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BEFORE THE  
POSTAL REGULATORY COMMISSION  
WASHINGTON, DC 20268

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Rules for Complaints

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Docket No. RM2008-3

**REPLY COMMENTS OF TIME WARNER INC.  
IN RESPONSE TO ORDER NO. 101  
(October 27, 2008)**

Time Warner Inc. (Time Warner) respectfully submits these reply comments in response to the initial comments of Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. ("Valpak") and the Newspaper Association of America ("NAA") in response to Order No. 101, Notice and Order of Proposed Rulemaking Establishing Rules for Complaints (issued August 21, 2008).

**1. Valpak's and NAA's Extravagant Claims Regarding Procedural Protections for Complainants Under § 3662 of the PAEA Are Unsupported by the Text of the Act and Are Belied by the Absence of a Requirement for a Hearing on the Record Under §§ 556 and 557 of the Administrative Procedure Act.**

In their initial comments in response to Order No. 101, Valpak and NAA each make extravagant claims regarding the process they believe should be accorded complainants in proceedings under § 3662 of the Postal Accountability and Enhancement Act ("PAEA" or "Act"). For the most part, these claims follow the models of the Federal Rules of Civil Procedure and of proceedings subject to §§ 556 and 557 of the Administrative Procedure Act ("APA") (such as rate and classification proceedings conducted under the Postal Reorganization Act of 1970 ["PRA"]). For example, Valpak argues that:

- the Commission's proposed regulations requiring a statement of "the nature of the evidentiary support that the complainant has or expects to obtain during discovery" and "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" are "perhaps too demanding," because "a complainant should not be expected to know what the discovery would reveal before it is conducted" and because "[t]here is no requirement that a complainant's allegations be based on anything other than information and belief, nor should there be" (pp. 5-6);
- "except perhaps in cases of grave abuse, no complaint should be subject to dismissal prior to an answer by the Postal Service" (p. 6); and
- the Commission is "without any statutory authority" to "carv[e] out 'rate and service inquiries,'<sup>1</sup> as an alternative to 'complaints,'" or to "deny 'complaint' status . . . 'to complaints that concern rate or service matters that are isolated incidents affecting few mail users'" or "based on whether the complaint raises issues of 'public postal policy . . . with substantial ramifications'" (pp. 16-18; internal citations omitted).

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<sup>1</sup> Valpak states (at 16): "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." This is correct, as far as it goes. However, Valpak's suggestions (at 16-17) that the Commission's proposed rules for rate and service inquiries are not based on "a statutory delegation [of] . . . the power to promulgate substantive rules" and that the Commission must be relying for its rulemaking authority on some "source other than the statute" are in error. The Commission plainly identifies the statutory source of its authority:

The rate or service inquiry process will help the Commission in deciding whether to address these matters in a more formal manner, which could potentially include the initiation of a complaint proceeding by a public representative or the appointment of an investigator to explore the matter. 39 U.S.C. 503 allows the Commission to promulgate these regulations to carry out its enhanced responsibilities under the PAEA.

Order No. 101 at 11.

Section 503, which provides that "[t]he Postal Regulatory Commission shall promulgate rules and regulations and establish procedures, subject to chapters 5 and 7 of title 5, and take any other action they deem necessary and proper to carry out their functions and obligations to the Government of the United States and the people as prescribed under this title," is also cited by the Commission as the statutory authority for its proposed rules allowing the appointment of a Commission investigator in complaint proceedings. *Id.*

These arguments are apparently based on the misconception that the PAEA is intended to preserve the rights to due process that were afforded to mailers by the PRA. Thus Valpak makes the following extraordinary (and entirely circular) argument:

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.

Valpak Initial Comments at 19.<sup>2</sup>

Had Valpak only concluded that statement with "PRA" rather than "PAEA," it would have been correct (albeit without significance for the issue Valpak was addressing).

NAA makes essentially the same logic-defying argument, namely that because certain due process protections that were afforded to mailers by the PRA are omitted from the PAEA, those protections must somewhere, somehow be implicit in the PAEA. NAA, for example, offers the following as one "of several reasons" why "[i]t is appropriate for the Postal Service to bear the burden of proof" in complaint proceedings:

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<sup>2</sup> Valpak also states erroneously that the PAEA "changed 39 U.S.C. section 3662 to provide a broader jurisdictional basis for complaints." Initial comments at 2. In fact, the PAEA narrowed the PRA's jurisdictional basis for complaints (which included the entirety of title 39). Order No. 101 discusses in some detail the significance of the provisions omitted from the Commission's complaint jurisdiction by the PAEA. See Order No. 101 at 7-9.

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. [footnote omitted] This contrasts with practice under 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.

NAA Initial Comments at 6-7.

The normal inference when Congress repeals one regulatory regime and adopts another in its place is that it does not intend provisions of the repealed regime to continue in force except where it so indicates.

NAA's additional reasons for the view that the Postal Service should bear the burden of proof in a complaint proceeding are similarly ill conceived. NAA states (at 6) that "the Postal Service remains a government service operated by the federal government" and that "[i]t is perfectly appropriate to ask that a government service bear the burden of demonstrating that it acts in accordance with the law." That stands on its head the ordinary presumption of regularity accorded to agency actions.<sup>3</sup> NAA states (at 7) that § "3652(a)(1) requires the Postal Service to 'demonstrate' in its annual compliance filing that its products complied with all applicable requirements, . . . plainly plac[ing] the burden of proving the lawfulness of the products on the Postal Service" and thus "provid[ing] further support for the

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<sup>3</sup> Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971) ("the Secretary's decision is entitled to a presumption of regularity" [citing Pacific States Box & Basket Co. v. White, 296 U.S. 176, 185 (1935); and United States v. Chemical Foundation, 272 U.S. 1, 14-15 (1926)]).

conclusion that the Postal Service bears the ultimate burden of persuasion in complaint proceedings under the PAEA." This is a non sequitur. If the Act expressly places the burden of proof on the Postal Service in one provision, the correct inferences are: (1) that the burden of proof would not lie on the Postal Service absent such an express provision; and (2) that a section of the Act that lacks such an express provision does not place the burden of proof on the Postal Service. Finally, citing § 3653(e)'s provision that a determination of compliance by the Commission shall create a rebuttable presumption of compliance in a proceeding under § 3662, NAA ingeniously argues that "[t]he absence of any [such] presumption" in cases where a complaint is founded on a provision of title 39 that does not come within the Commission's annual compliance review "implies that Congress intended for the Postal Service to have the burden of persuasion in those cases." This argument mixes apples with oranges. A rebuttable presumption of compliance has no effect on the burden of persuasion, which remains with the party who is the proponent of the proposition in question (i.e., in a § 3662 proceeding, with the complaining party who alleges Postal Service noncompliance with the law). A rebuttable presumption of legality simply relieves the Postal Service of any burden of producing *some evidence of legality* at the outset of the proceeding, shifting the initial *burden of production of evidence of illegality* to the complaining party.<sup>4</sup>

