

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Rules for Complaints

)

Docket No. RM2008-3

**VALPAK DIRECT MARKETING SYSTEMS, INC. AND
VALPAK DEALERS' ASSOCIATION, INC.
COMMENTS REGARDING PROPOSED RULES
GOVERNING THE DISPOSITION OF COMPLAINTS
(October 6, 2008)**

On August 21, 2008, the Commission issued Order No. 101, Notice and Order of Proposed Rulemaking Establishing Rules for Complaints. This rulemaking was designed to implement the changes that the Postal Accountability and Enhancement Act ("PAEA") (Pub. L. 109-435) made to the complaint provisions in Title 39, United States Code. *See* 39 U.S.C. § 3662. The deadline to submit initial comments was set for October 6, 2008, and the deadline to submit reply comments was set for October 27, 2008. Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. (hereinafter "Valpak") submit these joint initial comments in response to Order No. 101.

Background

Under the Postal Reorganization Act of 1970 ("PRA"), the Commission had limited authority: (i) to hear complaints against the Postal Service under then 39 U.S.C. section 3662; (ii) to respond to such complaints; and (iii) to require any change in the Postal Service's actions with respect to any complaint that it found to be justified. It generally was agreed that mailers who filed complaints under PRA had relatively little hope of obtaining significant relief.

Although PAEA eliminated the extensive pre-implementation rate and classification review process that had been in effect under PRA, it created an important post-hoc annual compliance procedure (under 39 U.S.C. section 3652), and changed 39 U.S.C. section 3662 to provide a broader jurisdictional basis for complaints, to strengthen the Commission's ability to order remedies, and to reduce the Postal Service's discretion in complying with such orders. The Commission order commencing this docket described PAEA as "elevat[ing] the role that complaints play in providing interested persons a forum for addressing issues arising under specified sections in title 39." Order No. 101, p. 3.

In further support of this elevated role for the complaint process, PAEA now provides a specific provision for judicial review of a Commission order on a complaint, 39 U.S.C. section 3663, and empowers federal courts to enforce such an order and to enjoin the Postal Service from not complying with or otherwise violating such an order, 39 U.S.C. section 3664.

The Commission succinctly described the mandate of PAEA for both transparency and accountability, as follows:

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. See 39 U.S.C. 3622(b)(6) ("increase the transparency of the ratemaking process"); 39 U.S.C. 3691 (transparency of service standards) ; 39 U.S.C. 3622(b)(3) ("maintain high quality service standards"); 39 U.S.C. 504(g)(3)(A) ("public interest in maintaining the financial transparency of a government establishment ..."). [Order No. 101, p. 4.]

The Commission's proposed rules provide that the complaint, answer, and all relevant documents (such as the report of an investigator, discussed *infra*) in a complaint proceeding be made publicly available on the Commission's website.

With this general policy in mind, an important step in evaluating the proposed complaint procedures is to analyze how the underlying law has changed with the passage of PAEA. To this end, Appendix I sets out the complaint provisions of PRA and PAEA, and compares and contrasts the two. General comments and a discussion of the provisions governing the requirements for complaints and answers are set out in section I, below. The implications of the Commission's practice of appointing a variety of individuals to represent the interests of the public are discussed in section II. Finally, the proposal for separate rate and service inquiries is discussed in section III.

COMMENTS

I. The Proposed Rules Are Well Crafted and Generally Consistent with the Commission's Greater Role Adjudicating Complaints under PAEA than under PRA, Providing for Both Due Process and Transparency, Although Some Modifications Are Suggested.

In general, the Commission's proposed "Rules for Complaints" constitutes an excellent first effort to address procedures with respect to the disposition of complaints filed pursuant to 39 U.S.C. section 3662. Proposed rule section 3030.1 indicates that the rules set forth in Part 3001, subpart A, apply with respect to complaints filed under 39 U.S.C. section 3662, if they meet the form and manner requirements of Subpart B — except for discovery rules 3001.25-

27, which only apply after the Commission makes a finding under Rule 3030.30(a)(1) that the complaint raises “material issues of fact or law.”

In general, the Commission appears to have achieved its objective to provide due process rights to all participants — complainants, the Postal Service, the officer of the Commission, and intervenors:

The proposed rules replace existing regulations and are designed to enable the Commission to hear and resolve complaints in a streamlined and efficient manner while providing **appropriate due process for all participants**. [Order No. 101, p. 1 (emphasis added).]

A. Singular Allegation. However, one small change in proposed Rule 3030.1(b) would be helpful. As drafted, it requires that the Commission make a finding under Rule 3030.30(a)(1):

“that the complaint raises material issues of fact or law.”

This proposed language in the regulation faithfully reproduces the text of 39 U.S.C. section 3662(b)(1)(A)(1) which states “upon a finding that such complaint raises **material issues of fact or law**.” While section 3662(b) may be construed as mandating review of any complaint that raises more than one issue of fact or law, there is nothing in the language of the statute that would prohibit the Commission from conducting a substantive review if the complaint raises only one such issue. Indeed, in its explanation of the contents of its proposed regulation — section 3030.10 Complaint contents — the Commission contemplates a “determin[ation] whether the complaint raises **a material issue of fact or law**.” (Emphasis added.) Therefore, it is suggested that the proposed regulation be changed to:

“that the complaint raises **one or more** material issues of fact or law.”

