Postal Regulatory Commission
Submitted 2/13/2008 3:39:49 pm
Filing ID: 58970
Accepted 2/13/2008

Draft 2/13/08

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

ANNUAL COMPLIANCE REPORT	:	DOCKET NO. ACR2007

REPLY COMMENTS OF TIME WARNER INC.
ON FY 2007 ANNUAL COMPLIANCE REPORT
(February 13, 2008)

Pursuant to § 3653(a) of the Postal Accountability and Enhancement Act ("PAEA") and the Commission's Notice of Filing of Annual Compliance Report by the Postal Service and Solicitation of Public Comment ("Notice of Filing") (issued December 31, 2007), Time Warner Inc. ("Time Warner") hereby submits its reply comments on the Postal Service's FY 2007 Annual Compliance Report ("ACR") (filed December 28, 2007).

Time Warner submits these reply comments for the purpose of expressing its agreement with the Reply Comments of Alliance of Nonprofit Mailers. *et al.* ("ANM *et al.*") (filed this date) that the contentions contained in the Initial Comments of Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. ("Valpak") "provide no basis for finding that the Periodical rates established by the Commission and the Governors less than a year ago are unlawfully low" or that any "purported failure of periodicals revenue to cover attributable costs . . . constitute[s] an exigent circumstance under 39 U.S.C. § 3622(d)(1)(E)."

1. No legitimate issue of compliance of FY 2007 Periodicals rates with applicable law has been raised in this proceeding

As Time Warner stated in its initial comments in this docket (filed January 30, 2008) (at 4):

> Since the rates in effect in FY 2007 were established under the ratesetting criteria of the PRA, Time Warner agrees with the Postal Service that the relevant criteria for determining the compliance of those rates with the law are those of the PRA rather than of the PAEA.

And, as Time Warner stated in its Reply Comments . . . in Response to Initial Comments on Commission Order No. 26:[1]

> The PRA contained a requirement that the Commission recommend rates calculated to produce revenues from each class of mail at least equal to that class's attributable costs. This is a requirement which, in Time Warner's view, the Postal Rate Commission consistently carried out in good faith.

As the reply comments filed today by ANM *et al.* further explain (at 6 [footnote omitted]:

> The PRA required the Commission and the Governors to establish rates based on a reasonable projection that revenues would cover costs in the rate case test year. The Commission and the Governors used a test year of FY 2008, not FY 2007—a choice that Valpak did not challenge. The Commission and the

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[1] Docket No. RM2007-1, Reply Comments of Time Warner Inc. in Response to Initial Comments on Commission Order No. 26 (filed October 9, 2007) (at 16 [footnote and internal quotation marks omitted]); *see also id*. at 21:

> Under the PRA, the Commission did not single out attributable-cost recovery and subject it to year-by-year (rather than test-year) analysis. Nor did it adopt a policy of "truing up" rates retrospectively in order to make up for previous failures to recover attributable costs. In essence, the Commission adopted the eminently practical view that rate regulation is not an exact science and that the authors of the attributable-cost requirement did not intend to commit the Commission to the pursuit of a delusive exactitude through a multiplication of regulatory checks and procedures. The Commission faithfully recommended rates that were calculated to recover attributable costs in the Test Year, but it did not interpret § 3622(b)(3) as requiring more [footnote omitted].

> Governors had no obligation to project that revenues would cover costs in FY2007, or to revise the FY2008 projections in light of subsequent developments. *See UPS v. USPS*, 184 F.3d 827, 831-34 (D.C. Cir. 1999) (minimum cost coverages prescribed by PRA are satisfied by test year projections, which "may or may not come to pass"); *id*. at 836 (PRA did not require that rates be "continually updated to reflect the latest, most accurate data").

Consequently, no legitimate question has been raised in this proceeding, by Valpak or any other party, regarding the compliance of the FY 2007 rates with applicable law.