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<sup>4</sup> See Berman, Mitchell N., "Constitutional Decision Rules," 90 Va. L. Rev. 1, 139, n. 402 (March 2004) ("the dominant view, sometimes called the "bursting bubble" theory, holds that a rebuttable presumption shifts only the burden of producing evidence with respect to the presumed fact; if and when that burden is satisfied, the presumption disappears"). Accord BLACK'S LAW DICTIONARY 1224 (8th ed. 2004) (defining a rebuttable presumption as "[a]n inference drawn from certain facts that establish a prima facie case, which may be overcome by the introduction of contrary evidence")

[footnote continues]

The mistaken notion that the PAEA was intended to retain process for mailers equivalent to that formerly afforded in omnibus rate cases, but on an after-the-fact basis, leads Valpak and NAA to the erroneous conclusion that the proper models-- indeed, the mandatory models--for complaint proceedings under the PAEA are civil litigation in the federal district courts and adjudicative agency proceedings subject to the requirement of a hearing on the record under sections 556 and 557 of the Administrative Procedure Act ("APA").<sup>5</sup>

Both Valpak and NAA fail to note or discuss a glaring omission from the text of § 3662. The most notable feature of § 3662 is what is absent from it--the dog that did not bark in the night, so to speak. *Section 3662 does not require a hearing on the record under sections 556 and 557 of the Administrative Procedure Act.* Unless a statute either expressly references §§ 556 and 557 of the Administrative Procedure

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(citations omitted).

<sup>5</sup> Valpak's arguments that a party should be able to lodge a complaint on the basis of nothing more than general allegations of counsel, based on information and belief, that the Postal Service has acted inconsistently with some provision of the Act or some regulation of the Commission, and proceed directly to discovery against the Postal service, mirror the extraordinarily liberal system of "notice pleading" used by the federal district courts under the Federal Rules of Civil Procedure. So too does NAA's attempt to resurrect the "colorable claim" standard, which the Commission, before it had had the opportunity to formulate or propose rules governing PAEA complaints, carried forward from its precedents under the PRA in the course of disposing of a motion to dismiss a complaint under the PAEA but which it has wisely omitted from the rules it now proposes. See NAA initial comments at 3, n. 2; Order No. 92, Docket No. C2008-3 (issued Aug. 1, 2008), at 4.

The system of notice pleading allows the parties to civil actions in federal courts to develop the factual record and refine the issues in a case through mutual discovery without engaging significant resources of the district courts (of which there are 94, with 678 authorized judgeships). The same system, if applied to complaints under the PAEA, would threaten to swamp the single, 5-member Postal Regulatory Commission with an unmanageable flood of litigation (witness the ongoing proceeding in which the Commission employed the "colorable claim" standard) and to impose enormous administrative burdens on the Postal Service. It is perhaps the worst model for PAEA complaint proceedings that one can think of.

Act or requires a hearing by its own terms, what is required by "proceedings" does not extend beyond the requirements of §§ 553 and 554 of that Act, which govern "informal" rulemakings and adjudications.<sup>6</sup> Consequently, § 3662 does not *require* the Commission to permit discovery, to receive testimony or other sworn evidence, to base its decision exclusively on the record before it, or to make findings that are supported by a preponderance of the evidence.<sup>7</sup> All that is required of the Commission, as regards the legal sufficiency of its decisions under § 3662, is that it must not unlawfully withhold or unreasonably delay action mandated by law, must

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<sup>6</sup> See Berry, Melissa M., "Beyond Chevron's Domain: Agency Interpretations of Statutory Procedural Provisions," 30 Seattle Univ. L. R. 541, 549, n. 51 (Spring, 2007):

[I]nformal adjudications, which are not labeled as such in the APA, "constitute a residual category, including 'all agency actions that are not rulemaking and that need not be conducted through 'on the record' hearings.'" City of West Chicago v. NRC, 701 F.2d 632, 644 (7th Cir. 1983) (quoting Izaak Walton League v. March, 655 F.2d 346, 361-62 n.37 (D.C. Cir. 1981)).

See also Stanley, John F., "Note: The 'Magic Words' of § 554: A New Test for Formal Adjudication Under the Administrative Procedure Act," 56 Hastings L.J. 1067, 1073 (May, 2005):

The distinction between formal and informal adjudication is . . . dependant upon whether the statute requires that the hearing be on the record. . . .

<sup>7</sup> See Pension Benefit Guaranty Corp. v. LTV Corp., 496 U.S. 633, 655-56 (1990) (holding that, in an informal adjudication, an agency has no obligation to advise the parties of the material upon which it intends to rely or to invite the submission of contrary evidence, unless the Due Process Clause so requires):

[T]he trial-type procedures set forth in §§ 5, 7 and 8 of the APA, 5 U.S.C. §§ 554, 556-557, which include requirements that parties be given notice of "the matters of fact and law asserted," § 554(b)(3), an opportunity for "the submission and consideration of facts [and] arguments," § 554(c)(1), and an opportunity to submit "proposed findings and conclusions" or "exceptions," § 557(c)(1), (2). . . . The determination in this case, however, was lawfully made by informal adjudication, the minimal requirements for which are set forth in § 555 of the APA, and do not include such elements. [some internal citations omitted]

See also Berry, "Beyond Chevron's Domain," at 549 ("Agency procedures in 'informal' adjudications . . . are limited to those procedures adopted by the agency, required by the enabling statute, or required by due process" [footnote omitted]); Stanley, "Note: The 'Magic Words,'" at 1073 ("unless specific procedures are required by the relevant statute, informal adjudication is generally only subject to the minimum procedures required to meet the due process limitations imposed by the Fifth Amendment").

observe procedures required by law, and that its actions, findings, and conclusions not be arbitrary and capricious, an abuse of discretion, or be based on a misinterpretation of an unambiguous statutory provision.<sup>8</sup>

If Congress had wished to guarantee by law that proceedings on complaints would include the incidents of a hearing on the record, such as the right to present

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<sup>8</sup> Various formulations have been used to describe the applicable standard of review of informal agency adjudications under § 706 of the APA. The leading cases on the issue are *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978) (holding that, in reviewing agency action under § 706 of the APA, the courts may not impose procedural requirements beyond those specified by § 706 itself, another statute, or the Constitution); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16 (1971) (holding that even in an informal adjudication the agency must give an adequate explanation and supply a sufficient factual record to permit a reviewing court to determine if the agency has engaged in reasoned decisionmaking); and *Pension Benefit Guaranty Corp.*, 496 U.S. 633, 653-55. The latter decision overturned a ruling that agency procedures were inadequate because the agency "neither apprised LTV [a party to informal adjudication before the agency] of the material on which it was to base its decision, gave LTV an adequate opportunity to offer contrary evidence, proceeded in accordance with ascertainable standards . . . , nor provided [LTV] a statement showing its reasoning in applying those standards." 496 U.S. at 653. The Court explained:

*Vermont Yankee* stands for the general proposition that courts are not free to impose upon agencies specific procedural requirements that have no basis in the APA. See 435 U.S., at 524. At most, *Overton Park* suggests that § 706(2)(A) of the APA, which directs a court to ensure that an agency action is not arbitrary and capricious or otherwise contrary to law, imposes a general "procedural" requirement of sorts by mandating that an agency take whatever steps it needs to provide an explanation that will enable the court to evaluate the agency's rationale at the time of decision.

