11, 15. See also Initial Brief of the National Newspaper Association, Inc. at 15

[2] Office of the Consumer Advocate Initial Brief at 7; Initial Brief of the American Postal Workers Union at 2, 4.

piece among Periodicals.[3] Another consequence would be a major shift of future institutional cost responsibility from large to small mailers, resulting in inefficient price signals to larger mailers. See Joint Initial Brief at 18-21. The level of service accorded to smaller mailers could also be adversely impacted. See id. at 29-30.

Nevertheless, Time Warner et al. state in their initial brief (at 5) that the "pace and scope of progress in addressing the[ir] concerns" has been

> excessively cautious because of the Commission's concerns about potential rate impacts on small publications and about providing an adequate period of adjustment for all types of Periodicals mailers, and because of the Postal Service's aversion to any proposal that did not command a "consensus" within the relevant mailing community.

On this basis, Complainants effectively urge the Commission (at 73) to take a "leap in the dark" by recommending the proposed rate structure that would lock in windfall savings for Complainants while deferring until a subsequent rate case issues relating to the adverse rate impact on thousands of smaller mailers. The Commission should reject out of hand this suggestion that it should subordinate to Time Warner's schedule its responsibilities to Periodicals mailers as a whole.

The potentially severe adverse impact of the proposed rate structure on thousands of small and medium-sized publications is a fundamental threshold issue that must be resolved before the Commission could consider recommending the radical de-averaging of costs and rates proposed by Complainants. As in the analogous circumstances presented in Docket MC95-1, any doubts that the Commission may have regarding the state of the record is reason to exercise great *caution* and *reject* the

[3] See Joint Initial Brief of American Business Media and The McGraw-Hill Companies, Inc. ("Joint Initial Brief") at 4-5 & n.2. Under the proposed rates, TV Guide would pay 12.39 cents per piece while an ABM publication with similar physical characteristics but much lower circulation would pay 44.47 cents per piece under current mailing practices.

proposed rate structure (for the time being at least) — not reason to absolve Complainants of their burden of proof and plunge ahead while postponing major issues affecting most Periodicals mailers. In Docket MC95-1, the Commission squarely held that it lacked discretion under the Postal Reorganization Act to defer to a future rate case issues relating to the adverse impact of proposed fundamental restructuring of Periodicals rates. See Joint Initial Brief at 20-21.

If deemed warranted, the Commission should encourage the Postal Service to consider some of the issues raised in this proceeding and to undertake the studies that even Complainants' witness Mitchell recognized are necessary before considering sweeping rate design changes. Tr. 3/902. The Postal Service is far better situated than Complainants to undertake spebral studies and resolve open cost issues, to bring all affected mailing communities into a process of consultation, and to more fairly balance competing interests. As Complainants note in their initial brief (at 72), the Postal Service is "not a private business but a public enterprise conducted for the benefit of the people." According to Complainants, moreover (at 12 n. 7), the Postal Service is already conducting market surveys of Periodicals and Standard mailers regarding hypothetical bundle, sack and pallet charges. Contrary to Complainants, however, we presume that the Postal Service has not prejudged any such issues but rather is undertaking to learn how a broad range of mailers could be impacted and what reasonable alternatives may exist under the current worksharing discount structure.

## I. THE PROPOSED RADICAL DE-AVERAGING PRESENTS AN UNDUE RISK OF ADVERSE IMPACT UPON SMALL PUBLICATIONS AND EDITORIAL DIVERSITY.

There is no dispute that under the rate structure proposed by Complainants, 75% of the extended sample of small publications analyzed by Postal Service witness Tang

would face rate increases ranging up to 90% under current mailing practices. Tr. 5/1546 (Stralberg), 6/2242 (Tang). If witness Tang's analysis were extended to the Periodicals class as a whole, some 18,750 small publications could be adversely affected. See Tr. 6/2232; Initial Joint Brief at 7 n.3 ("some 7,250 small publications would face at least a 30% rate increase, and some 3,250 small publications would face a rate increase of at least 50%") (extrapolating from witness Tang's direct testimony).[4] More than 2,500 medium-sized publications could likewise be adversely affected, with more than 1000 facing double-digit rate increases under current mailing practices. See Tr. 6/2247-2249 (Tang's extended sample). According to witness Stralberg's analysis, those rate increases could range up to 82%.[5] Stralberg accordingly acknowledged that given current mailing practices, the proposed rate structure would have a "severe impact" on many small and medium-sized publications. Tr. 5/1582.

### A. Co-Mailing, Co-Palletization and/or Drop-Shipping Are Not an Answer for Many Small and Medium-Sized Publications.

Complainants now further acknowledge in their initial brief, as American Business Media and McGraw-Hill have shown in this proceeding, that:

> there obviously are many small- and medium-sized publications that for some time will remain without access to comailing, co-palletization, and dropshipping.

Initial Brief of Time Warner Inc. et al. at 40. See Initial Joint Brief at 23-25. Many small and medium-sized publications would lack such access for a very long time at least and

[4] Extrapolating from witness Tang's extended sample, some 6,500 small publications would face at least a 30% increase, and some 2,500 small publications would face at least a 50% rate increase. See Tr. 6/2249-2250.

[5] See Tr. 5/1579-1581 (Stralberg's analysis of 154 mail.dat files provided by American Business Media). See also Tr. 5/1575-1578 (Stralberg's analysis of Bradford Exhibit LB-1, showing double-digit rate increases ranging up to 81% for 51 of 153 sampled publications of American Business Media members); Initial Joint Brief at 7 n.3 (further breakdown of potential adverse effect for those ABM publications and the ABM publications for which mail.dat files were provided).

would therefore be unable to mitigate the “severe impact” of the proposed rate structure through co-mailing, co-palletization, or drop-shipping — contrary to Complainants’ earlier suggestions.

