

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268

Periodic Reporting Rules : Docket No. RM2008-4
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INITIAL COMMENTS OF TIME WARNER INC.
IN RESPONSE TO ORDER NO. 104
(October 16, 2008)

Time Warner Inc. (Time Warner) respectfully submits these comments in response to Order No. 104, Notice and Order of Proposed Rulemaking Describing Form and Content of Periodic Reports (issued August 22, 2008).

1. Time Warner supports the general approach of Order No. 104.

The periodic reporting rules proposed in Order No. 104 "are designed to implement all of the PAEA's provisions that make the Postal Service's operations and finances transparent and accountable." Order No. 104 at 2. That is a substantial undertaking, for, as the Commission notes:

[w]hile it no longer has to use cumbersome trial-type procedures to evaluate proposed rate changes, the scope of [the Commission's] various review functions is comprehensive, and many must be completed in a very short time frame.

Id. at 7.

In Time Warner's view, the Commission has produced a thoughtful and comprehensive proposal. As indicated in Time Warner's initial comments in response to Order No. 99, we are especially pleased that Order No. 104 declares the Commission's

desire to approach "analytical issues through a process that

promotes cooperation and facilitates consensus," expresses its approval of "an opportunity for input and feedback from other stakeholders and the Commission," and states its intention to provide "highly flexible" procedures for considering changes in analytical principles.¹

The regulations proposed in Order No. 104 reflect those commitments.

Time Warner's initial comments in response to Order No. 99 also observed that

Order No. 104 does not address the utility of public exchanges of views, of ventilating tentative proposed changes, or of simply identifying areas where further research or analysis is believed to be needed, outside the context of a formal request for a rulemaking, perhaps for the purpose of developing such a request or determining whether such a request is warranted.

Id.

We stated that

such exchanges of information or opinion, if made publicly available for scrutiny and comment, or as a springboard for further analysis by any interested party, can make important contributions to the kind of open and cooperative process the Commission envisages.

Id.

Those comments were made with the understanding that efforts such as those described must rest largely in the hands of the Postal Service and interested parties, and that the Commission's contribution, prior to a formal request to initiate a rulemaking, is likely to consist primarily in facilitating such efforts.² That contribution

¹ Docket No. RM2008-2, Initial Comments of Time Warner Inc. in Response to Order No. 99 (September 8, 2008), at 5 (*quoting* Order No. 104 at 30-31).

² Time Warner also recognizes that in Docket No. RM2008-2 it was necessary to "limit the issues addressed . . . to those raised by the Postal Service's proposals in order to complete the requested review expeditiously." See Order No. 115, Order Accepting Certain Analytical Principles for Use in the Postal Service's Periodic Reports (issued October 10, 2008), at 2.

is important, perhaps essential, to continued mailer participation in the ratemaking process. Time Warner believes that all mailers who are concerned to preserve such participation appreciate what the Commission has already done in this respect through the scheduling of informal technical conferences, as well as its statement in Order No. 104 (at 31) of its continuing intention to foster "a process that promotes cooperation and facilitates consensus."

While Time Warner supports Order No. 104's general approach, we are concerned that proposed rule 3050.20 ("Compliance analysis in the Postal Service's Annual Report") and portions of the accompanying explanatory text may create confusion about underlying substantive principles of the PAEA. Section 2 below discusses the confusion that we believe proposed rule 3050.20 may create regarding what matters are subject to Annual Compliance Determination by the Commission under § 3653(b) of the PAEA. Section 3 discusses the confusion that the Commission's explanation of proposed rule 3050.20 may create regarding the scope of Commission review under § 3691(d) of service standards established by the Postal Service.

Finally, in section 4 below, we suggest changes in the list of products and "constituent rate categories" for which the Commission proposes that costs, volumes, and revenues be disaggregated in CRA and CSC reports.

2. Proposed rule 3050.20 and the accompanying explanatory text may create confusion about the boundaries of the Commission's authority to make determinations of compliance under § 3653(b) of the PAEA.