Here, unlike in *Overton Park*, the Court of Appeals did not suggest that the administrative record was inadequate to enable the court to fulfill its duties under § 706. Rather, to support its ruling, the court focused on "fundamental fairness" to LTV. 875 F.2d, at 1020-1021. . . . [T]he procedural inadequacies cited by the court all relate to LTV's role in the [the agency's] decisionmaking process. But the court did not point to any provision in ERISA or the APA which gives LTV the procedural rights the court identified. Thus, the court's holding runs afoul of *Vermont Yankee* and finds no support in *Overton Park*.

496 U.S. at 654-55.

The Commission's proposed regulations provide for many of the procedural protections that the PAEA fails to require. In particular, proposed rule 3030.1 makes subpart A of the Commission's Rules of Practice generally applicable to complaints. Time Warner fully supports this feature of the proposed rules. Our difference with Valpak and NAA is that we do not think the procedures set out in subpart A of the Rules of Practice, which was adopted to carry out the PRA's requirements for hearings on the record under §§ 556 and 557 of the APA, are *mandatory* under § 3662 of the PAEA.

testimony, conduct discovery, and receive a decision that is supported by substantial evidence and based solely on the record of the proceeding" (see 5 U.S.C. § 706), it could easily have provided--and would have had to provide--that upon determining that a complaint raises material issues of fact or law, the Commission "shall provide the opportunity for a hearing on the record under sections 556 and 557 of the Administrative Procedure Act" (see, e.g., former 39 U.S.C. [PRA] § 3624).

**2. The PAEA Leaves to the Commission's Discretion Whether to Designate Public Representatives on a Case-by-Case Basis or to Create a Permanent Office of Public Representative Headed by a Single Individual.**

- a. The PAEA follows the general style of the PRA in its provision for designation of an officer of the Commission who shall represent the interests of the general public in Commission proceedings.**

Like the PRA (§§ 3624 and 3661), the PAEA (§§ 505, 3653, and 3662) does not include a single provision creating an "Office of the Public Representative" but rather a series of separate provisions for the appearance of "an officer of the Commission" in specified proceedings as representative of the public. In the PRA, § 3624 provides that in rate and classification cases under §§ 3622 and 3623, "the Commission shall not recommend a decision until opportunity for a hearing on the record under sections 556 and 557 of title 5 has been accorded 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." Section 3661 of the PRA, which concerns Commission review of changes "in the nature of postal services which will generally affect service on a nationwide or substantially nationwide basis," contains, in the identical language, the PRA's only other reference to a public representative.

The PAEA repeals former § 3624 but retains § 3661 of the PRA. It also adds three new references to a public representative: in §§ 505, 3653, and 3662.<sup>9</sup> Each of these references employs essentially the same language as §§ 3624 and 3661 of the PRA.<sup>10</sup>

We will discuss in section 2.C below the reliance that Valpak places on the alleged "plain meaning" of § 505 for its conclusion that the PAEA requires a permanent office of Public Representative under a single director. Here, we make a more general observation. Both the PRA and the PAEA contain a series of provisions requiring the appearance of an officer of the Commission as representative of the interests of the general public in specific proceedings.<sup>11</sup> Neither contains what one would certainly expect to find if Valpak's interpretation of the PAEA were right, namely a provision that requires, or even alludes to, creation of an "office"

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<sup>9</sup> Both the PRA and the PAEA consistently refer to "an officer of the Commission . . . , who shall . . . represent the interests of the general public." Under the PRA, the Postal Rate Commission used the terms Consumer Advocate and Office of the Consumer Advocate to refer to this representative. Under the PAEA, the Postal Regulatory Commission uses the term Public Representative for the same purpose. These are evidently titles of convenience chosen by the Commission. They do not appear in either statute. We follow that usage here, referring to the "Public Representative" or "the Consumer Advocate" (or "OCA") depending on whether we are discussing practices under the PRA or the PAEA.

<sup>10</sup> Section 505 states that "[t]he Postal Regulatory Commission shall designate an officer of the Postal Regulatory Commission in all public proceedings (such as developing rules, regulations, and procedures) who shall represent the interests of the general public." Section 3653 states that "the Postal Regulatory Commission shall promptly provide an opportunity for comments on [the Postal Service's Annual Compliance Report] 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." Section 3662, in describing those who may file complaints under that provision, includes within the term "[a]ny interested person" "an officer of the Postal Regulatory Commission representing the interests of the general public."

<sup>11</sup> Section 505's provision for such an officer to appear "in all public proceedings" is not to the contrary. A number of proceedings provided for in the PAEA, such as annual rate adjustments under § 3622(d)(1)(C)&(D), contain no requirement of an opportunity for public participation.

within the Commission to represent the interests of the public, or a permanent director of such office along the lines of such statutory officers as "the Chairman of the Commission" and "the Postmaster General."

**b. The Plain Meaning of § 505 of the PAEA Is Opposite to the "Plain Meaning" that Valpak Ascribes to that Provision.**

According to Valpak:

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.

Valpak Initial Comments at 10.

One cannot but admire the audacity of arguing that a meaning that has suggested itself exclusively to Valpak is "plain."<sup>12</sup> But contrary to its assertions, Valpak's constructions of the meaning of § 505 do not correspond to the "plain," or "ordinary," or "common," or "natural," or likely meaning of the text.

Section 505, in its entirety, provides as follows:

The Postal Regulatory Commission shall designate an officer of the Postal Regulatory Commission in all public proceedings

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<sup>12</sup> Valpak's comments (at 14) lamely explain why its insight into the meaning of § 505 dawned so belatedly: "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." That may explain why Valpak has failed to *focus* on the issue before now. But it does not explain why, over a period when seven different persons were appointed to serve as public representative in fifteen different dockets (see Valpak Comments at 7-8), neither Valpak nor any other party even intimated a belief that the practice contravened the "plain meaning" of § 505.

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

Valpak focuses on two features of this provision: the use of the singular form *an officer* in the phrase "an officer of the . . . Commission," and the choice of the plural form and of the adjective *all* in the phrase "all public proceedings."

Valpak's argument that the use of the singular "an officer" "implies one person heading a permanent office" defies the ordinary conventions of both statutory interpretation<sup>13</sup> and English grammar. Valpak emphasizes the fact that "officer" is singular, but more significant are that it is preceded by "an" and that it is in lower case. The word "an" is what grammarians call an "indefinite article." (English possesses two indefinite articles, "a" and "an," and one definite article, "the.") Commonly, the indefinite article is used with the singular to refer to someone or something whose individual identity is indefinite or unfixed.<sup>14</sup> When an individual's

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<sup>13</sup> See N. Singer ed., 2A STATUTES AND STATUTORY CONSTRUCTION (6th edn. 2000), § 47:34:

Common usage in the English language does not scrupulously observe a difference between singular and plural word forms. This is especially true when speaking in the abstract, as in legislation prescribing a general rule for future applications. In recognition of this, it is well established, by statute and by judicial decision, that legislative terms which are singular in form may apply to multiple subjects or objects. [footnote omitted]

.....