For example, at page 39 of their brief Complainants quote the testimony of witness O’Brien suggesting that “both *small* and large printers are developing the capacity to co-mail, co-palletize, and drop ship” (emphasis added), and identifying Frye Communications and Publishers Press as supposedly “small family-owned printer[s].”

By no stretch are Fry and Publishers Press “small” printers, even if they are “family-owned.”[6] Quite to the contrary, Publishers Press prints 900 publications (Tr. 5/1470), and according to witness O’Brien (Tr. 5/1472) Fry "is similar to Publishers Press." Fry describes itself as one of the largest privately owned printers in the country, and it has press runs up to 5 million. Id. This is not the type or size of printer that typically prints any of the more than 15,000 Periodicals with circulation below 1,000.

There is no basis for assuming that hundreds of small printers producing a relative handful of small publications each will ever be in a position to add 62,000 square feet of plant—or the equivalent of 1.3 football fields—as did Fry to accommodate co-mailing (Tr. 5/1439), or invest more than $1 million (Tr. 2/523, 6/1700) on speculation that co-mailing could save their customers any money.[7] For a small printer that, for example, prints 30 monthlies with an average circulation of 5,000, the total *annual*

[6] Although family-owned, Mars is not a small candy manufacturer.

[7] Complainants erroneously contend at page 37 of their brief, without any record reference, that “Quad also markets comailing equipment for use by other printers.” Complainants’ witness O’Brien testified (Tr. 5/1468) that Quad now refuses to do so because, in his words, “they feel that their co-mail technology provides their company with a competitive advantage.” The Complainants’ brief frequently departs from Rule 46, which requires specific references to the record to support factual assertions. See e.g., pages 55-60 of the Complainants’ initial brief, which contain a record reference only to the final sentence.

copies would be 1,800,000 — roughly what Quad/Graphics mails for its largest single publication *every week.* See Tr. 2/444. If that small printer invested $1 million in order to co-mail, the cost per copy mailed would be 11¢, assuming a 20% carrying charge (covering depreciation as well as software and other costs).[8] As witness Schaefer explained (without comment in Complainants' brief), even the far more limited co-mailing charges assessed by a large printer like Quad/Graphics would consume a large portion of any postage savings realized through co-mailing — and thus frustrate efforts to avoid large postal rate increases through co-mailing. Tr. 6/1934. See also Tr. 2/560 (Schick).

In discussing the availability of co-mailing and co-palletizing, the Magazine Publishers of America asserts without basis in its initial brief (at 10) that "[s]ome printers … now accept publications from other printers into their worksharing programs, making these services available to more publishers." To the contrary, witness Schaefer testified without contradiction anywhere in the record that this is *not* the current practice. Tr. 6/1938. At best, the record shows that one printer, Quebecor World, has agreed to do so in the future (*if* it has the capacity after first accommodating all its print customers) for one large publisher, Time Warner — for which Quebecor World does tens of millions of dollars worth of printing annually. Tr. 5/1463 (O'Brien). Witness O'Brien also recognized that printers, including Quad/Graphics, will not *now* allow material printed elsewhere into their co-mail pools (Tr. 5/1467), and that he knows of no printer that *now* will (Tr. 5/1494).

Most publishers, if they sought to co-mail or co-palletize (and drop-ship) their publications, would have to switch their printing contract to a large printer in order to do

[8] ($1,000,000 X .2) ÷ (30 X 5,000 X 12) = .111

so. But contrary to the further baseless assertion in MPA's brief (at 10), publishers obviously could not do so legally until expiration of their existing printing contracts, which typically extend three to five years in duration. See, e.g., Tr. 6/1937 (Schaefer).[9] Moreover, as pointed out in the initial brief of the National Newspaper Association ( at 6-7), there has been no showing that most smaller publishers could afford to switch to apparently more expensive large printers, or that they would even be accepted by large printers, much less receive the same degree of attention provided by smaller local printers.

The substantial increase in the co-mailing capability of large printers that is planned (under the current rate structure) over the next couple of years should eliminate enormous numbers of sacks,[10] encourage drop-shipping and drive out substantial costs from the postal system. However, co-mailing will not protect many small and medium-sized publications from severe rate increases under the proposed rate structure — as Complainants themselves have now well recognized.

### B. Larger-Volume Sacks Are Not an Answer for Many Publications, Notwithstanding Complainants' Extravagant Claims and Unfair Attacks on Intervenor-Supplied Data.

There is no basis for Complainants' shamelessly sweeping assertions that "[p]ractically without exception, the high postage increases that would occur for a few publications are a direct result of mailing in very low-volume sacks," and that by "[e]liminat[ing] the excessive use of very low-volume sacks, which after all is practiced

[9] MPA mistakenly relies in this regard on testimony by witness O'Brien (Tr. 5/1437) that printing contracts do not typically prohibit a publisher from mailing or distributing its publication — after it has been printed in accordance with the contract — through a different printer. But this assumes that the second printer is willing to accept for co-mailing or co-palletization publications that have been printed elsewhere. As demonstrated above, this is not the current practice.