B. Service. The provision in section 3030.11 regarding service requires service only by e-mail. It is suggested that service should be sufficient if made by hand delivery or by U.S. Mail.

C. Investigator. Providing for an “investigator” in Rule 3030.21 appears to be a useful innovation, along the lines of a Special Master. It particularly is appreciated that, like other documents in a complaint docket, the report of an investigator be “written” and “public.”

D. Complaints. The complaint requirements¹ in Rule 3030.10 appear quite substantial, and perhaps too demanding. They are certainly more rigorous than the requirements of the prior rules. There are questions concerning the meaning of, or even the rationale for, some of the items in certain of the rules.

Subsection (a)(5) requires a statement of “the nature of the evidentiary support that the complainant has or expects to obtain during discovery....” It is uncertain how much of a statement would be required, and what the consequences might be if the statement were too superficial, or even later proved incorrect. It is not clear why any such statement should even be required. The essence of discovery is to acquire information; a complainant should not be expected to know what the discovery would reveal before it is conducted.

Subsection (a)(6) requires “an explanation as to why such facts [alleged in the complaint] could not reasonably be ascertained by the complainant where claims are premised on information and belief.” Any number of facts — if not all of the facts — set forth in a

¹ The Commission’s proposed regulations dealing with Complaints and Answers are contrasted with current regulations in Appendix II.

complaint might be stated upon information and belief. There is no requirement that a complainant's allegations be based on anything other than information and belief, nor should there be.

Section 3030.10(b) of the proposed rules would allow the Commission to dispense with any of the requirements in section 3030.10(a) "to serve the interests of justice," but nothing is provided to indicate the conditions under which the Commission would make such a finding. The bar for filing a complaint should not be set so high that this type of waiver often would be required.

It is not certain what, if any, consequences would flow from a complainant's failure to adhere perfectly to all of the conditions of proposed rule 3030.10(a), although presumably complainants normally would be given the benefit of the doubt, particularly in light of proposed rule 3030.10(b). Nevertheless, it seems that, except perhaps in cases of grave abuse, no complaint should be subject to dismissal prior to an answer by the Postal Service, and a complaint should not be converted into a "rate or service inquiry" prior to the Postal Service responding to the complaint. In all such cases, it is submitted, there should be public notice of the filing of a complaint, and public disclosure of all subsequent action on the complaint by the Commission or by the Postal Service.

E. Answers. Although generally well crafted, proposed rule 3030.14 could be modified in the following particulars:

Subsection (a)(3) omits key language contained in the current regulations, which states: "[e]ach fact alleged in a complaint not thus specifically answered shall be deemed to have been admitted." This language should be restored.

Subsection (a)(6) should be modified to confirm that “prior to the filing” refers to the filing of the Postal Service’s answer.

II. PAEA Section 505 Requires the Commission to Designate Only One of Its Officers to Represent the Interests of the Public in All Cases.

A. Following the Enactment of PAEA, the Commission Changed Its Practice from Designating Only One of Its Officers to Represent the Interests of the Public in All Public Proceedings to Designating One Such Officer per each Public Proceeding from a Rotating List of Officers.

Prior to implementing PAEA, the Postal Rate Commission designated one individual to serve as the representative of the general public in all cases before the Commission. First denominated the Officer of the Commission, and more recently called the Consumer Advocate, heading the Office of the Consumer Advocate, this singly-designated officer represented the interests of the public in **all** proceedings before the Commission.

Beginning with its implementation of PAEA, however, the Commission changed its practice, choosing an individual in each case from a roster of seven different individual officers, all of whom are identified as “designated **Public Representatives** in the Active Cases pending before the Commission” and each of whom is assigned to a specified public proceeding.²

Since enactment of PAEA, the following seven persons have served as **Public Representatives** in cases before the Commission: Emmett Rand Costich; Paul Harrington; Robert Sidman; Katja Eichinger; Patricia Gallagher; Kenneth E. Richardson; and William

² http://prc.gov/PRC-DOCS/home/info_for_mail_comm/Public%20Representatives.pdf (emphasis added).

Miller. These appointments have been made separately as new dockets are opened, including the following types of dockets:

- Complaint dockets (C2008-3);
- Mail classification dockets (MC2008-7; MC2008-1);
- Public inquiry dockets (PI2008-1; PI2008-2; PI2008-3; PI2008-4);
- Rulemaking dockets (RM2008-1; RM2008-2; RM2008-3; RM2008-4; RM2008-5; RM2008-6); and
- Competitive product dockets (CP2008-16; CP2008-17).

In contrast to its prior practice of designating one of its officers to represent the interests of the general public in **all** public proceedings before the Commission, the role of each of the seven designated Public Representatives is limited to the specific assigned docket matter. By way of illustration, in the instant docket, Docket No. RM2008-3, the Commission appointed a Public Representative, using this language:

Pursuant to 39 U.S.C. 505, Kenneth E. Richardson is appointed to serve as officer of the Commission (Public Representative) to represent the interests of the general public **in the above-captioned docket**.

It is Ordered: ...

3. Kenneth E. Richardson is designated as an officer of the Commission representing the interests of the general public **in this docket**. [Commission Order No. 101, p. 18 (italics original; emphasis added).]