Issues over singular or plural interpretation often arise in the form of disputes about whether the article "a" restricts the application of the term which it modifies to single objects or subjects. . . . *It is most often ruled that a term introduced by "a" or "an" applies to multiple subjects or objects unless there is reason to find that singular application was intended or is reasonably understood.* [emphasis added; footnote omitted]

<sup>14</sup> See, e.g., THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th edn .2000):

*indefinite article:* *n[oun]. Grammar.* An article, such as English *a* or *an*, that does not fix the identity of the noun modified.

generic or institutional identity is specific or fixed, the definite article is used with a singular noun (e.g., "the principal of John's high school"). When the individual occupant of a particular office is referred to, the definite article is used with a singular upper-case noun (e.g., "the Postmaster General"). Consider, for instance, the following statements:

"You should see *an attorney* to make sure that your Will was properly executed."

"I've heard that *the attorney* who is representing your wife was abandoned in the forest as an infant and raised by wolves."

"Mr. Colson, *the Attorney General* will see you now."

These usages are conventional, that is to say, usual. They are not universal or without known exception. But the following excerpts from title 39 demonstrate that it follows these ordinary conventions of English usage. Provisions that create a permanent office use the indefinite article with an upper-case, singular noun. Subsequent references to that officer use the definite article with an upper-case, singular noun.

§ 204 There shall be within the Postal Service *a General Counsel, . . . a Judicial Officer, and a Chief Postal Inspector. The General Counsel . . . shall be appointed by, and serve at the pleasure of, the Postmaster General.*

§ 504 *The Chairman* of the Postal Regulatory Commission shall be the principal executive officer of the Commission. *The Chairman* shall exercise or direct the exercise of all the executive and administrative functions of the Commission. . . .

§ 3216(e)(2) . . . *the Postmaster General* shall send to *the Chief Administrative Officer* of the House of Representatives . . . a statement . . . .

When a reference is to an individual whose identity is indefinite or unfixed, when the individual in question could be one person today and someone else tomorrow, title 39

commonly uses an indefinite article with a lower-case, singular noun (as in "an officer of the . . . Commission").

§ 404(c) No letter of such a class of domestic origin shall be opened except under authority of a search warrant authorized by law, or by *an officer or employee* of the Postal Service.

504(f)(4) For purposes of this subsection, the term 'covered person' means *an officer, employee, agent, or contractor* of the Postal Service.

Valpak's representation of the "plain meaning" of the phrase "all public proceedings" in § 505 is similarly ill founded. To begin with, consider the flimsiness of Valpak's evidence for the alleged "plain" or "ordinary" meaning of the word *all*. Citing no authority, Valpak asserts that "the ordinary meaning" of *all* is 'the whole amount, or quantity' and that the Commission has "in effect, construed section 505" as if it used the words "**each** public proceeding[]" rather than "**all** public proceedings." Initial Comments at 10. Valpak unhelpfully adds that "the common meaning of 'each' is 'being one of two or more distinct individuals having a similar relation and often constituting an aggregate.'" (We say "unhelpfully" because the common meaning of *each* is simply a red herring. No one argues that the word *each* appears in the text.)

Valpak's argument respecting the "plain meaning" of *all* is insupportable under any standard.

First, an elementary principle in the study of language, long recognized in applying the plain meaning rule, is that words do not have a single, determinate "ordinary" meaning, but a range of possible ordinary meanings, depending on their

context.<sup>15</sup> And the more common the word, the greater the variety of ordinary meanings it is likely to have. (E.g., the word *arteriosclerosis* appears fairly specific, as words go, but is by no means limited to one meaning and can be used, for instance, to describe the condition of an ailing economy or the decline of a venerable institution. *Arteriosclerosis*, however, plainly has a narrower range of ordinary meanings than, say, *malady* or *disorder*.) The word *all*, not unexpectedly, has a large number of ordinary meanings.<sup>16</sup> One of those is 'the whole amount, or quantity.' But perhaps the *most* common meaning of *all*, when used as an adjective, is "each," or

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<sup>15</sup> See R. Kelso and C. Kelso, "Appeals in Federal Courts by Prosecuting Entities Other than the United States: the Plain Meaning Rule Revisited," 33 Hastings LJ 187 (1981) (rpt. in N. Singer ed., 2A STATUTES AND STATUTORY CONSTRUCTION (6th edn. 2000), § 48A:16):

In the past, the plain meaning rule rested on theories of language and meaning, now discredited, which held that words have inherent or fixed meanings. These theories are unnecessary to the plain meaning rule, however, if the rule is interpreted to direct the court to construe and apply words according to the meaning that they are ordinarily given, taking into account the statutory context, basic rules of grammar, and any special usages stated by the legislature on the face of the statute.

<sup>16</sup> The entry for *all* in the OXFORD ENGLISH DICTIONARY runs just short of ten columns over nearly four pages. Compare the following differing uses of *all* in a more or less random selection of more or less familiar quotations:

"All Gaul is divided into three parts": J. Caesar (where *all* means *on the whole*).

"So are they *all*, *all* honorable men": W. Shakespeare (*each and every one*).

"I dare do *all* that may become a man": W. Shakespeare (*everything*).

"All is well" (*everything*).

"All is not well" (*something*).

"All together now" (*everyone*).

"All the way home" (*for the entire extent [or duration] of*).

"All work and no play" (*nothing but*).

"All I really want to do / Is, baby, be friends with you": B. Dylan, song lyric (*one of several things*).

"And down will come baby, cradle and all": nursery rhyme ([with *and*] *inclusive*).

"Who ate *all* the fudge?" (*the whole amount or quantity of*).

"every," or "each and every" (as in the syllogism familiar to generations of beginning students of logic: "Socrates is a man. All men are mortal. Therefore, Socrates is mortal.")<sup>17</sup>

In the dictionary most often used in defining contemporary statutory terms, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1st edn. 1961) ("WEBSTER'S THIRD"),<sup>18</sup> the first three definitions of the adjective *all* describe three different general meanings of the word, and a larger number of shades of meaning, all of them "ordinary."

The first definition in WEBSTER'S THIRD is (but for Valpak's addition of a comma) exactly the definition suggested by Valpak--"the whole amount or quantity." The illustrations of the word *all* used in this sense, however, indicate that it refers to an amount or quantity that comprises a single, undifferentiated whole, not one that is composed of distinct, individual, numerable instances or exemplars (such as "all . . . proceedings"). The complete text of the first definition of the adjective *all* in WEBSTER'S THIRD follows:

**1a** : that is the whole amount of quantity of <*all* rubbish should be cleared out of cellars> <needed *all* the courage he had> <it *all* began one rainy afternoon> : that is the whole extent or duration

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<sup>17</sup> In § 505's phrase "all public proceedings," *all* is, of course, used as an adjective. The *entire* entry for the word *all* in the first comprehensive dictionary of American English is: "All *a.* [*adjective*] every one; *n.* [*noun*] the whole; *ad.* [*adverb*] wholly." Noah Webster, A COMPENDIOUS DICTIONARY OF THE ENGLISH LANGUAGE: A FACSIMILE OF THE FIRST (1806) EDITION, (rpt. 1970).