2. No plausible argument exists that past failures of Periodicals class to recover attributable costs under the PRA amount to an exigent circumstance under the PAEA

For the last two decades under the PRA, Time Warner has done more than any other party to address the continuing problem of excessively high measured Periodicals costs. Under the PAEA, we have commented more extensively than any other party on the significance of § 3622(c)(2)'s attributable-cost recovery requirement, and on its relation to § 3622(d)(1)(E)'s exigent circumstances provision. We have conceded candidly that--in circumstances that have not yet arisen and which we hope will not arise--the relation between the two provisions could become problematic. Our comments have sought to help the Commission in developing an interpretation of the PAEA that is at once fair, practical, and faithful to Congressional intent, in "circumstances, unforeseen by Congress, that might confront it at the outset of implementing the new system . . . [i.e.,] that Periodicals class will enter the new system with a deficit in recovery of attributable costs that cannot be entirely eliminated in a single year by rate increases subject to the annual limitation other

than by making cost reductions that would result in severe service degradation."[2]

We observed that:[3]

> Periodicals is a class for which Congress expressed continuing special solicitude in the PAEA, including particular concern in § 708 about:
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> > (1) the quality, accuracy, and completeness of the information used by the Postal Service in determining the direct and indirect postal costs attributable to periodicals; and
> >
> > (2) any opportunities that might exist for improving efficiencies in the collection, handling, transportation, or delivery of periodicals by the Postal Service, including any pricing incentives for mailers that might be appropriate.

We concluded that "the attributable-cost recovery requirement, whatever it may have been under the PRA, is not 'the bedrock of Commission ratemaking' under the PAEA" and that "whatever degree of flexibility the Commission legitimately possessed in interpreting and applying the attributable-cost recovery requirement under the PRA is not *diminished* but *enhanced* under the PAEA, which makes the requirement merely one among a number of subordinate policy provisions."[4] We stated that:[5]

> Time Warner fully agrees with the comments [of other Periodicals mailers] that: (1) § 3622 creates a hierarchy of statutory authority as outlined by the Postal Service, ANM/MPA,

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[2] Docket No. RM2007-1, Reply Comments of Time Warner Inc. to Initial Comments in Response To Commission Order No. 2 (filed May 7, 2007), at 31-32.

[3] *Id*. at 31.

[4] Reply Comments of Time Warner Inc. in Response to Initial Comments on Commission Order No. 26, at 21-22.

[5] Reply Comments of Time Warner Inc. to Initial Comments in Response To Commission Order No. 2, at 25-26.

> and Senators Carper and Collins; (2) that the exigent circumstances and banking provisions of § 3622(d) provide the *exclusive* authority for increasing rates for any market-dominant class in excess of the caps; (3) that the use of the word "requirement" in § 3622(c)(2) does not elevate the failure of a market-dominant class to recover its attributable costs to the status of "exigent circumstances"; and (4) that the proper mechanism for Commission enforcement of compliance with the requirement of 3622(c)(2) is the remedial provisions of § 3662 (which do not include the power to authorize rate increases in excess of the annual limitation), pursuant to proceedings under that section or under § 3653.

To those previous comments we wish now to add only a few words addressing the specific facts and circumstances currently pertaining to Periodicals mail as indicated by the data filed by the Postal Service in its FY 2007 ACR and as known to Time Warner. The reply comments being filed today by ANM, *et al.* (at 7-8) set the proper background for the Commission's evaluation of this information:

> as the Commission specifically found in R2006-1, the stronger worksharing incentives incorporated into the R2006-1 rate design for Periodicals are inducing major changes in mailer behavior that should further close the gap between revenues and costs in FY 2008 and future years. R2006-1 Op. & Rec. Decis. at iv; ANM-MPA at 5-6 (providing several examples of changes in publisher and printer behavior that have already occurred). [footnote omitted]

The data submitted by the Postal Service in its Annual Compliance Report indicate a Periodicals Class cost coverage of approximately 83% in FY 2007. However, as pointed out in today's ANM *et al.* reply comments (at 7):

> The current set of Periodicals rates . . . did not take effect until July 15, 2007, more than nine months into FY 2007. For the portion of FY 2007 when the R2006-1 rates were in effect, the same CRA data would show that the coverage ratio exceeded 90 percent—*even assuming no change in mailer behavior or the CRA methodology*.

Time Warner can attest on the basis of its own operations and its knowledge of the Periodicals industry that mailers are still making changes to their mailing practices in response to the new pricing signals that went into effect on July 15, 2007. Time Incorporated, the magazine division of Time Warner, is a leader in pursuing innovation, yet still has a number of magazines that have not entered into co-mailing or co-palletization. Time Inc. is in the process of revising the mailing practices for these titles and anticipates full utilization of co-mailing and co-palletization in 2008. We believe that this kind of transition is taking place throughout the publishing industry as mailers adjust to the new rate structure and co-mailing capacity expands. Our suppliers have informed us of plans for several new co-mailing facilities that are opening on the East Coast and in the Midwest. As a result, mailers will have more opportunities to co-mail in 2008 and we fully expect continued improvement in the preparation of Periodicals.

Respectfully submitted,

s/ _____
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