

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

Rules for Complaints

Docket No. RM2008-3

**COMMENTS OF THE  
NEWSPAPER ASSOCIATION OF AMERICA  
ON NOTICE AND ORDER OF PROPOSED RULEMAKING  
ESTABLISHING RULES FOR COMPLAINTS  
(October 6, 2008)**

The Newspaper Association of America (“NAA”) respectfully submits these comments on the Commission’s Notice and Order of Proposed Rulemaking<sup>1</sup> to implement the Section 3662 complaints provisions of the Postal Accountability and Enhancement Act of 2006 (“PAEA”).

**I. INTRODUCTION AND SUMMARY**

The Newspaper Association of America (“NAA”) is a non-profit organization representing more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90 percent of the daily newspaper circulation in the United States and a wide range of non-daily U.S. newspapers. NAA members use all classes of mail. According to the most recent data available, NAA member newspapers spent nearly \$1 billion in postage in 2006.

NAA was an active participant in postal reform efforts and is gratified that the Commission has initiated this proceeding. Complaints under Section 3662

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<sup>1</sup> Order No. 101 (Aug. 21, 2008), 73 *Fed. Reg.* 51,888 (Sept. 6, 2008) (“*NOPR*”).

are a central component of the new statutory system. As the Commission states, Congress intended the complaint process to play a “significantly expanded” role compared to that under prior law in ensuring that the Postal Service’s rates and services comply with hard-fought and carefully balanced legal requirements. To achieve this, the Commission should adopt complaint procedures that fully effectuate this important statutory provision.

NAA supports the proposed rules as generally consistent with the statute. However, NAA is concerned that the *NOPR* does not address vitally important issues in the complaint process that arise only after the Commission commences a formal complaint proceeding upon a finding of material issues of fact or law. The *NOPR* does not discuss the allocation of the burden of proof in Section 3662 proceedings. Nor does it address the issue, identified in early comments, of how to avoid having an annual compliance review prejudice a concurrently pending Section 3662 complaint. To address these matters, the Commission:

- Should affirm that the Postal Service bears the burden of demonstrating the lawfulness of its rates or practices in a Section 3662 proceeding; and
- Should ensure that the annual compliance review process does not eviscerate the complaint process.

As for the specific proposals in the *NOPR*, NAA commends the Commission for properly rejecting calls that it apply a threshold more burdensome than the statutory “material issue of fact or law” in deciding whether to commence a complaint proceeding. In addition, while NAA understands the Commission’s purpose in proposing the “investigator” function, that role requires

further clarification. Finally, the Commission should ensure that the certification requirement does not itself become a subject of litigation.

## **II. THE COMMISSION RIGHTLY REJECTED SUGGESTIONS THAT IT CREATE A MORE BURDENSOME STANDARD THAN “MATERIAL ISSUES OF FACT OR LAW”**

Section 3662 of the PAEA provides that the Commission shall commence proceedings within 90 days after the filing of a complaint if the Commission finds that the complaint “raises material issues of fact or law.” 39 U.S.C. § 3662(b)(1)(a). Proposed Section 3030.30(a) of the proposed rule reiterates that statutory standard. In so doing, the Commission properly rejected calls by some parties last year for an artificially more burdensome standard.

The proposed rule is faithful to the statute and should be adopted. Indeed, a more burdensome standard would be inconsistent with the statute and therefore unlawful. Under the PAEA, a complainant need show only the existence of a material issue of fact or law. Neither the statute nor the proposed rule requires that the complainant prove the merits of its contentions or even that it has any particular likelihood of success.<sup>2</sup>

This standard also is appropriate as a policy matter because of the obstacles that many complainants will face. In most cases, the Postal Service will hold most of the relevant information in the form of data, documents, or other

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<sup>2</sup> In a pending complaint under Section 3662 as revised by the PAEA, the Commission stated that the complainant need not establish a violation of law, but rather need establish merely a “colorable claim raising material issues of fact or law” in order for the Commission to initiate a proceeding under Section 3662. Order No. 92, Docket No. C2008-3 at 4 (Aug. 1, 2008). The Commission’s application of that formulation in that proceeding is consistent with the statutory test.

types of information. Of that portion of Postal Service information required to be disclosed in periodic reports, much will be subject to claims of confidentiality. In practice, these factors may greatly hinder the ability of a complainant to assemble facts to present to the Commission. The complaint process will fail to achieve the intended “increased accountability and transparency” if the Postal Service is able to conceal data, under claims of confidentiality or by simply not making facts public, and then have complaints dismissed at the preliminary stage. The proposed standard reduces the risk that a meritorious complaint will be dismissed at a stage when much relevant data is unavailable due to Postal Service claims of confidentiality and the unavailability of discovery.<sup>3</sup>

Proposed rule 3030.10(6) also is helpful in this regard by allowing complainants to plead “upon information and belief.” This is a responsible step that should help complainants overcome, at the preliminary stage, the obstacle posed by nonpublic or otherwise unavailable data. By analogy, Rule 11(b)(3) of the Federal Rules of Civil Procedure prohibits counsel from making an averment upon information and belief in a complaint or answer without having a basis, after reasonable inquiry, for believing that it “will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.”