Section 3652, which provides for the Postal Service to make an Annual Compliance Report (ACR) to the Commission, states that the ACR shall supply information "in sufficient detail to demonstrate that all products during [the previous] year complied with all applicable requirements of this title" (§ 3652(a)(1)). Section 3653(b), which governs the Commission's Annual Compliance Determination, requires the Commission to make a determination "whether any rates or fees in effect during such year (for products individually or collectively) were not in compliance with applicable provisions of [chapter 36 of title 39] (or regulations promulgated thereunder)."

Both the Commission's proposed regulation on "Compliance analysis in the Postal Service's Annual Report" (proposed rule § 3050.20) in Order No. 104 and the accompanying discussion create confusion about what the Commission means by the term "compliance" and the Commission's view of the reach of its authority to make annual determinations of compliance.

The text of proposed rule § 3050.20 does not contain the word "factors." It provides as follows:

§ 3050.20

The Postal Service's Annual Report shall include an analysis of the information that it contains in sufficient detail to demonstrate that . . . all of its products . . . comply with all of the applicable provisions of chapter 36 of title 39 and the regulations promulgated thereunder, meet the goals established under 39 U.S.C. 2803 and 2804 [which relate to the Postal Service's "Annual Plan"], and promote the public policy objectives set out in title 39.

The grammar of that sentence connects the clause "to demonstrate that . . . all of its products" equally with: (a) "comply with the provisions of chapter 36," (b) "meet the goals established under . . . [§§] 2803 and 2804," and (c) "promote the public policy objectives set out in title 39." As indicated above in the first paragraph of this discussion, however, § 3652(a)(1) implies a requirement of *demonstrable* compliance solely with respect to a showing that "all products during such year complied with all applicable requirements of this title." That provision does not mention or refer to the Postal Service's Annual Plan or the public policy objectives of title 39. On first impression, § 3652(a)(1) appears to correspond directly to § 3653(b)(1), which provides for the Commission's determination "whether any rates or fees in effect during such year (for products individually or collectively) were not in compliance with applicable provisions of this chapter (or regulations promulgated thereunder)." However, there are clear differences between the terminology of these two provisions. Where § 3652(a)(1) refers to "products," 3653(b)(1) refers to "rates or fees . . . for products." Where § 3652(a)(1) refers to compliance with "all applicable requirements of [title 39]," 3653(b)(1) refers to compliance with "applicable provisions of [chapter 36]" and regulations thereunder.

Corresponding terms regarding showing of compliance in §§ 3652(a)(1) and 3653(b)(1)				
§ 3652(a)(1) requires that	"all products"	be in compliance with	"all applicable requirements of"	title 39
§ 3653(b) requires that	"rates or fees . . . for products individually or collectively"		"applicable provisions of" & regulations thereunder	chapter 36 of title 39

The reasons for the differences between these two provisions are not clear. It is possible to argue that § 3652(a)(1)'s "all products" and "[title 39]" are broader than § 3653(b)(1)'s "rates or fees . . . for products" and "[chapter 36]." And it is possible to account for the fact that § 3652(a)(1) requires demonstrability of compliance for "all products" but § 3653(b)(1) requires demonstrability of compliance only for "rates or fees" by pointing out that § 3653(b)(2) provides for an annual determination of compliance with respect to whether the Postal Service has met its service standards--so that "all products" in § 3652(a)(1) would encompass the subject matter of both § 3653(b)(1) and § 3653(b)(2). This line of analysis remains partial and unsatisfactory, however, because it does not work for the difference between "[title 39]" in § 3652(a)(1) and "[chapter 36]" in § 3653(b)(1). Service standards are, like rates and fees, encompassed by chapter 36--so that § 3652(a)(1) does not need to embrace all of title 39 in order to encompass both subsections (b)(1) and (b)(2) of § 3653. It may be that this difference between the two provisions is a drafting oversight and does not have any significance.