<sup>18</sup> In the three Supreme Court terms from 1998-1999 through 2000-2001, WEBSTER'S THIRD was relied on most frequently for the definition of terms--30 times in opinions by seven of the Justices. The closest runner-up was BLACK'S LAW DICTIONARY, which was relied on 17 times in opinions by eight of the Justices. See S. Thumma and J. Kirchmeier, "The Lexicon Remains a Fortress: An Update," The Green Bag: An Entertaining Journal of Law, 5 Green Bag 2d 51, App. C (Autumn, 2001).

of < *all* the year round> <sat up *all* night> <one of the greatest victories in *all* history> **b** : as much as possible: the greatest possible <wished them *all* happiness> <traveled with *all* speed> <was told in *all* seriousness><sup>19</sup>

The second definition of the adjective *all* in WEBSTER'S THIRD appears to fit much better the sense carried by *all* in the phrase "all public proceedings" in § 505.

**2a** : every member or individual component of : each one of -- used distributively with a plural noun or pronoun to mean that a statement is true of every individual considered <*all* things to *all* men> <*all* my friends were there> <a film suitable for *all* ages> <refugees *all* from one thing and another -- *Punch*> <they *all* came late> **b** of members of a class : each and every one of -- used in logic as a verbalized equivalent of the universal quantifier<sup>20</sup>

Unfortunately, at least for Valpak's argument, *all* in § 505's phrase "all public proceedings" has every appearance of being "used distributively with a plural noun or pronoun to mean that a statement is true of every individual considered." "Every,"

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<sup>19</sup> Some students of lexicography prefer to continue using WEBSTER'S SECOND NEW INTERNATIONAL DICTIONARY (1st edn. 1934) ("WEBSTER'S SECOND"), not, as is commonly supposed, because WEBSTER'S THIRD admits certain Anglo-Saxon vulgarisms and some colloquialisms such as "ain't" (which in fact has an entry in WEBSTER'S SECOND), but because many entries and much scholarly commentary that appeared in WEBSTER'S SECOND were omitted from WEBSTER'S THIRD for reasons of cost. To accommodate any such diehards, we include the corresponding definitions of the adjective *all* from WEBSTER'S SECOND. The full text of the first definition given by WEBSTER'S SECOND is:

1. The whole of; --used with a singular noun or pronoun, and referring to amount, quantity, extent, duration, quality, or degree; as, *all* the wheat; *all* the year; *all* this; specif., as much as, or the greatest, possible; complete; perfect; as, *all* happiness; with *all* speed; in *all* kindness.

This is an inapt definition to apply to "all public proceedings" in § 505, because that term refers to distinct, individual, numerable proceedings--the same reason that the first definition in WEBSTER'S THIRD is inapt--and for the additional reason that "proceedings" is not "a singular noun or pronoun."

<sup>20</sup> The corresponding definition in WEBSTER'S SECOND is the third definition of the adjective *all*:

3. Every member or individual component of; each one of;--used with a plural noun. In this sense, *all* is used generically and distributively, meaning that a statement is true of every individual or case; as, *all* men are mortal.

"each," or "each and every" is precisely the meaning that the Commission has presumably attributed to *all* in "all public proceedings" and is precisely the meaning that Valpak needs to *rule out* in order to sustain *its* interpretation of § 505's "plain meaning."

The third definition given by WEBSTER'S THIRD, like the first, comes closer to the meaning that Valpak ascribes to *all* in § 505 than to the meaning that Time Warner (and presumably the Commission) regard as the more natural reading. But the third definition is inapposite for much the same reason that the first is inapposite.

Definition 3 is:

**3** : the whole number or sum of -- used collectively with a plural noun or pronoun to mean that a statement is true of the sum of the individuals considered <*all* the angles of a triangle are equal to two right angles> <*all* these together are not worth 10 dollars> <after *all* these years><sup>21</sup>

This definition is close to Valpak's "the whole amount, or quantity," in the sense that it indicates the total possible aggregate of whatever *all* is modifying. Moreover, "proceedings" *is* a plural noun. But the definition is inconsistent with any plausible reading of *all* in § 505, because it is *limited to* the collective sense of the word, whereas *all* in § 505 plainly at least *includes* the distributive sense. Thus, if Valpak were asked whether it would be a violation of § 505 if the Commission failed to designate a public representative in some particular public proceeding, it would presumably answer in the

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<sup>21</sup> The corresponding definition in WEBSTER'S SECOND is number 2:

**2.** The whole number or sum or;--used collectively, with a plural noun or pronoun expressing an aggregate, to mean, esp. in logic, that a statement is true of the sum of the individuals or cases considered; as, *all* the angles of a triangle are equal to two right angles.

affirmative. An affirmative answer to that question carries with it an acknowledgment that the phrase "all public proceedings" at least includes the distributive sense "every public proceeding," a sense that is *excluded* by definition 3. (It would be an absurdity to say that "every angle of a triangle is equal to two right angles.") That is to say, *all* as used in § 505 must carry a distributive sense (meaning *each* or *every*). Moreover, that sense rather than a collective sense (*the whole amount or quantity*) is its natural and dominant sense in the context in which it is used.

The discussion thus far concerns only § 505's diction, i.e., its particular choice of vocabulary. We now turn to its grammar and syntax. Recall that the full text of § 505 is as follows:

§ 505

The Postal Regulatory Commission shall designate an officer of the Postal Regulatory Commission in all public proceedings (such as developing rules, regulations, and procedures) who shall represent the interests of the general public.

Both the grammar of the sentence and the ordinary meaning of the preposition *in* dictate that the prepositional phrase "in all public proceedings" must modify the verb *shall designate*. If one pays attention to the grammar of the sentence, it is plain that what happens *in* the public proceedings is the *designating* of the officer.<sup>22</sup> If one wishes, as a grammatical matter, to locate the particular "officer," rather than the act

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<sup>22</sup> It is true that *in* can occasionally bear the meaning Valpak ascribes to it in § 505. For instance, if one describes entering into a blind bargain as "buying a pig in a poke [i.e., a sack]"--referring to the former practice of trying to palm off a cat as a suckling pig to a greenhorn"--it is not the "buying" that is located within the sack but the alleged "pig." That expression is memorable, however, in part precisely because its colloquial use of *in* deviates from the expected. See BREWER'S DICTIONARY OF PHRASE AND FABLE (16th edn. 1959; rev. Adrian Room), at 910. (The seller in such a transaction, by the way, must be careful not to expose the deception by inadvertently "letting the cat out of the bag." *Id.*)

of "designating" the officer, *in* the "public proceedings," and to do so in good idiomatic English, one would speak of designating an officer "*for* all public proceedings," not "*in* all public proceedings." In the one case, the designating takes place outside the public proceedings in order that the officer may appear in the public proceedings. In the other, both the designating and the appearance of the officer take place in the public proceedings. The first is Valpak's interpretation. The second is what the grammar of § 505 requires.

