

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268

Rules for Complaints

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Docket No. RM2008-3

INITIAL COMMENTS OF TIME WARNER INC.
IN RESPONSE TO ORDER NO. 101
(October 6, 2008)

Time Warner Inc. (Time Warner) respectfully submits these initial comments in response to Order No. 101, Notice and Order of Proposed Rulemaking Establishing Rules for Complaints (issued August 21, 2008).

Summary

As Order No. 101 observes (at 4):

[T]he PAEA [Postal Accountability and Enhancement Act] changed and expanded the Commission's complaint authority. . . . This enhancement of the Commission's complaint authority reflects Congress' intent for complaints to become one of the major tools to achieve the PAEA goal of increased accountability and transparency of the Postal Service to the public it serves. . . .

In fact, so extensive is the enhancement of the Commission's remedial authority under the PAEA that this proceeding confronts the Commission primarily with the challenge of placing sensible limits on its exercise of its complaint jurisdiction, so that the system will not be overwhelmed by the volume of complaint proceedings and the Commission will not be transformed into a sort of constabulary or small claims court for complaints against the Postal Service.

Time Warner believes that the proposed regulations embody a sensible,

flexible approach to this challenge, one which, in the Commission's words, "recognize[s] that the Commission's primary role is to foster public postal policy as set forth in the PAEA by focusing on issues and decisions with substantial ramifications," but which also reserves the Commission's authority to exercise its complaint jurisdiction for the "direct remediation of individual, localized mailer problems" if it concludes "that the Postal Service is not dealing effectively" with them. Order No. 101 at 4-5, 12.

Time Warner strongly supports both Order No. 101's general approach and its specification of grounds for the exercise of the Commission's complaint jurisdiction.

Time Warner does recommend one change in the proposed rules, namely in proposed § 3030.10(a)(9), which would require that a complaint must, *inter alia*,

[i]nclude a certification that states that prior to filing, the complainant attempted to meet or confer with the Postal Service to resolve or settle the complaint.

We think that the rules should make allowance for cases in which such an attempt would have no prospect or only a negligible prospect of being productive, and that in such cases a statement and explanation to that effect should suffice.

Discussion

1. The Commission's general approach

Under the complaint provision of the Postal Reorganization Act (PRA), former § 3662 of title 39, the Postal Rate Commission's remedial powers were meager. If, after a hearing, the Commission determined that a complaint regarding rates or classifications was justified, it was authorized to conduct a rate or classification proceeding in conformity with former § 3624 and issue a recommended decision to

the Governors to be "acted upon in accordance with [former] section 3625." In other words, the Governors retained the ultimate authority to accept or reject whatever remedy the Commission might recommend. If the complaint concerned other matters, the Commission's authority was limited to the issuance of "a public report thereon to the Postal Service[,] which shall take such action as it deems appropriate." Consequently, relatively few complaints were filed under the PRA. Parties that felt aggrieved by a rate or classification had a much better chance of effecting change by litigating the matter in the context of an omnibus rate case, where the recommendation issued to the Governors would cover a multiplicity of interrelated issues, making the rejection of individual components of the recommendation much more problematic.

The absence of effective remedial powers under former § 3662 made it unlikely that complaint cases would intrude on the managerial prerogatives of the Postal Service. Still, the Postal Rate Commission adopted a standard narrowing the scope of matters it would entertain under former § 3662 to less than the full reach of its statutory jurisdiction. As it stated in Order No. 1307 (at 12):

The Commission adopted a rule to guide it in determining when to apply its discretion to hold hearings, as granted in § 3662, which states in part:

. . . complaints raising a question as to whether the Postal Service has properly applied its existing rates and fees or mail classification schedule to a particular mail user or with regard to an individual, localized, or temporary service issue not on a substantially nationwide basis shall generally not be considered as properly raising a matter of policy to be considered by the Commission.

. . . The Commission generally considers that the following types of complaints are not a matter of policy that have

nationwide implications and thus, will not be entertained: (1) whether the Postal Service has properly applied its existing rates and fees or mail classification schedule to a particular mail user, or (2) complaints with regard to an individual, localized, or temporary service issue.