[10] The co-palletization of only 14 Crain Communications publications eliminated 900,000 sacks per year. Tr. 6/1780 (McGarvy).

only by a relatively small minority of Periodicals mailers, … the large increases alleged by opponents of the rates simply will not occur." Initial Brief of Time Warner Inc. et al at 31, 40-41. As an initial matter, it is not merely a "few publications" that would face high postage increases under the proposed rate structure — roughly 10,000 small publications could face rate increases of 30% or more, and more than a thousand medium-sized publications could face double-digit increases (as demonstrated at the outset of this section). Further, it is highly unlikely that such massive adverse impact could be attributable primarily to a mailing practice engaged in "only by a relatively small minority of Periodicals mailers."

Rather, as we demonstrated in our initial brief (at 26-27), and as witness Stralberg acknowledged on cross-examination, "there are many factors that impact how a particular publication would be affected." Tr. 5/1627. For example, witness Stralberg has shown that some 16% of small publications — about 4000 — would incur a double-digit rate increase ranging up to 47% due solely to the proposed zoning of the editorial pound charge, on top of further rate increases due to other aspects of the proposed rate structure (and on top of a potentially double-digit general rate increase that the Postal Service is expected to request in the near future). See Tr. 5/1573-74; Initial Joint Brief at 33. Complainants tacitly acknowledge this at pages 33-34 of their brief, where they assert that if "publications that rely heavily on 'skin sacks' were to abandon that practice, the proposed rates *without editorial zoning* would either lower their postage or cause a small increase." (Emphasis added). Complainants later acknowledge (at pages 35 and 41) that another factor among the many other factors contributing to

adverse impact under the proposed rate structure is non-machinability, which "many publications might find difficult to change."

Witness Stralberg never presents any quantification of *how much* less "severe" the rate impact would be if publications eliminated skin sacks by changing their sack minimums from 6 to 24 pieces, even though the data he analyzed indicated that a number of publications with 24 piece sack minimums would nevertheless incur double-digit rate increases. See, e.g., Tr. 5/1636. Instead, Complainants on brief unfairly charge that in claiming adverse impact under the proposed rate structure, McGraw-Hill and American Business Media supposedly "did not base [such claims] on any data or apply them to any identifiable publications," and "would not or could not provide requested data on the publications they themselves were affiliated with." Initial Brief of Time Warner, Inc. et al. at 28. See also id. at 63. To the contrary, in response to Complainants' extraordinarily broad and detailed discovery requests issued prior to the submission of intervenor testimony, McGraw-Hill and American Business Media provided Complainants with a wealth of data concerning virtually every conceivably relevant mailing characteristic of hundreds of publications published by McGraw-Hill or ABM members.

With considerable effort, McGraw-Hill responded fully to each of Complainants' comprehensive interrogatories calling for an array of such information for each of McGraw-Hill's 84 diverse Periodicals. See Tr. 6/1963-1993. McGraw-Hill likewise provided Excel spreadsheets that showed the impact of the proposed rates on each McGraw-Hill publication for which mail.dat files existed, and were prepared using witness Stralberg's own software developed for that purpose. See MH-LR-1.

Complainants have not previously raised any issue as to McGraw-Hill's full compliance with such discovery requests.[11] American Business Media provided data of equal scope by producing 154 complete mail.dat files from recent years,[12] as well as ample significant information (beyond Exhibit LB-1) concerning the 153 member publications on that exhibit.[13]

Complainants include the impact data provided by American Business Media (as well as information provided by the National Newspaper Association) as part of their catalogue of data sources for Witness Stralberg's impact analysis, but they inexplicably *exclude* the impact data provided by McGraw-Hill, which is relegated to a vague footnote. See Initial Brief of Time Warner et al. at 28-31 & n.18. Perhaps this is because the McGraw-Hill data is not consistent with Complainants' theory that any and all significant adverse impact of the proposed rate structure could be dispelled simply by raising sack minimums to 24 pieces.

Several McGraw-Hill publications have 24-piece sack minimums yet would still incur double-digit rate increases. These publications include *Power*, which averages 12 pieces per bundle and 32 pieces per sack yet would incur a 19.3% rate increase; *Healthcare Informatics*, which averages 11 pieces per bundle and 30 pieces per sack yet would incur an 18.1% rate increase; *Overhaul & Maintenance*, which averages 11

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[11] Complainants note that McGraw-Hill declined to provide the mail.dat files themselves. Complainants acquiesced, and for good reason — all relevant information sought by Complainants and contained in the mail.dat files was provided to Complainants in response to their comprehensive interrogatories. The mail.dat files also contained commercially sensitive information that is not germane to this proceeding and was not specifically requested in any interrogatory. McGraw-Hill went to some length to explain that withholding the mail.dat files was fully in accord with Commission precedent in such circumstances. See Objection of The McGraw-Hill Companies to Complainants' Discovery Requests, filed August 24, 2004.

[12] See Tr. 6/1826-1827; TW et al. LR-8, LR-9, and LR-10.

[13] See Tr. 5/1550-1551; TW et al LR-7. Complainants note in their initial brief (at 29) that American Business Media produced "considerably more details" about the analysis on Exhibit LB-1.

pieces per bundle and 38 pieces per sack yet would incur a 15.8% rate increase; *Engineering News Record*, which averages 13 pieces per bundle and 46 pieces per sack yet would incur a 13.2% rate increase; and *Business & Commercial Aviation*, which averages 12 pieces per bundle and 31 pieces per sack yet would incur a 13.3% rate increase. See Tr. 6/1975, MH-LR-1. Some of the sampled publications of American Business Media members likewise have 24-piece sack minimums yet would still incur double-digit rate increases under the proposed rate structure. See Tr. 5/1636.