### **III. THE *NOPR* DOES NOT ADDRESS BURDEN OF PROOF AND OTHER PROCEDURES IN COMPLAINT PROCEEDINGS**

Once the Commission determines, pursuant to proposed Section 3030.30(a)(1), that a complaint passes the threshold determination of raising

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<sup>3</sup> The current Commission rule authorizing depositions is not contained in Rules 25-27 and thus is available prior to the Section 3030.10 finding of a material issue of fact or law.

material issues of fact or law, a complaint proceeding will ensue. Unfortunately, the *NOPR* is mostly silent regarding what standards of proof and other procedural rules will apply in such proceedings under the PAEA.<sup>4</sup>

This omission should be rectified. It is vital that the procedural rules for complaint proceedings afford the complainant a full and fair opportunity to build and present its case. Section 3030.1(b) makes clear, but in an indirect manner, that current discovery rules apply after the “material issue” finding has been made. These discovery rules are absolutely necessary because the great majority of relevant information is likely to be in the possession of the Postal Service.<sup>5</sup>

An important aspect of complaint proceeding procedures will be the burden of proof after the Commission determines that a material question of fact or law exists and a proceeding commences. The statute itself does not assign the burden of proof. Section 3662 states merely that the Commission shall order a remedy if the agency “finds the complaint to be justified.” 39 U.S.C. § 3622(c).

The “to be justified” standard carries over from the previous version of Section 3662. But there is no reason to believe that Congress meant to ratify past practices. As an initial matter, a review of Commission decisions over the years shows that in practice the Commission typically has not assigned, or even

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<sup>4</sup> The *NOPR* is not completely silent. It is evident from proposed Section 3030.1(b) that the Commission’s existing rules of discovery, including interrogatories and requests for admission, would be available after the Commission has found under rule 3030.30(a)(1) that the complaint raises material questions.

<sup>5</sup> It is clearly essential that the Commission retain its current rules regarding discovery.

discussed, burdens of proof.<sup>6</sup> In any event, the substantial revisions to the ratemaking process and the relative roles of the Commission and Postal Service accomplished by the PAEA, as well statutory provisions in PAEA summarized below, require placing the ultimate burden of proof on the Postal Service in complaint proceedings under Section 3662 of the PAEA.<sup>7</sup>

It is appropriate for the Postal Service to bear the burden of proof for several reasons. First, the Postal Service remains a government service operated by the federal government. It is perfectly appropriate to ask that a government service bear the burden of demonstrating that it acts in accordance with the law.

Second, the structure of the PAEA dictates placing the burden of persuasion on the Postal Service. Under the PAEA, both postal ratesetting and postal business operations are, in the first instance, matters for the Postal Service. The Commission's review of proposed rate changes under the new ratesetting system primarily focuses on compliance with the price cap at a class level. It does not closely examine individual rate changes. Consequently, the current review of proposed rate changes does not result in a finding by the Commission that any particular rate is lawful.<sup>8</sup> This contrasts with practice under

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<sup>6</sup> Commission decisions on complaints under the Postal Reorganization Act typically recited the parties' contentions and then presented the Commission's discussion and decision. Burdens of proof were typically not mentioned. *See, e.g., Opinion and Recommended Decision*, Docket No. C87-1 (Dec. 16, 1988); *Opinion and Recommended Decision*, Docket No. C99-4 (April 20, 2000).

<sup>7</sup> As discussed below, in complaints against services or rates which an annual compliance review has deemed to comply with Chapter 36, the burden remains on the Postal Service but the complainant would first have to overcome a rebuttable presumption in favor of the rate or service.

<sup>8</sup> Regulatory practice before other agencies has drawn a distinction between the "legal" rate – that the USPS can charge after following the notification process for rate adjustments

the predecessor Postal Reorganization Act, under which the Postal Rate Commission played a far larger role in reviewing rate changes before they took effect, including recommending, after an extensive formal trial-type hearing pursuant to the now-repealed Section 3624, rates that it believed lawful.