B. PAEA Does Not Permit The Commission to Designate More than One of Its Officers to Represent the Interests of the General Public or to Assign One of Its Roster of “Public Representatives” to a Specified Docket Matter.

Under PRA, although there were provisions referring to the role of the “officer of the commission,” there was no statutory provision creating, or even governing, the Commission’s

designation of one of its officers to serve in the position of Consumer Advocate, that is, as an officer designated to represent the interests of the general public. By regulation, the Commission implemented an overall PRA statutory requirement for such an officer by creating the Office of the Commission (“OOC”), and then the Office of the Consumer Advocate (“OCA”). In doing so, the Commission designated only one of its officers to serve in that capacity in all of the public proceedings coming before the Commission.³

Under PAEA, Congress inserted into the overall statutory scheme section 505, which specifically provides for the designation of one of its officers to represent the interests of the general public, and which reads as follows:

§ 505. Officer of the Postal Regulatory Commission representing the general public
The Postal Regulatory Commission shall designate **an officer of the Postal Regulatory Commission in all public proceedings**

³ PRC regulations as of July 2003 required that there be one “head” of the Commission’s Office of the Consumer Advocate, as follows:

Sec. 3002.7 Office of the Consumer Advocate.

(a) The **Office of the Consumer Advocate** provides representation for the interests of the general public in Commission proceedings. The office prepares and litigates before the Commission legal and evidentiary presentations in all formal Commission dockets under chapter 36 of title 39, U.S. Code. It also is responsible for maintaining a continuing litigation capability including preparation for consideration of issues likely to reflect the interests of the general public in subsequent proceedings.

(b) **The head of this office** is responsible for directing both legal and technical personnel to fulfill its functions. The office includes both litigation attorneys and a broad spectrum of technical expertise to analyze and evaluate the diverse economic, cost and market issues before the Commission. During the pendency of a proceeding, personnel serving in the Office of the Consumer Advocate are prohibited from participating or advising as to any intermediate or Commission decision in that proceeding pursuant to the Commission Rules of Practice.

(c) A mission statement regarding the Office of the Consumer Advocate is contained as appendix A to this part. [48 Fed. Reg. 13168, Mar. 30, 1983, as amended at 64 Fed. Reg. 37402, July 12, 1999; http://edocket.access.gpo.gov/cfr_2003/julqtr/39cfr3002.7.htm (emphasis added).]

(such as developing rules, regulations, and procedures) who shall represent the interests of the general public. [Emphasis added.]

By its relatively recent decision to identify several of its officers as individuals from among whom the Commission may designate one to represent the interests of the general public in a particular docket matter, the Commission has, in effect, construed section 505 to have authorized it to designate “an officer” to represent the interests of the general public in “**each** public proceeding[.]” But the plain language of the statute mandates that the designated officer represent the interests of the general public in “**all** public proceedings.”

According to “[a] fundamental canon of statutory construction, ... unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.” Perrin v. United States, 444 U.S. 37, 42 (1979). In contrast to the word “all” — the ordinary meaning of which is “the whole amount, or quantity” — the common meaning of “each” is “being one of two or more distinct individuals having a similar relation and often constituting an aggregate.” As applied here, “all” means “the whole amount, or quantity” of public proceedings, whereas “each” means “one of two or more” of such public proceedings before the Commission.

By the ordinary meaning of its plain language, then, section 505 authorizes the designation of “an” officer — that is, one officer — to represent the interests of the general public in “all” public proceedings before the Commission, not the designation of several such officers to represent the interests of the public, “each” of which would be designated as an officer to represent the interests of the general public in “each” of several public proceedings, docket by docket.

Absent “persuasive reasons to the contrary,” this common-sense interpretation of the words of section 505 conforms to “the axiom that words used in a statute are to be given their ordinary meaning.” *See Burns v. Alcala*, 420 U.S. 575, 580-581 (1988). Not only are there no such reasons to the contrary, but there are additional compelling reasons for construing section 505 as having authorized the designation of only one Public Representative to represent the interests of the general public in “all” matters before the Commission “because [such construction] is [the] only one of the permissible meanings [that] produces a substantive effect that is compatible with the rest of the law.” *See United Savings Assn. of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988).

C. The Commission’s Docket-by-Docket Rotating System of Officers Designated to Represent the Interests of the General Public Undermines the Operation of 39 U.S.C. Section 3662.

As the Supreme Court has pointed out, “[s]tatutory construction is a holistic endeavor.” *Id.* “A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme — because the same terminology is used elsewhere in a context that makes its meaning clear.” *Id.* Such is the case here.

As previously noted, 39 U.S.C. section 505 mandates that the Commission “designate an officer of the Postal Regulatory Commission in **all** public proceedings ... who shall represent the interests of the general public.” (Emphasis added.) New section 3662 expressly authorizes that complaints may be filed by: “[a]ny interested person (including an **officer** of the Postal Regulatory Commission **representing** the interests of the general **public**)....” *See* 39 U.S.C. section 3662 (emphasis added). Under the Commission’s current rotating system of officers designated to represent the public interest, no such officer could ever initiate a

complaint — for the simple reason that no such officer would be designated by the Commission until **after** such a complaint was filed.⁴

As the Commission points out in its Discussion of the Proposed Rules for Complaints, “the PAEA changed and expanded the Commission’s complaint authority.” Indeed, as the Commission has further observed, “[t]he 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.” Yet, the Commission’s construction of 39 U.S.C. section 505 to authorize a rotating system of officers representing that very public interest “would effectively vitiate” the role that such an officer is assigned by section 3662 — the filing of a complaint, which it cannot do. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 345 (1997).