Complainants therefore cannot meet their burden of proof on the adverse impact issue by associating some large rate increases with use of low-volume skin sacks, and then speculating that those rate increases could be avoided simply by shifting to 24-piece sack minimums. Nor could Complainants meet their burden of proof by seeking to unfairly denigrate all of the impact testimony presented by American Business Media based on Complainants' highly distorted rendition of one evidentiary issue.[14]

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[14] See Initial Brief of Time Warner et al. at 63-67 (part IV.B). It is important to bear in mind the somewhat unique genesis of Exhibit LB-1 (TR. 6/1703-06), presented by American Business Media witness Bradfield, in evaluating Complainants' characterizations relating to the exhibit. The genesis lay in an undertaking by larger ABM members to evaluate the impact on their publications of Complainants' proposed rates in order to assist ABM in formulating a position on the Complaint filed in this proceeding. In the normal course of business (there appearing no reason at the time to alter it), most of the participating ABM members did not retain the mail.dat files used for the impact analysis. Some time later — well before American Business Media had formulated or submitted any testimony — Complainants served ABM with discovery requests seeking (among many other things) information relating to any impact analysis undertaken on behalf of ABM, and ABM provided Complainants with all such information within its possession and control. Having done so, ABM later decided to address such information through the testimony of witness Bradfield.

The data underlying Exhibit LB-1 were generated using software provided by Time Warner for the professed purpose of facilitating the calculation of postage under the proposed rates. Tr. 5/1545-46, 6/1828. Complainants nevertheless mounted what amounts to a gratuitous challenge to the integrity of those who performed the calculations (using the Time Warner software) underlying Exhibit LB-1. Yet Complainants waived oral cross-examination of witnesses Bradfield and McGarvy (both of whom performed calculations underlying Exhibit LB-1), preferring to resort to their campaign of unfair innuendo rather than afford those witnesses an opportunity to explain their method and permit the Commission an opportunity to evaluate their credibility. Moreover, Complainants' witness Stralberg made affirmative use of the data underlying Exhibit LB-1 (see Tr. 5/1550-51) and thereby effectively vouched for the reliability of such data, which is consistent with the data generated by the mail.dat files produced by ABM to

Contrary to Complainants' insinuations, American Business Media does not have a legal burden in this proceeding to prove that none of its members could possibly mitigate the adverse rate impact to any extent in the future.[15] Rather, Complainants have the burden of persuading the Commission (based on substantial evidence) that their proposed rate structure would not likely have any undue adverse effect on other Periodicals mailers — whether they happen to be represented in this proceeding or not.[16] There is no basis in the record for Complainants' suggestions-without-citations (at 32) that that all mailers would supposedly be able to avoid "large" rate increases, or that "most … could even achieve lower postage than at present." Moreover, even if the latter unsupported statement (and similar statements about the average impact or the

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Complainants (as well as the data gathered by Postal Service witness Tang). In these circumstances, Exhibit LB-1 should likewise be credited by the Commission rather than subjected to an adverse inference as to the credibility of the witnesses who prepared it. Compare Tr. 5/1440, 1474-77 (O'Brien testimony regarding his "confidential conversation" with two unnamed companies allegedly planning to offer co-mailing), Tr. 2/396, 498-99 (Schick testimony declining to identify publications represented on co-mailing exhibit).

[15] Complainants state at page 29 of their initial brief that in response to interrogatories, ABM witnesses "confirmed that [Exhibit LB-1] assumed that the publications represented would make no changes in their mailing practices in response to changes in the rate structure." However, the same is true of any impact analysis prepared with the Time Warner software, and witness Bradford had stressed this in his *direct* testimony. Tr. 6/1691. That testimony clarified the position of American Business Media regarding Exhibit LB-1 — that it is consistent with a broad adverse impact of the proposed rate structure on a significant portion of the 25,000 or so Periodicals under current mailing practices, and that Complainants could not show that all or most such adverse impact would likely be avoided.

[16] Contrary to Complainants' misleading suggestion at page 65 of their brief, American Business Media never stated that witnesses Bradfield and Cavnar had "not addressed the issue of impact" or that the impact of the proposed rate structure on ABM members was "not an issue in the case." Rather, when viewed in proper context, American Business Media stated that the impact issue is not limited simply to American Business Media member publications but that "the impact issue in this case is … the impact of [proposed] rates … on the twenty thousand or more publications entered into the mail." Objection of American Business Media to Request for Production: Time Warner et al./ABM-T1-3 (filed September 23, 2004) at 4. The Presiding Officer well recognized that American Business Media thoroughly addressed this properly-framed impact issue (as Complainants point out at page 65 n.49 of their brief), which is fundamental to this case. The point is that Complainants could not prevail in this case even if they could show (they cannot) that the relatively few parties able to intervene would not be adversely affected. Rather, Complainants' heavier burden is to show if they can that the proposed rate structure would not have any undue adverse impact on the outside-county Periodicals subclass as a whole. Complainants are plainly unable to meet that burden.

impact on “many” or “most”) were true, the Commission presumably would not be indifferent to the adverse impact upon thousands of Periodicals that each contribute uniquely to the editorial diversity of the Nation’s press. To the extent that the Commission harbors any doubts in this regard, whether based on gaps in the record or otherwise, the Commission should exercise a judicious caution — particularly where, as here, a radical bottom-up de-averaging is proposed. See MC95-1, ¶¶ 2133, 3088-90 (rejecting similar proposal), discussed in Joint Initial Brief at 16-17, 20-21.