When an advocate of following the "plain meaning" of statutory texts consistently prefers paraphrases over direct quotations, and invariably changes the arrangement of the parts in order to express the alleged "plain meaning," the reader is well advised to keep the actual statutory language constantly in view, and to be alert to the possibility that some of the purported paraphrases may turn out to be something else.

If Congress intended § 505 to have the meaning that Valpak ascribes to it, a more likely way of expressing that intention would have been to state that the "Commission shall designate an officer of the Postal Regulatory Commission to represent the interests of the public in all public proceedings." That hypothetical formulation is *similar* to what § 505 actually states (i.e., that the "Commission shall designate an officer of the Postal Regulatory Commission in all public proceedings . . . who shall represent the interests of the general public"). But the hypothetical formulation changes the antecedent of "*in* all public proceedings" from "designating" to "representing," transforming Valpak's interpretation into *one* possible *natural* reading of the text, a reading that the actual text excludes by placing the "represent[ing]" in a

concluding "who shall . . . represent" clause that is in apposition with the noun "officer," which in turn is the object of "shall designate." To put it more plainly: § 505 states that *the Commission shall designate an officer in all public proceedings, who shall represent the interests of the public*; Valpak interprets § 505 as if it stated that *the Commission shall designate an officer, who shall represent the interests of the public in all public proceedings*.

Valpak repeatedly paraphrases § 505 as if it followed the hypothetical formulation above rather than its actual syntax. Valpak removes the phrase "represent the interests of the general public" from the "who shall" clause at the end of the sentence and relocates it immediately following the word "officer." For example, Valpak states:

the plain language of the statute mandates that the designated officer *represent the interests of the general public in "all public proceedings."*

Initial Comments at 10 (italics added for emphasis).

Two paragraphs later, it states:

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. . . .

*Id.* (emphasis added).

In the next paragraph, it states:

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*. . . .

*Id.* at 11 (emphasis added).

By relocating qualifying phrases, Valpak obstructs correct identification of the antecedents to which they refer.<sup>23</sup> This flouts one of the most fundamental and venerable principles of statutory construction, namely that "[i]t must be assumed that language has been chosen with due regard to grammatical propriety and is not interchangeable on mere conjecture."<sup>24</sup>

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<sup>23</sup> See N. Singer ed., 2A STATUTES AND STATUTORY CONSTRUCTION (6th edn. 2000), § 47:33:

Referential and qualifying words and phrases, where no contrary intention appears refer solely to the last antecedent. [footnote omitted]  
The last antecedent is "the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence. [footnote omitted] Thus a proviso usually is construed to apply to the provision or clause immediately preceding it. [footnote omitted]

<sup>24</sup> See *Hines v. Mills*, 187 Ark. 465, 60 SW 2d 181 (1933); and Black, CONSTRUCTION AND INTERPRETATION OF LAWS § 75 (2d edn. 1911). The principle may be stated alternatively as: "[w]ords are to be interpreted according to the proper grammatical effect of their arrangement within the statute" See *Harris v. Commonwealth*, 142 Va. 620, 1288 SE 578 (1925); Black, CONSTRUCTION AND INTERPRETATION OF LAWS § 55 (2d edn. 1911); and Sutherland, STATUTORY CONSTRUCTION § 408 (2nd edn. 1904).

**c. The PAEA does not and cannot implicitly "ratify" the Rate Commission's discretionary creation of a permanent Office of the Consumer Advocate under the PRA.**

By following the exact style of the PRA's provisions for the appearance of a public representative, the Congress that enacted the PAEA may be deemed to have implied that it did not view the Postal Rate Commission's interpretation of that provision as contrary to its intention in the PRA, and that it did not mean to change the intended meaning of the nearly identical language in the PAEA. Contrary to Valpak's misleading history of the Commission's practice under the PRA, it is entirely clear that the Commission did not view itself as required by law to create an Office of the Consumer Advocate under the direction of a single individual. It did create such an office, but only in the exercise of its discretion, and not until twelve years subsequent to the passage of the PRA.<sup>25</sup>

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<sup>25</sup> Moreover, when the Commission created a permanent "Office of the Officer of the Commission," it expressly indicated that this office was intended not to *constitute* the statutory "officer of the Commission" referenced in §§ 3624 and 3661 but rather to *support* that officer, who would continue to be "*designated at the commencement of each rate and classification proceeding*" (emphasis added). See Docket No. RM82-2, Order No. 433, Organization (June 1, 1982), at 2 ("This statement provides policy guidelines for the Officer of the Commission (OOC) designated at the commencement of each rate and classification proceeding, and the supporting permanent 'Office of the Officer of the Commission'"). See also Docket No. RM99-3, Order No. 1255 (64 Fed Reg. 37401 [July 12, 1999]), where the Commission described Order No. 433 as having "issued policy guidelines for the officer of the Commission (OOC) (and for the permanent staff assigned to the OOC)" and then added:

*Subsequently, the Commission designated a staff unit as the Office of the Consumer Advocate (OCA). The director of the OCA is generally appointed as the officer of the Commission responsible for representing the interests of the general public. [Emphasis added.]*

Order No. 1255's statement that the director of that office was "generally"--i.e., not invariably or necessarily--"appointed as the officer of the Commission responsible for representing the interests of the general public" disproves Valpak's assertion that the Commission's practice was "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."

Relying on two false premises--its misinterpretation of the "plain meaning" of § 505 and its erroneous history of the Commission's provision for a public representative under the PRA--Valpak reaches a conclusion that could not be correct under any possible set of factual premises. According to Valpak:

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 serve in that capacity.

Valpak Initial Comments at 15.

The problem with Valpak's analysis is that it applies the theory of Congressional ratification to matters entirely outside its scope. Under the theory of Congressional ratification, if an agency maintains a longstanding and consistent *interpretation* of language in its enabling statute, and it can be shown that Congress was aware of this fact, and if Congress then re-enacts the identical language without indicating an intention to disturb the agency's interpretation, Congress is assumed to have "ratified" the agency's interpretation. (The theory tends to come into play in cases where there is at least some plausible evidence that the Congress that originally enacted the language in question intended something different from the interpretation the agency subsequently adopted.) But the theory has no application in the case of, to use Valpak's word, a longstanding, consistent agency "*practice*," i.e., a course of action that is, and that the agency regards as, discretionary. The reasonable interpretation of § 505, in light of the Commission's practice under the

PRA, is that Congress intended to permit the practice to continue, not that it intended to make it mandatory.<sup>26</sup>

Had Congress wished to write the Commission's practice into law, it could easily have done so, not by re-enacting the language of the PRA but by adopting the language of the Commission's regulation at 39 C.F.R. § 3002.7.<sup>27</sup>

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<sup>26</sup> Valpak cites *North Haven Board of Education v. Bell*, 456 U.S. 521, 535 (1982), in support of its argument that "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." Initial Comments at 13. That case actually states a somewhat different proposition:

Where "an agency's *statutory construction* has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter *that interpretation*, although it has amended the statute in other respects, then presumably *the legislative intent [of the original statute] has been correctly discerned*.