Unquestionably, the current practice of the Commission renders this statutory provision ineffective. When there are seven different persons appointed to serve as “public representatives,” the appointments are limited to the docket in which they were appointed. None of these seven persons would appear to have the authority from the Commission to file a complaint.

Furthermore, when Congress enacted section 3662(a) as part of PAEA, it was during the 35-year uninterrupted period when one individual served in this role for all Commission dockets opened during his tenure. Indeed, at that time, the role of the OOC/OCA was not

⁴ Indeed, the proposed regulations state that “a duly appointed officer of the Commission representing the interests of the general public” may file a complaint (section 3030.2), but the Commission does not explain who would exercise this power in the proposed system.

limited to representation before the Postal Rate Commission. For example, the OCA filed comments with the President's Commission on the United States Postal Service.⁵ And then OCA Shelly Dreifus testified before the Senate Committee on Government Affairs on postal reform legislation on March 9, 2004.⁶

Indeed, the practice under PRA, including the visibility of the single consumer advocate under PRA before Congress, gives rise to the inference that Congress intended, by its enactment of 39 U.S.C. section 505, the continued appointment of a single individual – one “officer of the Postal Regulatory Commission representing the interests of the general public” not only to file complaints, but to participate fully, representing the public interest in all of the Commission’s public proceedings. *See North Haven Board of Education v. Bell*, 456 U.S. 512, 535 (1982). Congress did not use the plural “officers” of the Commission. The currently-used term “Public Representatives” appears to have been unfamiliar to Congress in postal matters when it fashioned the complaint provision in PAEA.

D. The Commission’s Rotating System Does not Foster the Overall Purpose of PAEA.

In its Introduction and Background Section, the Commission restates several times its “enhanced responsibilities due to the passage of the PAEA.” Those enhancements are not reflected only in a “significantly expanded” complaint authority, but in other ways as well,

⁵ http://www.treas.gov/offices/domestic-finance/usps/comments/organizations/comments_ConsumerAdvocate-PRC.doc

⁶ <http://hsgac.senate.gov/public/index.cfm?Fuseaction=Hearings.Detail&HearingID=e00d44e1-f3e3-40eb-8006-03269c1b83ee>

which call for a more robust system of public advocacy — not one where the public interest is represented ad hoc, docket by docket.

Not until this rulemaking have the parties and the Commission been compelled to focus on how the provisions of 39 U.S.C. section 3662(a), dealing with who is authorized to file complaints, bear on this issue of whether a system of ad hoc, or rotating, Public Representatives is consistent with PAEA. Viewed from this perspective, it is submitted that the ad hoc system is not a permissible approach under PAEA.

PRA contained two main sections referencing an “officer of the Commission.” One section, that set out in former section 3624, has been superseded.⁷ The other, as provided by section 3661, is still in effect:

§ 3661. Postal services

- (a) The Postal Service shall develop and promote adequate and efficient postal services.
- (b) When the Postal Service determines that there should be a change in the nature of postal services which will generally affect service on a nationwide or substantially nationwide basis, it shall submit a proposal, within a reasonable time prior to the effective date of such proposal, to the Postal Regulatory Commission requesting an advisory opinion on the change.
- (c) The Commission shall not issue its opinion on any proposal until an opportunity for hearing on the record under sections 556 and 557 of title 5 has been accorded to the Postal Service, users of the mail, and an **officer of the Commission** who shall be required to represent the interests of the general public. The opinion shall be in writing and shall include a certification by

⁷ § 3624. Recommended decisions of Commission

(a) The Postal Rate Commission shall promptly consider a request made under section 3622 or 3623 of this title, except that the Commission shall not recommend a decision until the opportunity for a hearing on the record under sections 556 and 557 of title 5 has been accorded to the Postal Service, users of the mails, and an **officer of the Commission** who shall be required to represent the interests of the general public.... [Emphasis added.]

each Commissioner agreeing with the opinion that in his judgment the opinion conforms to the policies established under this title. [Emphasis added.]

Under PAEA, the “public interests” officer of the Commission also has a role in annual compliance reviews:

§ 3653. Annual determination of compliance
(a) Opportunity for public comment. After receiving the reports required under section 3652 for any year, the Postal Regulatory Commission shall promptly provide an opportunity for comment on such reports by users of the mails, affected parties, and an **officer of the Commission** who shall be required to represent the interests of the general public. [Emphasis added.]

In short, as the role of the Commission has been enhanced to ensure public accountability and transparency in the operation of the Postal Service, the role of the public interest officer has been likewise expanded and enhanced. By dispersing that responsibility among several officers, it is diffused, and limiting each officer to represent the interests of the public only with respect to a single docket would not foster — and indeed could be considered “destructive” of — PAEA’s overall purpose. *See Robinson*, 519 U.S. at 346.