**C. Related Issues of Costs, Complexity, Service and Adverse Impact.**

We demonstrated in our initial brief (at 27-28) that the much heavier sacks that would be encouraged under the proposed rate structure could have a significant effect of *increasing* postal costs, and thus increasing the adverse impact of the proposed rate structure on small publications. Significantly, Complainants themselves emphasize in their initial brief (at 17-19) that the proposed rate structure “raises several important costing issues that have never been addressed” (heading). Several of these unresolved cost issues reinforce the prospect that heavier sacks may not in fact provide the cost savings assumed by Complainants when they assert that mailers could avoid rate increases by using heavier sacks containing more and larger bundles.

First among these cost issues is whether additional costs that witness Stralberg treated as piece- or bundle-related are in fact “wholly or partially weight related.” Complainants’ Initial Brief at 18. Complainants further point out that “when a bundle with many pieces breaks the added costs are proportionately larger than when a bundle with few pieces breaks” (id.), and it stands to reason that larger and heavier bundles are more prone to breakage than smaller and fewer bundles in a sack. Moreover, Complainants also observe that a movement toward larger bundles would reduce the

level of presortation of pieces within the bundles, thus increasing piece-sorting costs (see id. at 10), and that true costs of a major piece-sorting operation (manual sortation of incoming secondary flats) is unknown. Id. at 19. Complainants acknowledge in this regard that "[b]ecause the costs involved are fairly large, model inaccuracies can result from not knowing the true productivity of this operation." Id. See also Joint Initial Brief at 21-23 (discussing Postal Service testimony regarding other unresolved cost issues underlying the proposed rate structure).

These unresolved cost issues undercut Complainants' self-serving theory that smaller mailers facing severe rate increases may nevertheless not be adversely affected under the proposed rate structure, and undermine the Commission's ability to evaluate the full extent of the adverse impact. See Joint Initial Brief at 27-28.

Indeed, these complex cost tradeoffs would undermine the ability of small publications (as well as larger publications) to determine the rate impact of their own mailing practices under the proposed rate structure. Complainants assert in this regard:

> Cost-based charges for bundles, sacks and pallets as well as pieces will give mailers … incentives to seek the *proper balance* between (1) avoiding piece-sorting costs by creating finely presorted bundles, and (2) avoiding bundle-handling costs by creating fewer, less finely presorted bundles. Similar tradeoffs apply to sacks and pallets.

Initial Brief of Time Warner et al. at 10 (emphasis added). Complainants further observe in this regard that "lower bundle sizes may be desirable for non-machinable flats," and that yet "[a]nother possibility is that the optimal bundle size may differ depending on the presort level of the pallet on which the bundle is going to be carried." Id. at 42 (citing witness Stralberg).

Complainants accordingly acknowledge that the proposed rate structure does indeed "add a level of complexity" (id. at 16), but go on to assert that this is a "non-issue" because "[e]ven to the very smallest of Periodicals mailers, sometimes portrayed as arranging mailings on a kitchen table, the *number* of bundles and containers is neither an unfamiliar concept nor difficult to ascertain." Id. at 25-26 (emphasis added). Yet that small publication that arranges mailings at the kitchen table — or any but the most sophisticated mailer — cannot realistically be expected to determine the "proper balance" between "avoiding piece sorting costs" by creating smaller, more finely presorted bundles and "avoiding bundle-handling costs" by creating larger, less finely presorted bundles, taking into account machinability and container presort level, etc., *and* the widely held view that less finely presorted sacks may receive a lower level of service (i.e., slower delivery time).[17] These are not clearer price signals but rather *conflicting* price signals.

Significantly enhanced computer software would in all likelihood be essential — if and when it is developed, affordable and user-friendly — in order to attempt to navigate such information overload with any hope of mitigating the adverse impact of the proposed rate structure. See Tr. 6/1942-1943 (Schaefer). But no computer software could be adequate unless and until the unresolved cost measurement issues underlying the proposed rate structure are adequately addressed by the Postal Service. Special cost studies by the Postal Service are necessary before undertaking a radical restructuring of the Periodicals rate structure. See Joint Initial Brief at 22-23 (discussing testimony by witnesses Mitchell and Miller). Until then, there can be no assurance that any modeled cost savings under the proposed rate structure would actually materialize.

[17] See Initial Joint Brief at 29-30.

The outside-county Periodicals subclass has an unfortunate history of unexplained inordinate cost increases that overwhelm efforts to pursue more efficient mailing practices. See Joint Initial Brief at 28.

In the final analysis, Complainants assert that the "higher returns due to any increase in complexity will substantially exceed any higher costs." But windfall returns to Time Warner et al. would be of little comfort to smaller mailers saddled with the higher costs, particularly if potential efficiency gains are lost due to the increased complexity of conflicting price signals. The exponential increase in the complexity of the proposed rate structure would exacerbate its adverse impact on smaller mailers.

The adverse impact on smaller mailers may well be exacerbated even further to the extent that the proposed rate structure exacts a premium price for using smaller sacks to obtain adequate service. See Initial Joint Brief at 29-30. Notwithstanding the dismissive attitude expressed in Complainants' brief (at 31) in this regard, witness O'Brien testified (Tr. 5/1493-94) that even Time Warner subscribes to and acts on the widely held view that smaller, more finely presorted sacks tend to receive faster service than larger, less finely presorted sacks (a matter of particular importance considering that sacks tend to receive slower service than pallets).[18] Complainants nevertheless assert (at 25) that "the value of mail service … is more thoroughly recognized and more effectively enhanced under the proposed rates, which would empower individual mailers … to make properly informed decisions." This is simply an economist's veiled way of describing a premium price for obtaining standard service by using more finely presorted but smaller sacks. In sum, Complainants have not met their burden of showing that the severe adverse impact of the proposed rate structure on thousands of

[18] See Initial Joint Brief at 30 n. 26.

small and medium-sized publications could likely be avoided, whether by using larger sacks or otherwise.

