

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

Postal Rate And Fee Changes, 2005)

Docket No. R2005-1

REPLY BRIEF OF
PERIODICALS COALITION

SUBMITTED ON BEHALF OF

AMERICAN BUSINESS MEDIA,
DOW JONES & COMPANY, INC.,
MAGAZINE PUBLISHERS OF AMERICA, INC.,
THE MCGRAW-HILL COMPANIES, INC.,
AND
TIME WARNER INC.

October 3, 2005

Reply Brief of
Periodicals Coalition

American Business Media, Dow Jones & Company, Inc., Magazine Publishers of America, Inc., The McGraw-Hill Companies, Inc., and Time-Warner Inc. (collectively, "Periodicals Coalition") hereby submit their Reply Brief.

The Periodicals Coalition members are signatories to the Joint Stipulation and Agreement ("Agreement") submitted by the Postal Service. As such, we fully support the rates and fees embodied in that Agreement and have explained in our Initial Brief the reasons why it should be adopted as the basis for the Commission's Recommended Decision in this proceeding.

In our Initial Brief, we fully anticipated the arguments that would be made by Valpak Direct Marketing Systems, Inc. and Valpak Dealers Association, Inc. in opposition to the Agreement. Accordingly, no reply to Valpak from the Periodicals Coalition is necessary

However, the Coalition did not anticipate certain contentions in the Initial Brief of the Office of Consumer Advocate ("OCA"), the only other party to oppose the settlement rates. Accordingly, a few brief comments about those OCA arguments are appropriate, given their unanticipated (and we submit inappropriate) nature in the posture of this proceeding.

We did not anticipate that the OCA would address, as it did in its Initial Brief (at 32-35), what the Commission should do if Congress takes certain legislative actions that it has neither taken nor is virtually certain to take ever, much less prior to the anticipated

date of a recommended decision. The Commission has already dealt with this possible scenario quite appropriately in Ruling No. R2005-1/84 ("In the event that any proposed legislation that affects this proceeding becomes law and the record in this proceeding is not adequate for the Commission to render its opinion and recommended decision, participants, including OCA, will be allowed appropriate procedural due process.") (footnote omitted). The Commission should adhere to the approach set out in Ruling No. R2005-1/84 and again refrain from addressing the speculative matters in Section III of OCA's Initial Brief. It remains true, as the Commission said in that ruling, that it is not appropriate for it to speculate on actions Congress may take.

The Coalition also did not anticipate that OCA, despite entering into an agreement with the Postal Service that the OCA would not file evidence in this proceeding (OCA Initial Brief at 3), would submit voluminous argument (*i.e.*, Sections V and VI of its Initial Brief) of a highly technical and factual nature that takes issue with the position of the Postal Service on the subjects addressed therein but that is utterly devoid of *any* citation to any evidence in this record other than the Postal Service's testimony. *Id.* at 41-87, *citing* testimony of Postal Service witnesses and various Postal Service responses to discovery requests. These Sections of OCA's Initial Brief are not proper argument, but appear instead to consist primarily of the expert testimony that OCA would have filed absent its agreement with the Postal Service not to file testimony in this proceeding.¹

¹ Section IV of OCA's Initial Brief, which is quite general, is similar to Sections V and VI, relying mostly on non-record evidence from much older Commission proceedings. The limited record evidence from this proceeding cited in that section is plainly insufficient by itself to support detailed factual findings of the sort OCA advocates without that section, or Sections V and VI, being admitted into evidence, along with the evidence from prior proceedings..

OCA's failure to cite record evidence supporting its arguments in those sections of its Initial Brief is not surprising, given the state of this record, with nearly all parties either entering into the Agreement with the Postal Service or not filing evidence, by agreement in the case of OCA. Accordingly, the Postal Service's testimony on the matters addressed in Sections IV, V and VI of the OCA Initial Brief was not the subject of the usual *evidentiary* response and rebuttal by any party. But unsupported arguments of a technical and factual nature on brief cannot substitute for *evidence* that is needed to support factual findings and conclusions. See *generally* 39 C.F.R. § 3001.31; see *especially id.* § 3001.31 (j)(official notice limited to facts of which judicial notice could be taken). Certainly, the highly technical material in Sections IV, V, and VI of the OCA Initial Brief is not the stuff of which official notice could be taken; rather, it is controversial material and factual assertions long opposed by the Postal Service and numerous parties. Accordingly, the Commission cannot rely on it for its findings and conclusions here and should either disregard or give minimal weight to OCA's unsupported argument.

The Periodicals Coalition does not seek Commission findings that the Postal Service's cost attributions that are the subject of Sections IV, V and VI of the OCA Initial Brief are preferable to any and all other alternatives, including those suggested by the Commission's prior rulings or in the OCA's brief. As discussed in the Periodicals' Coalition's Initial Brief, the Commission, especially in a settlement context, may find merely that the Postal Service's attributions and the resulting rates are within a range of reasonableness. But for at least five reasons, it would be especially inappropriate to make the findings proposed by OCA.

First, the matters discussed in Sections IV, V, and VI of OCA's Initial Brief are not in evidence. Obviously, the Commission cannot make factual findings based on technical material which is highly controversial but is not in evidence.

We have already addressed the second reason, *i.e.*, that official notice may not be taken of the highly controversial, factual material contained in the OCA brief.

Third, participants such as those in the Periodicals Coalition have been denied any fair opportunity to conduct discovery and oral cross-examination and submit rebuttal testimony relating to the testimony for which Sections IV, V and VI of OCA's Initial Brief obviously is intended as a substitute.

Fourth, given the Agreement reached by virtually all mailers in this proceeding, the Commission can rely on the Postal Service's testimony and evidence as adequate evidentiary support for the Commission's Recommended Decision without tying any party's or its own hands in future proceedings on matters such as those discussed in Sections IV, V, and VI of the OCA Initial Brief. This should suffice to satisfy OCA, which may have been concerned about the Commission's making findings that would bind the parties in future proceedings.

Fifth, a Commission order treating the OCA's arguments as evidence or otherwise relying on them would discourage parties in future proceedings from entering into settlements with the Postal Service. Parties would be more reluctant to settle if, by not submitting evidence of their own, they could find themselves at a severe procedural disadvantage in supporting their position before the Commission, or if the rates recommended by the Commission depart from the agreed rates due to factors that would have been litigated but for the settlement. See Initial Brief of Periodicals Coalition

at 6-7, *citing* Order No. 1443 at 14 *and Union Electric Co. v. FERC*, 890 F.2d 1190, 1194-95 (D.C. Cir. 1989)(requiring agencies to give weight to settlements of the parties before it). Reliance by the Commission on unsupported factual allegations in Sections IV, V, and VI of OCA's Initial Brief would deprive settling parties of procedural due process.

Conclusion

The Commission should not rely on Sections III, IV, V, and VI of OCA's Initial Brief in making its Recommended Decision in this proceeding.

Respectfully submitted,

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