The only reasonable conclusion that can be drawn from the PAEA language referring in the singular to **an officer of the Commission** is that Congress ratified the long-standing, consistent practice of the Postal Rate Commission to have one person heading a permanent office who would be responsible for the important function of representing the interests of the general public in **all** public proceedings that come before the Commission.

III. PAEA Contains No Express Authority for the Commission to Exercise Jurisdiction over Rate or Service Inquiries which Are Not Complaints, or to Treat Complaints as if They Were Rate or Service Inquiries.

This rulemaking is designed to exercise the Commission's authority under 39 U.S.C. section 3662, which pertains exclusively to complaints. (The Commission's proposed rules for complaints are addressed in sections I and II, above.)

However, Order No. 101 also proposes regulations which set forth procedures to address "rate or service inquiries." *See e.g.*, section 3030.13, section 3031.10-12. If "rate or service inquiries" are a type of complaint, the rulemaking would appear to be authorized by PAEA. However, if this rulemaking seeks to establish "rate or service inquiries" as something other than a complaint, the Commission's statutory authority cannot be derived from 39 U.S.C. section 3662.

The underpinning for "rate or service inquiries" appears to be the notion 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..." and that the Commission should "focus ... on important issues that raise rate and service issues with broad implications or unfair competition issues." Order No. 101, pp. 4-5. These statements are not sourced to any PAEA language, but appear to be based on the Commission's perception of the "intent of Congress" (*id.* p. 3) — "Congressional intent that the complaint process be available for hearing ... broad policy matters" (*id.*, p. 5).

The Commission may not, however, derive any rulemaking authority from any source other than the statute. As a leading authority in administrative law has observed, "[w]ithout a statutory delegation, an agency does not have the power to promulgate substantive rules and

regulations.” B. Schwartz, Administrative Law, Section 4.3, p. 151 (2d ed., Little, Brown: 1984). According to the Supreme Court, a “substantive rule” is one “affecting individual rights and obligations.” See Chrysler Corp. v. Brown, 441 U.S. 281, 302 (1979). By carving out “rate and service inquiries,” as an alternative to “complaints,” without any statutory authority to do so, the Commission would adversely affect the individual right to the complaint process. Such an exercise of power “must be rooted in a grant of such power by Congress and subject to limitations which that body imposes.” *Id.* It may not be justified by the references to the “intent of Congress,” as the Commission has attempted here.

Perhaps it could be argued that “rate and service inquiries” are 39 U.S.C. section 3662 complaints, and the Commission has proposed two types of complaint proceedings, or, perhaps, two types of complaints: standard complaints, and complaints which are “rate and service inquiries.” However, if this position were taken, the proposed rules would be deficient in failing to provide full complaint treatment to the second type of complaints. It appears clear that “rate and service inquiries” are not intended to be considered complaints under the Commission’s proposed rules.

Section 3662(a) clearly states that “[a]ny interested person” may lodge a complaint with the Commission. However, the Commission’s analysis of its own proposed regulations denies complaint treatment to complaints filed by “individuals alleging isolated violations of section 101” and, with respect to a complaint based on 401(2), cannot include “the application of a particular rule to an individual mail user.” According to Order No. 101, only complaints based on the other sections would permit “individualized complaints.” The statutory authority for these distinctions is left unstated.

Section 3030.13(a) would apply — and thus would deny “complaint” status — “to complaints that concern rate or service matters that are isolated incidents affecting few mail users” The rule then lists certain exceptions. Thus, a complaint raising an unfair competition issue would remain a complaint — and would not be relegated to rate or service inquiry status. In like manner, a complaint raising an issue that affected a “significant number of mail users,” or impacted a “substantial region of the nation” would remain a complaint. *See* Proposed Rule 3030.13(a)(1)-(4).⁸ But other complaints authorized by 39 U.S.C. section 3662 would not be considered complaints, if the impact of the action complained of were not widespread. Otherwise, it would appear, therefore, that certain valid complaints under PAEA could be turned into rate or service inquiries, and not given treatment as a complaint, under the proposed rules.

The jurisdiction of the Commission with respect to complaints is set forth specifically in section 3662(a), and the Commission does not have the power to expand or contract that statutory language. The only discretion that the statute gives to the Commission with respect to complaints is to impose reasonable form and manner requirements. Furthermore, the Commission’s decision to consider a complaint should not be based on whether the complaint raises issues of “public postal policy ... with substantial ramifications” (*see* Order No. 101, p. 5) but rather on whether the complaint raises “material issues of fact or law” relating to a

⁸ Proposed Rule 3030.13(a)(3) also appears to provide for an exception where the complaint raised an issue of a “pattern, practice or systemic issue that affects a significant number of mail users (or is reasonably likely to be the beginning of such a pattern).” It is not clear what the essential issue would be between the issue raised by section (a)(2), as opposed to that raised by section (a)(3), since they both would be contingent upon a significant number of mail users being affected.

violation of specified laws — the only threshold determination that the Commission must make with respect to complaints under PAEA. *See* 39 U.S.C. § 3662.

Prior to PAEA, an omnibus rate case included large numbers of intervenors. Many have expressed their belief that the issues formerly raised by intervenors in such pre-implementation proceedings now will have to be raised in after-the-fact proceedings under PAEA. If the Commission's regulations were to transfer some of these issues to the Postal Service as a rate or service inquiry (unless there are broad policy implications justifying treatment as complaints), then the Commission's regulations will have erased a significant mailer protection provided by PAEA.