Third, the statutory provisions governing the annual compliance review provide further support for the conclusion that the Postal Service bears the ultimate burden of persuasion in complaint proceedings under the PAEA. The new Section 3652(a)(1) requires the Postal Service to “demonstrate” in its annual compliance filing that its products complied with all applicable requirements. That plainly places the burden of proving the lawfulness of the products on the Postal Service. If the Commission finds that a product is non-compliant with the PAEA in some respect, that is dispositive of the issue of lawfulness and the Commission can order appropriate relief.

On the other hand, a Commission determination of no noncompliance creates a “rebuttable presumption of compliance” with Chapter 36, the chapter of the PAEA governing rates and service standards. 39 U.S.C. § 3653(e). This presumption to an extent “rewards” the Postal Service’s showings made during the annual compliance review process. At the same time, however, Congress made this presumption rebuttable because it understood that the limited role of interested parties in the annual compliance review, the range of issues in fact considered therein, and the lack of discovery, might preclude adequate consideration of important issues of lawfulness in the annual compliance review.

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subject to price cap review – and a “lawful” rate, which has been found to satisfy all relevant legal requirements.

Equally as importantly, the rebuttable presumption established by 39 U.S.C. § 3653(e) applies only to service standard and rate matters under Chapter 36. It is not available at all in cases of complaints alleging violations of Sections 101(d), 401(2), 403(c), 404a, or 601 of the PAEA. The absence of any presumption in the Postal Service's favor for complaints under those sections, in contrast to service issues and rate claims under Chapter 36, implies that Congress intended for the Postal Service to have the burden of persuasion in those cases without the benefit of any presumption, consistent with the statutory structure.

Fourth, as a practical matter, the Postal Service alone will possess a great majority of the information relevant to the subject matter of the complaint. Potentially relevant information within the possession of the Postal Service will include not only data filed from time to time with the Commission, but also extensive internal records, never filed with the Commission, concerning its costs, actions, and activities in the field. Even reasonably thorough discovery requests are unlikely to identify, locate, and secure all of the potentially relevant information. Where the regulated entity controls the data, it is appropriate to place the burden of persuasion on that entity.

NAA recommends that the Commission address burdens of proof in the following manner in its rules.

1. In a complaint proceeding commenced pursuant to Section 3030.30(b) regarding a rate or service standard issue that has not been the subject of an annual compliance review, and after appropriate discovery and, if

necessary, a hearing, the Postal Service should bear the burden of proving the lawfulness of its rate or services.

2. In a complaint proceeding commenced pursuant to Section 3030.30(b) alleging violations of Sections 101(d), 401(2), 403(c), 404a, or 601 of the PAEA, and after appropriate discovery and hearings, the Postal Service should bear the burden of proving the lawfulness of the challenged conduct or practice.

3. In a complaint proceeding commenced pursuant to Section 3030.30(b) regarding a rate or service standard issue that has been found compliant in an annual compliance review and thus enjoys a rebuttable presumption of lawfulness, and after appropriate discovery and hearings, the complainant shall have the burden of articulating facts and argument making a *prima facie* case of unlawfulness. If the complainant is able to establish a *prima facie* case of unlawfulness, the presumption is rebutted and the burden of persuasion returns to the Postal Service.

#### **IV. THE COMMISSION SHOULD ENSURE THAT THE COMPLAINT PROCESS IS NOT EVISCERATED BY THE ANNUAL COMPLIANCE REVIEW**

There is a fourth category of complaints – one challenging a rate or service standard that is pending simultaneously with an annual compliance review. The problem is most likely to arise if the complaint is pending prior to the date that the Postal Service files its annual compliance report. The Commission understandably will need to divert considerable resources to reviewing that report to meet its 90-day deadline. However, if the complaint is deferred until the

Commission issues its finding of compliance or noncompliance, and that determination is applied to the complaint, then the usefulness of the Section 3662 process would be greatly reduced.<sup>9</sup>

Such an outcome would run contrary to the congressional intent that complaints serve an important role. Unlike in an annual compliance review, in which the Postal Service makes a general showing regarding all of its products and interested parties may file comments but not conduct discovery, a complaint proceeding seeks relief for a specific problem. Upon showing a material issue of fact or law, a complainant is entitled to seek discovery of data and other materials beyond that previously filed by the Postal Service. A complaint proceeding inherently involves a far more detailed examination of the Postal Service practice under review than is possible in an annual compliance review.