The regulations that the Commission now proposes in Order No. 101 are adapted to a situation that is in some ways entirely different and in some ways much the same as that which existed under the PRA. Rate and classification cases that are subject to the requirements of a full hearing on the record are a thing of the past, and the "enhancement of the Commission's complaint authority reflects Congress' intent for complaints to become one of the major tools to achieve the PAEA goal of increased accountability and transparency of the Postal Service to the public it serves." Order No. 101 at 4. Yet the PAEA has not appreciably expanded the Commission's jurisprudential resources, and it is intended in general to expand rather than contract the scope of the Postal Service's managerial discretion. Thus the new law contains tendencies that may be in some tension with one another. In view of the PAEA's elimination of the extensive prior review of rates and classifications that existed under the PRA, there is the need to afford to parties who may be aggrieved by Postal Service actions that violate the law a reasonable alternative venue in which to seek redress. But in view of the complexity and the enormous number of customers and (mostly small) transactions involved in managing the Postal Service, there is also the need to prevent the complaint procedure from imposing heavy administrative costs and burdens on the system in cases of relatively minor or incidental alleged violations. An additional challenge is presented by the fact that it is impossible to craft a standard that more or less

automatically discriminates complaints that merit a hearing from those that do not.¹ Any effective standard needs to rely on the discretion of the Commission in performing this triage function.

Upon weighing these matters, and "recogniz[ing] that the Commission's primary role is to foster public postal policy as set forth in the PAEA by focusing on issues and decisions with substantial ramifications," the Commission proposes rules that "are intended to reflect Congressional intent that the complaint process be available for hearing such broad policy matters which, under the PRA, would have been handled in the context of a comprehensive proceeding," and that "focus more of its limited resources on important issues that raise rate and service issues with broad implications or unfair competition issues, and less of its resources on issues that can more easily be remedied by postal management on a local level." Order No. 101 at 4-5. The Commission therefore concludes that its proposed complaint procedures should be "designed largely to deal with problems, needs, or concerns of more than only a limited number of persons or those dealing with claims of unfair competition." *Id.* at 5.

The Commission rests this conclusion upon both its understanding of the structure and intent of the PAEA and a careful consideration of the statutory text. Unlike the complaint provision of the PAEA, its predecessor provision in the PRA (former 39 U.S.C. § 3662) gave the Postal Rate Commission authority to hear complaints in all cases in which

¹ An example of such a mostly self-executing standard is the requirement that a sum of at least \$75,000 be in dispute in order to invoke the civil diversity jurisdiction of the federal courts. See 28 U.S.C. § 1332(a).

[i]nterested parties . . . believe the Postal Service is charging rates which do not conform to the policies set out in this title [title 39] or who believe that they are not receiving postal service in accordance with the policies of this title. . . .

Under the PAEA, the Commission's subject matter jurisdiction to hear complaints is limited to specified parts of title 39. As Order No. 101 observes, current § 3662

provides that a complaint may be filed by any person who believes that the Postal Service is not acting in accordance with sections 101(d), 401(2), 403(c), 404a, 601, and chapter 36 [of title 39] (or any regulations promulgated under these sections).

Order No. 101 at 6. On considering "the commonalities of these statutory provisions," the Commission finds that they fall into two categories: those that "may raise broad policy issues"; and those that "may raise issues relating to unfair competition." *Id.*; see also *id.* at 7-10. The specific regulations that the Commission proposes embody these conclusions.

Time Warner believes that the Commission has employed the correct analytical approach and reached the correct general conclusion. At this early stage of implementation of the PAEA, it would not be productive to attempt more. As the Commission properly states in the introductory section of Order No. 101 (at 2):

These regulations are designed to serve as a reasonable starting point. The Commission expects that these rules will evolve as the Commission grows more familiar with the types of issues that it may be asked to consider.

2. Proposed § 3030.10(a)(9)

Time Warner does respectfully suggest one revision to the proposed rules.

As Order No. 101 explains (at 14), proposed § 3030.10(a)(9)

requires the complainant to certify that it has attempted to meet or confer with the Postal Service. This criterion has two purposes. First, it is designed to allow the parties to explore

whether alternative dispute resolution procedures might be effective in settling the issues raised by the complaint. Second, it requires an attempt to resolve the complaint before involving the Commission. This follows the Commission's long-standing policy favoring settlement. See 39 CFR 3001.85(b).

Time Warner has no quarrel with the Commission's policy favoring settlement. But we think that the proposed rule as currently framed could amount in some cases to a requirement that a complaining party perform a futile or unduly burdensome act, or could lead to sterile and unedifying disputes between the Postal Service and a complaining party about the adequacy of efforts to resolve the issue before involving the Commission. We therefore suggest that proposed § 3030.10(a)(9) be revised to add the italicized words as follows:

(9) Include a certification that states that prior to filing, the complainant attempted to meet or confer with the Postal Service to resolve or settle the complaint, *or an explanation why complainant believes such attempt would have been unproductive, and why the complainant believes additional such steps or utilizing some form of alternative dispute resolution would be inadequate, and the reasons for that belief; . . .*

Conclusion

Time Warner appreciates this opportunity to comment on the Commission's proposed rules for complaints.

Respectfully submitted,

s/ _____
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