As a practical matter, many service issues are dealt with the Postal Service at a local, operational level. Indeed, mailers frequently work with the Postal Service at an operational level, for example, to improve the quality of envelopes and to determine the nature or cause of isolated service issues. However, the Commission cannot limit its responsibility to address a mailer's complaint by referring to alternate procedures. The Commission's appropriate response to the receipt of a complaint in the form and manner specified by the Commission is to either "begin proceedings" or dismiss the complaint under 39 U.S.C. section 3662(b)(1). Indeed, referral of a complaint to the "rate or service inquiry" procedures would likely be considered a failure of the Commission to act under section 3662(b)(2), which would be appealable under section 3663.

Finally, it is not clear, from the proposed rules, at what point in time — if ever — there would be public disclosure of a rate or service inquiry. In fact, proposed rule 3031.11(c) provides that the Commission need not even respond to the inquiring party — to say nothing of

disclosing the matter to the public. It is submitted that there should be expeditious public disclosure of all rate or service inquiries, as well as all complaints that are filed with the Commission. Non-disclosure is not consistent with, nor does it promote, transparency.

Under PAEA, section 3662 provides that “[a]ny interested person” may file a complaint (in the proper form and manner), and that the Commission must “begin proceedings” on such complaint if it “raises material issues of fact or law.” Under this statute, the Commission does not appear to have the latitude to send a complaint to the Postal Service as a rate or service inquiry. In doing so, the Commission would be barring complaint treatment to valid complaints, or exercising unjustified authority over rate or service inquiries which are not complaints. In either event, such treatment would appear to be without statutory support in PAEA.

Respectfully submitted,

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**Statutory Appendix:
Postal Regulatory Act of 1970 compared with
Postal Accountability and Enhancement Act**

1. Comparison of Complaint Procedures Under 39 U.S.C. § 3662

	Former 3662	New 3662
PRC's Complaint Jurisdiction	(i) nonconforming rates; and (ii) not receiving postal service in accordance with the policies of this title	nonconformance with 39 U.S.C.: (i) section 101(d) – fair and equitable cost apportionment; (ii) section 401(2) – USPS Rules and Regulations; (iii) section 403(c) – illegal discrimination or preferences; (iv) section 404a – protecting competitors and intellectual property; (v) section 601 – private delivery of mail; and (vi) chapter 36 – postal rates, classes, and services.
Complainant	“Interested parties”	“Any interested person (including an officer of the Postal Regulatory Commission representing the interests of the general public)”
PRC Procedure	Hold hearings, in its own discretion	Within 90 days, PRC must either, by written statement, (i) find that complaint raises material issues of fact or law, or (ii) dismiss the complaint

PRC Action if Complaint Justified	<p>I. If involving a subchapter II (rate or mail classification) matter — Issue “recommended decision” after proceedings under former 3624 (like a rate case)</p> <p>II. If other than rate or mail classification matter — Issue a “public report” to the Postal Service</p>	<p>In all types of cases, “shall order” the Postal Service to take such action to achieve compliance. If deliberate noncompliance by the Postal Service, may order a fine.</p>
Postal Service Response	<p>I. The governors would act on the recommended decision under former 3625</p> <p>II. Postal Service take such action on the public report as it deems appropriate</p>	<p>Postal Service must comply with the Commission’s order</p>
Appellate Review	<p>Governors or intervenors may seek judicial review in any U.S. Court of Appeals under former section 3628; court may order reconsideration, but may not modify the decision</p>	<p>Any adversely affected or aggrieved person or the Postal Service may appeal a Commission order to the U.S. Court of Appeals for the District of Columbia (39 U.S.C. § 3663)</p>
Enforcement	<p>N/A</p>	<p>U.S. District Courts have jurisdiction to enforce an order of the Commission against the Postal Service (39 U.S.C. § 3664)</p>

2. Former 39 U.S.C. § 3662

Rate and service complaints

Interested parties who believe the Postal Service is charging **rates** which do not conform to the policies set out in this title or who believe that they are not receiving **postal service** in accordance with the policies of this title may lodge a complaint with the Postal Rate Commission in such form and in such manner as it may prescribe. The Commission may in its **discretion hold hearings** on such complaint. If the Commission, in a matter covered by **subchapter II** of this chapter, determines the complaint to be justified, it shall, after proceedings in conformity with section 3624 of this title, issue a **recommended decision** which shall be acted upon in accordance with the provisions of section 3625 of this title and subject to

review in accordance with the provisions of section 3628 of this title. If a matter **not covered** by subchapter II of this chapter is involved, and the Commission after hearing finds the complaint to be justified, it shall render a **public report** thereon to the Postal Service which shall take such action as it deems appropriate. [Emphasis added.]

3. New 39 U.S.C. § 3662

Rate and service complaints.

(a) IN GENERAL.— **Any interested person** (including an officer of the Postal Regulatory Commission representing the interests of the general public) who believes the Postal Service is not operating in conformance with the requirements of the provisions of **sections 101(d), 401(2), 403(c), 404a, or 601**, or **this chapter** (or regulations promulgated under any of those provisions) may lodge a complaint with the Postal Regulatory Commission in such form and manner as the Commission may prescribe.