464 U.S. 535 (emphasis added; internal citations omitted).

The logic underlying this canon of construction plainly has no application to longstanding *discretionary practices* of agencies.

Valpak points to no evidence that the Postal Rate Commission interpreted the PRA as *requiring* that there be "one person heading a permanent office" of public representative (Valpak Initial Comments at 15), nor can any provision of the PRA plausibly be interpreted in that fashion. Without evidence of a longstanding, publicly known view on the Commission's part *that it was required by some provision of the PRA* to follow the practice, the most that the re-enactment of the identical language could imply is that Congress did not view the practice as legally impermissible.

<sup>27</sup> That regulation provided, in relevant part, as follows:

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

[footnote continues]

**d. Subsequent references in the PAEA to an officer of the Commission who shall represent the interests of the general public do not bolster Valpak's interpretation of § 505.**

Valpak believes that § 3662's authorization that a complaint may be filed by "[a]ny interested person (including an officer of the Postal Regulatory Commission representing the interests of the general public)," along with § 3653's provision for a public representative to file comments on the Postal Service's Annual Compliance Report, bolsters the case for its interpretation of § 505 in two ways.

First, according to Valpak, since, "[u]nder 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," "the Commission's construction of . . . § 505 . . . 'would effectively vitiate' the role that such an officer is assigned by section 3662." Valpak Comments at 11-12 [citation omitted]. There are two interpretations of the relevant provisions, however, that suggest themselves more readily than Valpak's supposition that Congress intended to make mandatory under the PAEA a practice that was followed as a matter of discretion under the PRA, without mentioning that practice expressly. First, the Commission may interpret § 3662's mention of "an officer of the Postal Regulatory Commission representing the interests of the general public" as referring to an officer who has appeared in that capacity in some *other* Commission proceeding and who

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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.

[48 FR 13168, Mar. 30, 1983, as amended at 64 FR 37402, July 12, 1999]

desires to lodge a complaint that is in some way grounded in that representation."

One point in favor of that interpretation is that it would avoid making a public representative into a kind of roving prosecutor, one who would not have to weigh the kinds of costs and trade-off's that face other parties when they consider pursuing a complaint. Second, even if Valpak were correct in thinking that Congress intended the creation of such a prosecutorial entity, it would follow only that the Commission should *designate a public representative for that purpose*, not that it must designate a *single* public representative *for all purposes*.

Valpak's second argument is that the two provisions respecting a public representative in §§ 3653 and 3662 reinforce Valpak's interpretation of § 505 because they indicate that "the role of the public interest officer has been . . . expanded and enhanced" under the PAEA. Diffusing that responsibility "[b]y dispersing [it] among several officers," Valpak says, "would not foster — and indeed could be considered 'destructive' of — PAEA's overall purpose." Valpak Comments at 15. Again, Valpak's premise is dubious: it is by no means obvious that the role played by the Office of Consumer Advocate as a litigant in rate and classification cases under the PRA is "enhanced" or "expanded" under the provisions of the PAEA. In any event, such enhancement as there may be must be determined with reference to what the PAEA itself provides. To say that an office or function is enhanced in one respect by an express provision of the Act does not entail saying that it is also enhanced in other, unmentioned respects. There is no reason to think that Congress could not have intended to enlarge the number of proceedings in which a public representative will appear and at the same time intended not to concentrate that

function in a single, permanent officer. Again, the most telling point is that if Congress intended what Valpak says it intended, it would have been easy for Congress to say so.

**3. Section 3662 Does *Not* Require, As Valpak Asserts, "That the Commission 'Must Begin Proceedings' on [a] Complaint [Filed by 'Any Interested Person' in the Proper Form and Manner] If It 'Raises Material Issues of Fact of Law.'"**

According to Valpak, the Commission's exercise of its authority under § 3662 is *mandatory* whenever the threshold jurisdictional requirements of that section are satisfied. Thus Valpak interprets § 3662 as *requiring* the Commission to provide a hearing on *every* complaint filed by "any interested party" that meets such "form and manner" requirements as the Commission adopts and that raises *any* material issue of fact or law respecting whether the Postal Service has failed to comply with any provision of chapter 36, with the other specified provisions of title 39, or with any regulations promulgated under any of those provisions. Valpak states that the Commission "does not have the power" to base its decision whether to grant a hearing on "whether the complaint raises issues of 'public postal policy . . . with substantial ramifications,'" but may only consider "whether the complaint raises 'material issues of fact or law' relating to a violation of specified laws" (*id.* at 18-19 [internal citation omitted]). Valpak summarizes its view as follows:

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."

*Id.* at 20.

"The only discretion that the statute gives to the Commission with respect to complaints," Valpak says, "is to impose reasonable form and manner requirements."

*Id.* at 18.

- a. **The language of § 3662 indicates that a finding by the Commission that a complaint raises material issues of fact or law is a condition precedent for exercise of the Commission's complaint authority, not a trigger that mandates exercise of that authority.**

Valpak grossly understates the Commission's discretion with respect to how it may proceed after a complaint is filed. Notably, in light of its reliance on textual exegesis and doctrines of statutory construction elsewhere in its comments, Valpak pays little attention to the language of § 3662(b). That section provides:

§ 3662

(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).

To begin with, the ambiguity of the word "proceedings" (in preference to "hearing" or "hearing on the record"), a term which lacks a statutory definition either

within or without the PAEA, in itself conveys considerable discretion. Section 3662(c)'s grant of remedial authority, in the event the Commission finds a complaint to be justified, to order "such action as the Commission considers appropriate" also conveys extremely broad discretion. But let us suppose for the sake of argument that Valpak intended its remark about the Commission's discretion as nothing more than a restatement or amplification of its view that "the Commission *must* 'begin proceedings' on such complaint *if it 'raises* material issues of fact or law" [emphasis added]. Does that assertion, standing alone, survive a critical examination?

The assertion that "the Commission must 'begin proceedings' on such complaint if it 'raises material issues of fact or law'" goes well beyond what § 3662(b) itself states or can fairly be interpreted to require. That provision does not indicate any circumstances under which the Commission *must* begin proceedings on a complaint. Rather, it states that the Commission "shall" (i.e., must) choose *one of two options* "within 90 days after receiving a complaint."

The Commission's first option, after receiving a complaint, is "upon a finding that such complaint raises material issues of fact or law, [to] begin proceedings on such complaint." The question immediately posed by that language is whether it states a condition precedent without which the Commission's lacks *authority* to begin proceedings (i.e., a jurisdictional threshold that must be met before the Commission may "begin proceedings"), or a threshold that, when met, *obliges* the Commission to begin proceedings (i.e., whether § 3662 invests the complainant who raises material issues of fact or law with a right to proceedings).