The problem with the text of proposed rule 3050.20 is that it further muddies these already cloudy waters. The proposed rule picks up "all products" from § 3652(a)(1) and "applicable provisions of [chapter 36] (or regulations . . . thereunder)" from § 3653(b)(1), and then appears to extend the concept of "demonstrable compliance" to "the goals established under 39 U.S.C. 2803 and 2804" and "the public policy objectives set out in title 39." (Recall that proposed rule 3050.20 is

captioned "*Compliance* analysis in the Postal Service's Annual Report" [emphasis added].)³

Section 3653 of the Act ("Annual determination of compliance") does include a provision, subsection (d), that refers to "the goals established under sections 2803 and 2804" and the "promotion of public policy objectives set out in this title."

However, that subsection, which comes after subsection (b), captioned "Determination of Compliance or Noncompliance," and subsection (c), captioned "Noncompliance With Regard to Rates or Services," is entitled "Review of Performance Goals" and authorizes the Commission to perform an "evaluat[ion]" and to "provide recommendations":

§ 3653(d) Review of Performance Goals.—The Postal Regulatory Commission shall also evaluate annually whether the Postal Service has met the goals established under sections 2803 and 2804, and may provide recommendations to the Postal Service related to the protection or promotion of public policy objectives set out in this title.

Unlike subsections (b) and (c), this subsection makes no mention of a "determination of compliance" or "action" by the Commission in the event that it makes an adverse determination. It provides for an "evaluat[ion]" with respect to meeting "goals" and for "recommendations" with respect to the "promotion of public policy objectives."

To speak of "compliance" with "goals" and "objectives" makes little sense. (Has one "complied" with an "objective" if one has pursued it, but in an unenthusiastic and lackadaisical fashion? There is no answer that is not arbitrary.) Even if one removes the term "compliance" from the discussion entirely, does it

³ It should in fairness be acknowledged that § 3653 of the Act, parts of which relate to matters that we argue the concept of "compliance" is not applicable to, is captioned "Annual determination of compliance."

make any sense to ask, as proposed rule 3050.20 would do, whether *every product* of the Postal Service meets the goals of the annual performance plan that the Postal Service is required to prepare "covering each program activity set forth in the Postal Service budget"? Does it make any sense to ask whether the Postal Service can *demonstrate* that "*all of its products*" promoted the public policy objectives set out in title 39"? The "public policy objectives set out in title 39," after all, constitute a diverse collection. For example, § 101 of title 39 ("Postal policy") provides that the Postal Service "shall place particular emphasis upon opportunities for career advancements of all officers and employees and the achievement of worthwhile and satisfying careers in the service of the United States." Is it possible to make sense of a requirement that the Postal Service be ready to demonstrate that "*all of its products*" promote this objective?

The reason that it is of enormous importance to avoid confusion of the matters subject to subsections (b) and (c) of § 3653 with those subject to subsection (d) of § 3653 is that subsection (c) provides the Commission with sweeping remedial powers:

(c) Noncompliance With Regard to Rates or Services.—If, for a year, a timely written determination of noncompliance is made under subsection (b), the Postal Regulatory Commission shall take appropriate action in accordance with subsections (c) and (e) [scrivener's error for "(d)"] of section 3662 (as if a complaint averring such noncompliance had been duly filed and found under such section to be justified).

The discussion thus far has suggested that the statutory language of §§ 3652 and 3653 is less than pellucid and that the text of proposed rule 3050.20 compounds rather than resolves the resulting confusion. Unfortunately, Order No. 104's explanatory discussion of proposed rule 3050.20 introduces still further confusion.

That discussion refers to "the Commission's annual compliance determination of the degree to which postal rates and service comply with the requirements, *objectives*, and *factors* of the PAEA." Order No. 104 at 2 (emphasis added).

The objections discussed above to applying the concept of "compliance" to the "goals" of the Postal Service's Annual Plan and all of the "public policy objectives" expressed in title 39 apply with equal force to applying the concept of "compliance" to the "Objectives" and "Factors" set out in § 3622(b) and (c) of the PAEA. Indeed, those objections apply even more forcibly in the case of "factors." A "factor" is not something that can be "complied with" (other than in the sense of "being taken into account"). By definition, an individual "factor" cannot *determine* a course of action or an overall outcome. Nor can an individual factor even *identify* a preferable course of action or a preferable outcome (as can a "goal" or "objective"). If a provision of the PAEA *determines* the proper choice or outcome with respect to some issue, that provision constitutes (with respect to that issue) not a "factor" but a "requirement." If it *identifies* but does not determine a desired outcome, it is not a "factor" but an "objective" or goal." "Factor" and "requirement" are mutually exclusive categories. The notion of "compliance" is meaningful with respect to the latter, but not with respect to the former.