(b) PROMPT RESPONSE REQUIRED.—

(1) IN GENERAL.— The Postal Regulatory Commission shall, **within 90 days** after receiving a complaint under subsection (a)—

(A) either—

(i) upon a finding that such complaint raises **material issues** of fact or law, **begin proceedings** on such complaint; or

(ii) issue an order **dismissing** the complaint; and

(B) with respect to any action taken under subparagraph (A) (i) or (ii), issue a written statement setting forth the bases of its determination.

(2) TREATMENT OF COMPLAINTS NOT TIMELY ACTED ON.— For purposes of section 3663, any complaint under subsection (a) on which the Commission **fails to act** in the time and manner required by paragraph (1) shall be treated in the same way as if it had been **dismissed** pursuant to an order issued by the Commission on the last day allowable for the issuance of such order under paragraph (1).

(c) ACTION REQUIRED IF COMPLAINT FOUND TO BE JUSTIFIED.— If the Postal Regulatory Commission finds the complaint to be **justified**, it **shall order** that the Postal Service take such action as the Commission considers appropriate in order **to achieve compliance** with the applicable requirements and to remedy the effects of any noncompliance (such as ordering unlawful rates to be adjusted to lawful levels, ordering the cancellation of market tests, ordering the Postal Service to discontinue providing loss-making products, or requiring the Postal Service to make up for revenue shortfalls in competitive products).

(d) AUTHORITY TO ORDER FINES IN CASES OF DELIBERATE NONCOMPLIANCE.— In addition, in cases of **deliberate noncompliance** by the Postal Service with the requirements of this title, the Postal Regulatory Commission may order, based on the nature, circumstances, extent, and seriousness of the noncompliance, **a fine** (in the amount specified by the

Commission in its order) for each incidence of noncompliance. Fines resulting from the provision of competitive products shall be paid from the Competitive Products Fund established in section 2011. All receipts from fines imposed under this subsection shall be deposited in the general fund of the Treasury of the United States. [Emphasis added.]

4. Statutes Setting Out Bases for Complaints under New Section 3662

39 U.S.C. § 101(d).

“Postal rates shall be established to **apportion the costs** of all postal operations to all users of the mail on a **fair and equitable** basis.”

39 U.S.C. § 401(2).

“Subject to the provisions of section 404a, the Postal Service shall have the following general powers:

* * *

(2) to adopt, amend, and repeal such **rules and regulations**, not inconsistent with this title, as may be necessary in the execution of its functions under this title and such other functions as may be assigned to the Postal Service under any provisions of law outside of this title.”

39 U.S.C. § 403(c) (emphasis added).

“In providing services and in establishing classifications, rates, and fees under this title, the Postal Service shall not, except as specifically authorized in this title, make any **undue or unreasonable discrimination** among users of the mails, nor shall it grant any **undue or unreasonable preferences** to any such user.”

39 U.S.C. § 404a (emphasis added).

“(a) Except as specifically authorized by law, the Postal Service may not--

(1) establish any rule or regulation (including any standard) the effect of which is to **preclude competition** or establish the terms of competition unless the Postal Service demonstrates that the regulation **does not create an unfair competitive advantage** for itself or any entity funded (in whole or in part) by the Postal Service;

(2) compel the disclosure, transfer, or licensing of **intellectual property** to any third party (such as patents, copyrights, trademarks, trade secrets, and proprietary information); or

(3) **obtain information** from a person that provides (or seeks to provide) any product, and **then offer any postal service** that uses or is based in whole or in part on such information, without the consent of the person providing that information, unless substantially the same information is obtained (or obtainable) from an independent source or is otherwise obtained (or obtainable).

(b) The Postal Regulatory Commission shall prescribe regulations to carry out this section.

(c) Any party (including an **officer of the Commission** representing the interests of the general public) who believes that the Postal Service has violated this section may bring a complaint in accordance with section 3662.”

39 U.S.C. § 601. Letters carried out of the mail

“(a) A letter may be carried out of the mails when--

- (1) it is enclosed in an envelope;
- (2) the amount of postage which would have been charged on the letter if it had been sent by mail is paid by stamps, or postage meter stamps, on the envelope;
- (3) the envelope is properly addressed;
- (4) the envelope is so sealed that the letter cannot be taken from it without defacing the envelope;
- (5) any stamps on the envelope are canceled in ink by the sender; and
- (6) the date of the letter, of its transmission or receipt by the carrier is endorsed on the envelope in ink.

(b) A letter may also be carried out of the mails when--

- (1) the amount paid for the private carriage of the letter is at least the amount equal to 6 times the rate then currently charged for the 1st ounce of a single-piece first class letter;
- (2) the letter weighs at least 12 1/2 ounces; or
- (3) such carriage is within the scope of services described by regulations of the United States Postal Service (including, in particular, sections 310.1 and 320.2-320.8 of title 39 of the Code of Federal Regulations, as in effect on July 1, 2005) that purport to permit private carriage by suspension of the operation of this section (as then in effect).

(c) Any regulations necessary to carry out this section shall be promulgated by the Postal Regulatory Commission.”