The second option open to the Commission after it receives a complaint is to "issue an order dismissing the complaint." No standards or conditions are specified respecting the Commission's exercise of that option. For instance, it is not stated that the Commission may dismiss a complaint: if the complaint fails to state a claim for which the Commission has the authority to order a remedy for; or if the complaint is fundamentally deficient in form; or if the complaint fails to raise material issue of fact or law; or if *the Commission finds that* the complaint fails to raise material issues of fact or law; or if the complaint would be subject to dismissal in a federal civil action under the Federal Rules of Civil Procedure.<sup>28</sup>

The language and grammatical construction of § 3662(b) support the view that the first option states a jurisdictional precondition for exercise of the Commission's discretion to begin proceedings on a complaint rather than a statutory obligation to institute further proceedings. Consider first the words "upon a finding that such complaint raises material issues of fact or law." They appear in a subsection whose application to any given complaint is itself not mandatory. That is to say, the language of subsection (b) imposes no conditions on the Commission's choice of option (i) or option (ii). Nothing in the language of subsection (b) prohibits the Commission from bypassing option (i) entirely. Nothing requires the Commission to *make* a finding as to *whether* the complaint raises material issues of fact or law.

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<sup>28</sup> Note that the Federal Rules of Civil Procedure are not presumptively or inferentially applicable to § 3662 proceedings, which are not "formal" or "trial type" proceedings subject to the requirements of a hearing on the record under §§ 556 and 557 of the APA but rather "informal" proceedings subject to the minimal procedural requirements of §§ 552 and 553 of the APA. See note 7 above.

Thus, the grammatical structure of subsection (b) grants the Commission what appears to be the unconditioned choice of going straight to option (ii), and option (ii) appears to give the Commission unfettered discretion to dismiss a complaint.

Second, the PAEA does provide an example of a provision that *directs* the Commission to *make a determination* of fact and then to take one or another action depending on that determination. Section 3653 ("Annual determination of compliance") shows that Congress knew how to draft a provision requiring the Commission to make a finding, and then requiring particular action depending on what finding it made. That section provides in relevant part:

§ 3653

(b) Determination of Compliance or Noncompliance.—Not later than 90 days after receiving the submissions required under section 3652 with respect to a year, the Postal Regulatory Commission *shall make a written determination as to—*

(1) *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); *or*

(2) *whether* any service standards in effect during such year were not met.

*If, with respect to a year, no instance of noncompliance is found under this subsection to have occurred in such year, the written determination shall be to that effect.*

(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).*

(Emphasis added.)

If Congress had wished to mandate that the Commission begin proceedings on every complaint that raises material issues of fact or law, it had available at least two obvious ways of expressing that intention. Congress could quite easily have followed the model of § 3653 and stated that, after a complaint is filed, the Commission "shall make a determination whether the complaint raises material issues of fact or law," and that "if the Commission finds that the complaint raises material issues of fact or law, it shall begin proceedings." But that is not what Congress did.

A less unambiguous but still possible way of indicating such an intention would have been to provide in § 3662(b) that "If a complaint raises material issues of fact or law, the Commission shall begin proceedings." By replacing the actual words of the provision, "Upon finding that," with the single word "If," Congress could have (at least arguably) created an implicit obligation for the Commission to determine *whether* a complaint raises such issues, and to begin proceedings *if* it does. However, the actual language makes the Commission's *finding* of material issues, rather than the *existence* (or not) of such issues, the contingency on which the beginning of proceedings rests.

The difference between these two readings is not a matter of mere semantics. It profoundly affects the responsibilities that the Commission must bear when complaints are filed. Under Valpak's reading, the Commission must make a determination whether a complaint raises material issues of fact or law and, if the determination is that it does, must (subject, presumably, to some *de minimis* exception) begin proceedings. That is the Commission's irreducible burden under

the Act, whether it has before it one complaint or 1,000 (assuming all are in the proper form).

Under the alternative interpretation, the Commission is permitted to do what its proposed rules contemplate--i.e., to winnow out from the universe of complaints that may be filed those that raise issues of "public postal policy . . . with substantial ramifications" or "claims of unfair competition" (Order No. 101 at 5), to determine whether these claims raise "material issues of fact or law," and, if they do, to institute proceedings to determine whether the claims are justified. The latter interpretation seems to Time Warner to better comport not only with the language and structure of § 3662 but with the intentions of Congress regarding the more limited role to be played by the Commission in regulating postal rates and services under the PAEA than under the PRA.

Finally, we take note of § 3662(b)(2)'s provision that if the Commission fails to exercise one of its two options within the prescribed 90 days after a complaint is filed, the complaint "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." That provision does not appear to give an appellate court any manageable standard of review, unless the Commission's authority to dismiss complaints rests within its own sound discretion. We can imagine someone making the argument that a reviewing court's standard for review of such an imputed dismissal should be whether the complaint raises material issues of fact or law. But any such argument must fail, because there are various *other* grounds that would warrant dismissal, and thus for review under 5 U.S.C. 706 (which, under § 3663 of

the PAEA, provides the applicable standard of review of final Commission orders). Under § 706 of the APA, a dismissal of a complaint brought under § 3662 of the PAEA could be reviewed with respect to whether it was arbitrary and capricious or constituted an abuse of discretion. It could be reviewed with respect to whether it was "contrary to constitutional right" (e.g., if it were alleged that the Commission had dismissed a complaint to punish a complainant's expression of a political opinion). It could be reviewed with respect to whether the complaint stated material issues of fact or law, whether it followed the form and manner requirements prescribed by the Commission, or whether the complaining party falls within the statutory meaning of "[a]ny interested person." It could be reviewed with respect to whether the dismissal had been based on a misinterpretation of law (e.g., if it were alleged that the Commission dismissed a complaint because it erroneously interpreted § 3662(b)(1)(A)(i) as stating a jurisdictional prerequisite for the initiation of proceedings). On which of these possibilities should a reviewing court focus in the absence of an order of dismissal? Only if the authority to dismiss is largely discretionary does a reviewing court have a sufficiently narrow standard--whether the Commission has abused its discretion, acted arbitrarily and capriciously, or failed to observe procedures required by law--to make its task manageable.

## Conclusion

Time Warner reiterates here what it said in its initial comments in response to Order No. 101:

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

Time Warner adds to those sentiments its assurance that it takes no exception to the provision of the proposed rules that provide for a full and fair hearing, once the Commission has determined to institute proceedings on a complaint under § 3662(b). Time Warner supports those provisions of the proposed rules, in particular the application of subpart A of the Rules of Practice to complaints, once the Commission has determined to institute proceedings on a complaint.

We respectfully dissent, however, from interpretations of the PAEA that would place the Commission in the position of a court of general jurisdiction and to requirements that it hold proceedings that are subject to elaborate and burdensome requirements of due process whenever any interested person is able to cross the extremely low threshold of stating a claim, however local, transient, or limited in significance, that raises a material issue of fact or law.

Respectfully submitted,

s/ \_\_\_\_\_  
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