Subjecting the Postal Service to a determination of its compliance with the "factors" and "objectives" set out in § 3622 would also contravene the language of those provisions themselves, because they are addressed not to the Postal Service but to the Commission. Section 3622(a) provides that "*the Postal Regulatory Commission shall . . . establish . . . a modern system for regulating rates and*

classes for market-dominant products" (emphasis added). Subsection (b) ("Objectives") provides that "[s]uch system shall be designed to achieve the following objectives" (emphasis added). Subsection (c) ("Factors") provides that "[i]n establishing or revising such system, the Postal Regulatory Commission shall take into account . . . [followed by list of statutory factors]" (emphasis added). To the extent that these provisions can be said to impose *requirements* rather than merely to identify goals, policies, and considerations, they impose them on the Commission. For the Commission to treat the "Objectives" and "Factors" as constituting, *of their own force*, legal requirements binding on the Postal Service, and as an appropriate basis for the exercise of the Commission's sweeping remedial powers under § 3653(c), would in Time Warner's view represent a misinterpretation of § 3622.⁴

The questions of overriding importance raised by this discussion, in their simplest form, are as follows:

- Does the Commission intend to make "determinations of compliance" with respect to whether the Postal Service's products have met the goals of its Annual Plan, or promoted the public policy objectives of title 39, or adequately promoted the objectives and taken account of the factors set out in § 3622?
- If so, does the Commission believe with respect to any or all of these matters that, in the event it makes a determination of non-compliance, the statutory prerequisites for the exercise of its remedial authority under § 3653(c) will have been met?

⁴ The extent to which the Commission may employ the objectives and factors set out in § 3622(b) and (c) as a basis for imposing requirements on the Postal Service, in the exercise of its rulemaking authority under § 3622(a), presents a different question.

If that is the Commission's intention and belief, the Commission is preparing, in Time Warner's view, to take measures that rest on a misinterpretation of the relevant provisions of the PAEA and that exceed its statutory authority.

3. Order No. 104's discussion of "Service Performance" introduces a troubling ambiguity about the scope of the Commission's review of Postal Service regulations implementing service standards.

A misinterpretation of the PAEA may also be implicit in Order No. 104's discussion of "Service Performance." Order No. 104 at 11-12. As background, we note that three provisions of the PAEA invest the Commission with jurisdiction to review whether Postal Service actions comply with the requirements of title 39, or specified provisions thereof, and regulations thereunder, and to order a remedy if it finds they do not. Section 3653(b) and (c) require the Commission to make an annual determination of compliance with respect to rates and services in effect during the previous year and, if finds non-compliance, to "take appropriate action in accordance with" the remedial provisions of § 3662. Section 3662 itself provides that "[a]ny interested person" may lodge a complaint alleging "that the Postal Service is not operating in conformance with" selected provisions of title 39 (or regulations thereunder) and requires the Commission to take remedial action if it "finds such complaint to be justified." And § 3691, which authorizes the Postal Service by regulation (in consultation with the Commission) to establish service standards for market-dominant products, provides that "[t]he regulations promulgated pursuant to this section (and any revisions thereto), and any violations thereof, shall be subject to review upon complaint under section[] 3662" (§ 3691(d)).

Following the model of § 3622, § 3691 sets out a list of "Objectives" which service standards "shall be designed to achieve" and "Factors" which "the Postal Service shall take into account . . . [i]n establishing or revising such standards." § 3691(b) and (c).

In a section of discussion captioned "Service Performance," Order No. 104 states:

Section 3691 of the PAEA requires the Postal Service, in consultation with the Commission, to establish and maintain a set of service standards for market dominant products. The section provides explicit statutory objectives for the service standards adopted, and requires a service performance measurement system in which the Commission plays a role. It also authorizes complaints under sections 3662 and 3663 for violations of the regulations that implement these service standards and performance measurement systems.