## II. THE HISTORIC ROLE OF THE FLAT EDITORIAL POUND CHARGE IN BINDING THE NATION TOGETHER THROUGH EDITORIAL DIVERSITY IS NO LESS IMPORTANT TODAY.

As we showed in our initial brief (at 35-39), the Commission has repeatedly and emphatically rejected Complainants' arguments for zoning the editorial pound charge, and the Commission was broadly affirmed in this regard by the Court of Appeals in *Mail Order Association of America et al. v United States Postal Service*, 2 F. 3d 408, 434-37 (D.C. Cir. 1993) ("*MOAA").* Complainants recognize this,[19] but nevertheless resort to a highly strained argument that the Commission should now reject the longstanding national policy embodied by the flat editorial pound charge in light of certain *dicta* in *MOAA,* i.e., statements in the Court's opinion that are not essential to its decision, and therefore are not binding on the Commission. By no means does any *dicta* in *MOAA* support Complainants position. Nor does it avail Complainants to recycle arguments already squarely rejected both by the Commission and by the Court in *MOAA.* Complainants have likewise utterly failed to show that the longstanding national policy of encouraging widespread dissemination of diverse Periodicals has been rendered obsolete by the Internet.

### A. The *Dicta* in *MOAA* Does Not Support Complainants' Position.

The Court held in *MOAA* that the flat editorial pound charge is supported by the mandate in § 101(a) of the Postal Reorganization Act that the Postal Service undertake

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[19] See Complainants' Memorandum of Law and Policy Relating to the Editorial Pound Charge for Periodicals, filed December 23, 2004 ("Cmplnt. Mem."), at 41 ("we accept the correctness of the Court's holding that the Commission's decision to retain the unzoned rate in Docket No. R90-1 was within its proper authority under the Act").

to "bind the Nation together" through the "personal, educational, literary and business correspondence of the people." 2 F. 3d at 426. The Court declared in this regard:

> This rather broad anti-Balkanization principle supports the view that the Service is entitled to enhance "widespread dissemination of information," not in the sense of increasing the "units of information " mailed, but in the sense of increasing the *nationwide* distribution of units of information.

Id. (emphasis in original). Complainants rely upon *dicta* in *MOAA* to the effect that § 3622(b)(8) of the Act, which directs the Commission to consider "the educational, cultural, scientific and informational ["ECSI"] value to the recipient of mail matter," does not *by itself* support the flat editorial pound charge. The Court stated in this regard:

> The trouble with the argument is that both the advantaged and *dis*advantaged publications supply these informational benefits. The Commission gave no reason why it considered the educational, cultural, scientific, and informational value of local publications … or dropshipped publications … to be less than that of long-haul publications …[A]ny reading of the statute that authorized the Commission to make such judgments would run into constitutional heavy weather, as the First Amendment limits the content-based distinctions that the government may make … [I]n any event the Commission does not even claim to have made such evaluations.

Id. (emphasis in original).

There is no basis for Complainants' assertion that this *dicta* somehow undercuts the Commission's support for the flat editorial pound charge. First, the Commission declared in Docket No. R90-1 that like the Court in *MOAA*, it had "consistently interpreted … § 101(a) ["obligation … to bind the nation together"] … to support the public policy of widespread dissemination of public information." Rec. Dec. ¶ 5279 (upholding flat editorial pound charge). The Court in *MOAA* found it "clear that the

Commission would have reached the same result under § 101(a) even without considering § 3622(b)(8)." 2 F. 3d at 437.

Moreover, contrary to Complainants' assertion, the Court in *MOAA* never indicated that "the ECSI provision is *irrelevant* to the policy of maintaining an unzoned editorial pound rate,"[20] but only that it could not *by itself* support such policy. Section 101(a) and the ECSI provision are inherently intertwined. As recognized in above-quoted passages from *MOAA* and R90-1, both provisions are designed to promote the dissemination of information, the only difference being that § 101(a) is focused specifically on *nationwide* dissemination of information. Indeed, § 101(a) is itself an "ECSI" provision no less than § 3622(b)(8). Like the latter provision, the Court in *MOAA* recognized that § 101(a) encompasses concern for diversity among Periodicals and editorial content. Thus, the Court affirmed under § 101(a) the Commission's rejection of zoned editorial pound charges in order to avoid "detrimental impact upon small publications which are mailed to distant zones," 2 F. 3d at 437.

Complainants nevertheless attempt to conjure an illusory distinction between § 101(a) ("binding") and § 3622(b)(8) (ECSI) — one that appears to defy any comprehensible articulation. See Initial Brief of Time Warner Inc. et al at 54. Complainants suggest that "bind[ing] the Nation" under § 101(a) may imply promotion of "'mass culture'" and "'homogenization'"— with which Time Warner identifies itself, as a "'communications conglomerate'" (Cmplnt. Mem. at 24) — rather than "'diversity.'" Initial Brief of Time Warner Inc. et al. at 45 (asserting that the question has not been answered and may be unanswerable). As recognized in *MOAA,* however, any attempt by the Commission to favor mass-circulation publications based on the perceived value

[20] Initial Brief of Time Warner Inc. et al. at 54 (emphasis in original).

of their "mass culture" editorial content would fly into "heavy weather" under the First Amendment. That is not the case with content-neutral policies designed to promote diversity among Periodicals.