Chapter 36. Postal Rates, Classes, and Services

Subchapter I. Provisions Relating to Market-Dominant Products

Subchapter II. Provisions Relating to Competitive Products

Subchapter III. Provisions Relating to Experimental and New Products

Subchapter IV. Reporting Requirements and Related Provisions

Subchapter V. Postal Services, Complaints, and Judicial Review

Subchapter VI. General

Subchapter VII. Modern Service Standards

5. Other Relevant New Sections

39 U.S.C. § 3663. Appellate Review

A person, including the Postal Service, **adversely affected or aggrieved** by a final order or decision of the Postal Regulatory Commission may, within 30 days after such order or decision becomes final, institute proceedings for review thereof by filing a petition in the United States

Court of Appeals for the District of Columbia. The court shall review the order or decision in accordance with section 706 of title 5, and chapter 158 and section 2112 of title 28, on the basis of the record before the Commission.

39 U.S.C. § 3664. Enforcement of orders

The several district courts have jurisdiction specifically **to enforce, and to enjoin and restrain** the Postal Service from violating, any order issued by the Postal Regulatory Commission.

**Regulations Appendix:
Complaint Regulations under PRA compared
with Proposed Regulations under PAEA**

1. Comparison of Complaint and Answer Requirements

	Current Regulations (Part 3001, subpart E)	Proposed Regulations (Part 3030)
<p>Required Complaint Contents</p>	<p>(a) full name and address of complainant;</p> <p>(b) full and complete statement of grounds, specific references to rates or services, and policies;</p> <p>(c) list of other persons similarly affected;</p> <p>(d) specific relief requested; and</p> <p>(e) copies of correspondence between complainant and Postal Service</p> <p>(3001.83)</p>	<p>(1) facts and circumstances giving rise to the complaint;</p> <p>(2) clearly identify and explain Postal Service’s violation of statutes or regulations, with citations;</p> <p>(3) complainant’s business, commercial, economic, or other issue;</p> <p>(4) a description of any similarly situated persons;</p> <p>(5) nature of evidentiary support the complainant has or expects to obtain during discovery;</p> <p>(6) explanation of why facts could not be reasonably ascertained if premised on information and belief;</p> <p>(7) statement of whether issues are pending in existing Commission proceeding and, if so, explanation of why timely resolution cannot be achieved in other forum;</p> <p>(8) specific relief requested and basis for that relief;</p> <p>(9) certification of attempt to meet with Postal Service to settle complaint; and</p> <p>(10) certificate of service on Postal Service.</p> <p>(3001.10)</p>

<p>Required Answer Contents</p>	<p>Answer to be filed within 30 days of complaint:</p> <p>(a) specific admission, denial, or explanation of each allegation in complaint — each fact not answered is admitted;</p> <p>(b) statement on the position of the Postal Service on the allegations that rates/service are not in accord with the policies of the Act, with facts and reasons; and</p> <p>(c) position on specific relief requested, disposition of the complaint, necessity of hearing, with facts and reasons.</p> <p>(3001.84)</p>	<p>Answer to be filed within 20 days of complaint:</p> <p>(1) clear and concise statement of disputed facts;</p> <p>(2) clear and concise statement of legal interpretations;</p> <p>(3) specific admission or denial with detail, and further explanation if denial is based on information and belief;</p> <p>(4) every defense relied upon, fully and completely, with affirmative defense separately and specifically captioned;</p> <p>(5) nature of evidentiary support the Postal Service has or expects to obtain in discovery; and</p> <p>(6) certification of attempt to meet with complainant to settle complaint.</p> <p>(3030.14)</p>
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2. Current Regulatory Requirements for Complaints and Answers (which will be superseded by the proposed regulations)

§ 3001.83 Contents of complaints.

Subject to the right of the Commission to require the furnishing of additional information, each complaint shall include the following information:

- (a) The full name and address of the complainant(s);
- (b) A full and complete statement of the grounds for such complaint, including specific reference to the postal rates or services involved and the policies to which it is claimed they do not conform;
- (c) A list or description of all persons or classes of persons known or believed to be similarly affected by the rates or services involved in the complaint;
- (d) A statement of the specific relief or redress requested;

(e) Copies of all correspondence or written communications between the complainant, his/her agent, representative, or attorney, and the Postal Service or any officer, employee or instrumentality thereof, which relate to the subject matter of the complaint; provided, however, that any such documents which are a part of a public file in any proceeding before an Administrative Law Judge or the Judicial Officer of the Postal Service need not be included if the complaint states the title, docket reference, nature, current status, and disposition of such proceeding.

§ 3001.84 Answers by the Postal Service.

Within 30 days after the filing of a complaint with the Commission (unless more time is allowed under § 3001.85(a)), the Postal Service shall file and serve an answer. Such answer shall be in the form and manner required by §§ 3001.9 to 3001.12, and shall include the following:

- (a) Specific admission, denial or explanation of each fact alleged in the complaint or, if the Postal Service is without knowledge thereof, a statement to that effect. Each fact alleged in a complaint not thus specifically answered shall be deemed to have been admitted;
- (b) A statement as to the position of the Postal Service on the allegations in the complaint that the rates or service involved are not in accord with the policies of the Act, and the facts and reasons in support of such position;
- (c) The position of the Postal Service on the specific relief or redress requested by the complainant, the disposition of the complaint recommended by the Postal Service, including whether or not a hearing should be held, and a statement of any facts and reasons in support of such position.