The Commission is deferring consideration of data reporting on service quality. Proposed rules 3050.50 *et seq.* are ultimately intended to describe the service performance information that would be required to implement the relevant provisions of the PAEA.

Order No. 141 at 11-12.

Viewed in the light of our previous discussion of proposed rule 3050.20 and Order No. 104's accompanying explanation, this statement could create an inference that the Commission believes it has the authority to review whether service standard regulations adopted by the Postal Service adequately reflect the "Objectives" and "Factors" set out in § 3691(b) and (c).

For reasons already discussed, Time Warner does not believe that it is possible to devise a standard of review for "compliance" with "objectives" or "factors" that is comprehensible, manageable, or gives fair warning of what is required and what prohibited.

This view would not unduly circumscribe the Commission's authority under § 3691(d) to a nullity. Indeed, it would place the Commission in the same relation to the Postal Service as a federal court which reviews agency rulemaking proceedings under the standards of § 706 of the Administrative Procedure Act. If the Postal Service adopted a regulation that expressly contradicted a statutory objective or failed to give any consideration to a statutory factor, if it unlawfully withheld or delayed action required by § 3691, or acted arbitrarily and capriciously, abused its discretion, violated an unambiguous statutory command, exceeded its statutory authority, or failed to observe legally required procedures, the resulting regulation could be overturned by the Commission. See 5 U.S.C. § 706.

Thus, exercise of the Commission's jurisdiction under § 3691(d) to review Postal service regulations establishing service standards would be appropriate if a the complaint alleged that the Postal Service had failed to take account of one of the statutory "Factors" set out in § 3691(b), or had failed to consult the Commission, but would not be appropriate if a complaint alleged that regulations adopted under § 3691 failed to attribute adequate importance to a particular statutory "Objective" or to give the appropriate weight to a particular statutory "Factor."

The nature of the review authority that Congress intended to vouchsafe to the Commission under § 3691(d) is, we believe, clear. An indication of the Commission's views on this issue--even one to the effect that the Commission has not formed a view, if that is the case--might help to reduce uncertainty, or even to avert burdensome litigation over a relatively clear-cut jurisdictional issue.

4. To better reflect the availability of data, some adjustments should be made to the list of products and "constituent rate categories" for which the Commission proposes that costs, volumes, and revenues be disaggregated in CRA and CSC reports (Appendix A).

In "Format of Documentation Supporting the CRA and CSC Reports," the Commission proposes that the CRA and CSC reports include the "costs, volumes, and revenues as defined in the current Mail Classification Schedule, and by each product's constituent rate categories." Order No. 104 at 16. The Appendix to Order No. 104 lists the products and "constituent rate categories" into which costs volumes and revenues are proposed to be disaggregated.

Given the large number of distinct categories in some classes, particularly international mail, and the likelihood that many categories may generate very few or even no samples in the IOCS and other statistical systems used to measure costs, volumes, and revenues, the level of disaggregation appears to be extremely ambitious. In order to partly overcome the problem of insufficient samples, it would be worth considering whether to use more than one year's observations in some of the statistical systems.

On the other hand, in the case of Outside County Periodicals, a subclass that has many distinct rate categories, a finer level of disaggregation is both practicable and desirable. For example, sacks, pallets, and bundles of Outside County mail have been separate rate categories since Docket No. R2006-1. By modifying the current method of tabulating IOCS data, but without changing the way that IOCS samples are collected, it should be possible to obtain CRA estimates of the costs incurred in the handling of Periodicals sacks, pallets, and bundles. Currently these costs are estimated only from mail flow models, with limited opportunity to check the

estimates against the CRA. (Volumes and revenues for these rate categories are already available from billing determinants.) Separate CRA-based cost estimates would provide better guidance for rate setting, as well better guidance for possible cost reductions within the Periodicals class.

Time Warner appreciates this opportunity to express its view on the proposed periodic reporting requirements for the Postal Service, and we commend the continuing commitment to an open and collaborative process that is reflected in the Commission's proposal.

Respectfully submitted,

s/

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