Promoting diversity among Periodicals is fully consistent with "binding the Nation together." Small-circulation national magazines "clearly play an important role in binding the nation together by meeting diverse informational needs that may not otherwise be served, and forming and sustaining distinct communities defined by common interests rather than geographic proximity." Tr. 6/1952 (Schaefer). As pointed out by witness Tang, small publications comprise a "large proportion of the editorial content in Periodicals," well in excess of their percentage volume. Tr. 6/2231. The Office of the Consumer Advocate observes in this regard (initial brief at 3) that 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." See also Initial Brief of the National Newspaper Association at 4-5 (similar). 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.'" OCA Initial Brief at 4 (quoting Justice Hugo Black) (emphasis added).

### B. Arguments That Have Already Been Rejected Repeatedly Add Nothing to Complainants' Position.

We demonstrated in our initial brief (at 35–39) that the Commission has repeatedly and emphatically rejected arguments by Complainants' witnesses Mitchell and Stralberg that a zoned editorial pound charge is warranted in order to "provide a clearer dropship 'signal' to mailers" and to "improve fairness in near zone rates." See,

e.g., Docket No. R87-1, Rec. Dec. ¶¶ 5398, 5402, 5405; Docket No. R90-1, Rec. Dec. ¶¶ 5270, 5273, 5275; Docket No. MC95-1, Rec. Dec. ¶¶ 5287, 5289. Further, the Court of Appeals in *MOAA* expressly rejected Time Warner's argument that a zoned editorial pound charge would "avoid discrimination against 'short-haul' publishers and 'cross-subsidization' of 'long-haul' publishers by short-haul ones." 2 F. 3d at 435. The Court "assume[d]" that such cross-subsidization was occurring but held 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.

Complainants nevertheless renew those same arguments here but offer no reason why these "economic considerations" should now prevail over the longstanding "public policy" considerations underlying the flat editorial pound charge. See Joint Initial Brief at 41-44. Complainants' assertion that high-editorial publications are being "held hostage" by the flat editorial pound charge (initial brief at 57) simply means that such publications lack incentive to abandon Postal Service transportation because they are benefiting from a low pound rate. Only by sharply raising that rate would high-editorial publications be "freed" to seek private transportation (drop-ship). Time Warner et al. plainly are not speaking or acting on behalf of the thousands of high-editorial publications not represented in this proceeding. Moreover, Time Warner et al. have acknowledged (initial brief at 40) that 'there are obviously many small and medium-sized publications that for some time will remain without access to comailing, co-palletization, *and dropshipping*." (Emphasis added).

Complainants acknowledge (initial brief at 36) that it is "impossible to determine with certainty how many … very small publications [having circulations less than 1000]

would experience respectively higher and lower postage under the zoning of editorial rates." Yet Complainants nevertheless proceed to assert — without citation or basis in the record — that "*most* of the very small publications … would pay *less* postage if the editorial pound rates were zoned" (id. at 55) (second emphasis in original), that it is "very likely that the ones who would pay less are in a clear majority" (id. at 56), and that "more small, high-editorial publications are being harmed by the … unzoned editorial pound rate than are benefiting from it." (Id. at 57).[21] To the contrary, because witness Stralberg's analysis was skewed, it is *un*likely that most of the very small publications (much less other small publications) would in fact experience lower postage under zoned editorial pound charges.[22]

Witness Stralberg's analysis is skewed because he assumed that 18% of the very small publications for whom no zone distribution is available — because they were 100% editorial — would have the same average zone distribution as other very small publications. Stralberg Comments at 2; Response of Witness Stralberg to ABM/TW et al.-1. Witness Tang later provided evidence that the mailings of such publications were likely distributed somewhat evenly across the zones,[23] while the mailings of the other

[21] This statement is doubly misleading because there are more than 10,000 "small" publications with circulations greater than 1000 (ranging up to 15,000), and as circulation increases it becomes ever less likely that they would benefit from zoned editorial pound charges. See Comments of Time Warner Inc. et al. Witness Halstein Stralberg on Characteristics of Very Small Periodicals, in Response to Notice of Inquiry No. 1, filed December 8, 2004, ("Stralberg Comments"), at 3. Complainants' brief is characterized by repeated failure to cite any portion of the record for questionable factual allegations, which makes response more difficult. See, e.g., Complainants' brief at 55-60.

[22] We note that according to witness Stralberg's analysis of witness Tang's extended sample, only 34% of the small publications would pay less under zoned editorial pound charges. See Tr. 5/1573-74.

[23] Statement of Postal Service Witness Tang in Response to Comments of Witness Stralberg Regarding NOI No. 1, filed December 20, 2004 ("Tang Statement"), at 2.

82% of very small publications were heavily concentrated in zone 1&2 and DSCF.[24] In other words, the 18% tended to be academic journals distributed nationally — which would benefit most from the flat editorial pound charge — while the 82% apparently tended to be local publications benefiting least from the flat editorial pound charge. Yet witness Stralberg treated those national publications as if they were local publications. Correcting for this error could apparently have had a material effect on Stralberg's analysis.[25]

In the final analysis, it should not really matter. The Commission has long been well aware that the flat editorial pound charge (traditionally set at 75% of the zone 1 charge) is appropriately designed to benefit high-cost long-haul publications the most, and that a number of low-cost and very short-haul publications could do even better under zoned editorial pound charges — just as any other low-cost mailer could generally do better under cost de-averaging. It would not seem particularly surprising or troubling if a majority of *local* Periodicals mailers fell into this category. Witness Mitchell testified that such publications could do better under zoned editorial pound rates only for mail entered at the destination ADC or further downstream and that *all* editorial matter nevertheless received a *net* benefit, considering the editorial piece discount. Tr. 3/1128-1131. Further, some 35% of the very small publications enjoy even lower in–county Periodicals rates for much of their mail. Tang Statement at 1. If any further relief were warranted, the flat editorial pound charge could be lowered.[26]

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[24] See Response of Postal Service Witness Tang to Notice of Inquiry No. 1, Item 9.