In addition, allowing the annual compliance review to “trump” a complaint proceeding could effectively limit complaints to only a few months of a year. Consider that the Postal Service files its annual compliance report on or about the end of December. The Commission must review that report and issue a determination of compliance or non-compliance within 90 days, which translates to late March. 39 U.S.C. §3653(b). To avoid being curtailed by the annual compliance review, a complaint would have to be filed sufficiently in advance of late December to allow not only the 90 days for a finding under Section 3030.10

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<sup>9</sup> Under the prior law, an omnibus rate case occasionally superseded and rendered moot a complaint. *E.g.*, Order No. 1040, *Order Dismissing Complaint of United Parcel Service for Mootness*, Docket No. C93-2 (Jan. 12, 1995). However, the enhanced role assigned the complaint process by the PAEA requires that the Commission strive to avoid similar outcomes in the new regime.

but also to litigate the subsequent complaint proceeding, which presumably would take at least several months or longer. This would relegate complaints in practice to a short period between the end of March and early June.

NAA urges the Commission to address this in a manner that fairly balances the interests of the complainant and the Postal Service and allows the Commission to manage its resources efficiently. One way to do that may be to establish or modify the procedural schedule for the complaint in a way that allows both proceedings to be resolved at the same time. Another might be for the annual compliance determination to reserve judgment on the subject matter of the pending complaint until the latter is resolved.

**V. THE ROLE AND POWERS OF THE “INVESTIGATOR” SHOULD BE CLARIFIED**

Section 3030.21 of the proposed rules would allow the Commission to appoint an investigator to explore issues raised in a complaint. While NAA is open to proposals that could expedite complaint proceedings, when adopting rules the Commission should more clearly explain the powers, functions, and responsibilities of the investigator and that ensure that the investigator does not in practice derail legitimate complaints.

For example, is the investigator intended to serve in a manner comparable to that of a special master in litigation? Furthermore, although the intent of the investigator position is to assist the Commission, the investigator should not in practice have the effect of supplanting a complainant’s control of the development and presentation of its case. To preserve confidence in the Section

3662 process, an investigator would need to have sufficient powers to obtain information, but not unduly influence the Commission's decisionmaking.

Therefore, the Commission should spell out more clearly the powers and responsibilities of the investigator. In particular:

- Would the investigator be able to invoke the subpoena power granted by 39 U.S.C. § 504(f)?
- The *NOPR* proposes that the investigator's report will be "public" and that parties would be able to comment on it prior to the Commission's decision. This is necessary, but not sufficient. It is also important that the complainant have access to the information obtained by the investigator from the Postal Service in the course of preparing his report. An ability to review an investigator's report to the Commission will have little usefulness if the complainant is not allowed access to the materials upon which that report is based.
- Would the investigator be recused from decision-making responsibilities?
- What role, if any, would the investigator have as the proceeding continues?

Clarification of the role, powers, and responsibilities of the investigator would help interested parties better understand the mechanics of the complaint process and the fairness of the proceeding.

## **VI. THE CERTIFICATION SHOULD NOT ITSELF BECOME A SUBJECT OF DISPUTE**

At Section 3030.10(a)(9) of the proposed rules, the Commission proposes to require a complainant to certify that it attempted to meet or confer with the Postal Service to "resolve or settle the complaint" and why additional discussions or some form of alternative dispute resolution would be inadequate. The general purpose of the certification is encourage the parties to attempt to resolve the matter without involving the Commission. *NOPR* at 14.

NAA recognizes the Commission's desire to avoid unnecessary complaints. In the vast majority of cases, parties in fact already meet with the Postal Service to discuss their concerns before a decision to expend the time and financial resources that come with litigation.

However, the certification requirement itself should not become a subject of litigation. The requirement should not be interpreted as to allow litigation over whether such a meeting was attempted, or whether, if attempted, the meeting was sufficiently substantive. The point should be that the complainant has tried to discuss the problem with appropriate Postal Service officials in an attempt to resolve the rate or practice of concern.

In particular, to avoid pointless preliminary and nonsubstantive disputes over the certification process, the Commission should:

- Consider whether the purpose of the certification requirement would be aided if the Postal Service were directed to designate one or more appropriate official(s) or office(s) which the complainant should attempt to contact; and
- Not require the complainant to disclose its legal theories in such a meeting.

The first suggestion is straightforward. If a potential complainant must meet with someone at the Postal Service to resolve a dispute before filing with the Commission, the meeting must be with someone who has sufficient authority to take action to resolve it. Second, the purpose of the meeting should be to attempt to resolve a problem, not to give the Postal Service a preliminary glimpse into the complainant's case. Accordingly, there should be no obligation that the prospective complainant disclose the legal theories or otherwise lay out its case. It should be sufficient to explain the problem and ask for relief.

## VII. CONCLUSION

For the foregoing reasons and for the reasons set forth in its initial and reply comments in Docket No. RM2007-1, the Newspaper Association of America urges the Commission to adopt its proposed regulations for considering complaints, with the modifications suggested herein.

Respectfully submitted,

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