[25] Stralberg's methodology for calculating zoned editorial pound charges is set forth in the Response of Witness Stralberg to ABM/TW et al-2.a.

[26] In R2001-1, the Postal Service proposed to establish drop-ship discounts from the otherwise flat editorial pound charge. See Tr. 6/1954-55 (Schaefer).

### C. Complainants Have Not Met Their Burden of Showing That the Flat Editorial Pound Charge Is Obsolete.

Complainants' resort to the bizarre argument (initial brief at 50-54) that although the ECSI value of mailed Periodicals remains strong (thus justifying continuation of the Periodicals class), widespread dissemination of those Periodicals is nevertheless no longer important — supposedly justifying elimination of the flat editorial pound charge. It would seem inescapable, however, that if the educational, cultural, scientific, and informational value of Periodicals remains strong, then it would likewise remain important to encourage widespread dissemination of such Periodicals. See Docket No. C95-1, Rec. Dec. at ¶ 3012 ("role of postal delivery of periodicals in binding the nation together … has historically justified separate treatment for this mail, and it continues to do so today").[27] Viewed from another angle, if the long-haul shipment of magazines were displaced by the Internet, why would short-haul shipment of such magazines remain immune?

Accordingly, even the Magazine Publishers of America, a party generally allied with Time Warner et al. in postal proceedings and an opponent of the flat editorial pound charge (see MPA initial brief at 2, 5, 8), has nevertheless taken the position that:

> New technologies such as the Internet and cable television have neither replaced the need for magazines nor eroded their importance as a necessary vessel for the dissemination of information. The Postal Service can deliver a newspaper or magazine to any address it serves; but the resident at that

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[27]"As has been seen, it has been the practice of the Government since its inception to fix cheap postage rates on newspapers and magazines with a view to the widest possible dissemination of information among the people. The abandonment of this policy and the establishment of a second-class rate schedule high enough to ensure the recovery by the Government of the whole cost of handling each newspaper and periodical publication deposited in the mails would deprive a considerable proportion of our population of what is perhaps the most important and substantial benefit which they derive from the postal system." Report on Second-Class Mail to the Postmaster General, submitted by Charles A. Heiss, May 21, 1946, contained in Time Warner et al. LR-12 — and as true now as it was then.

> address may not be able to afford (or even have access to) cable television or the technology and equipment necessary to explore the Internet, Tr. 6/1738 (Cavnar). Even for those with Internet access, not all of the content of hard-copy magazines is available on the web.

Initial Brief of Magazine Publishers of America, Inc. at 5. See also Initial Brief of National Newspaper Association, Inc. at 18 (witness Gordon recognized that "nearly a third of the population is not online") (Tr. 3/784); Office of the Consumer Advocate Initial Brief at 9-10 (similar). Complainants have presented no evidence of any declining demand for hard copy magazines.

Complainants contend that the Commission should not be "concerned" with the impact of the proposed rate structure on academic journals. Without any citations to the record, Complainants baldly assert (at 36, n. 32) that such journals "are subscribed to on the Internet to a much greater extent than most Periodicals and the per-copy cost of producing such journals dwarfs the postage differential at issue in this case." Complainants similarly assert (at 58) that such journals tend to be available in totality on the Internet. If there is any record support for these assertions, the Complainants cite none, and this last claim is doubtful.

But even if these unsupported claims were true, they would be irrelevant. The "availability" on the Internet tells us nothing about the willingness or even the ability of subscribers to receive their information in that form. If the Commission is going to accept the Complainants' unsupported assertions with regard to these journals, it should also accept as true that many people with computer access would be even more negative toward reading academic and scientific journals on their computer screens

than they would toward reading "lighter" material in that fashion.[28] And some readers, of course, will not have computer access (at least not at locations where they prefer to read their journals).

As for the cost of producing such journals (and there is nothing in the record comparing that cost with any other), McGraw-Hill and American Business Media fail to see how a high cost of production equates to a high tolerance for cost increases. Unless the Complainants can point to evidence that academic journals earn high profits that would permit them to shrug off very large postage increases, this argument should be rejected out of hand.

[28] McGraw-Hill witness Schaefer described a study showing that, for example, only 22% of Internet users that receive news both online and offline do so more often online. Tr. 6/1951. Tr. 6/1738. The study concluded (at v): "The integration of the Internet into everyday life doesn't match its popular appeal. Most Internet users still default to the traditional offline ways of communicating, transacting affairs, getting information and entertaining themselves." American Business Media witness Cavnar also addressed the continuing preference and requirement for hard-copy delivery. Moreover, contrary to the patently false assertion in Complainants' brief (at 55) that witness Cavnar "relies on Mitchell" for the proposition that web sites typically do not contain the entire contents of publications--one of the many harshly worded and inappropriate distortions of witness Cavnar's testimony--witness Cavnar in fact *cited* (not *relied*) on witness Mitchell's testimony but then proceeded to *rely* on his own company's experience and addressed the issue from an industry-wide perspective.

## CONCLUSION

For all the foregoing reasons, the Commission should not recommend the rate structure proposed in this proceeding.

Respectively submitted,

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