

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

Proposed Rulemaking Establishing Rules
For Complaints

Docket No. RM2008-3

**REPLY COMMENTS OF ASSOCIATION FOR POSTAL COMMERCE,
ALLIANCE OF NONPROFIT MAILERS, DIRECT MARKETING
ASSOCIATION AND MAGAZINE PUBLISHERS OF AMERICA, INC.**

The Association for Postal Commerce, Alliance of Nonprofit Mailers, Direct Marketing Association and Magazine Publishers of America, Inc. ("PostCom, et al.") believe that in general, the Rules the Commission has proposed to implement the provisions of Section 205 of the Postal Accountability and Enhancement Act ("PAEA"), 39 U.S.C. § 3662, are appropriate and well thought out. In particular, the Commission has recognized that Section 3662 is not simply a continuation of the complaint standards that applied under the Postal Reorganization Act of 1970; the rules recognize, as properly they should, the need to distinguish between matters of substantial importance to the full effectuation of the new statute and those which are highly individualized and idiosyncratic. The rules also place appropriate emphasis on the desirability of settlement of issues whenever that is possible.

There is, however, one aspect of the rules which PostCom, et al. believes needs to be reconsidered. The proposed rules include a provision that would permit the Commission to appoint an "investigator" who would be assigned the task of exploring

issues in a complaint proceeding, presumably through meetings with the parties to such a proceeding. The Commission evidently believes that this option to appoint an investigator would enable it to deal with complaints more efficiently, especially when information cannot easily be obtained through conventional means.”¹ Although the concept of an “investigator” is both novel and unprecedented in administrative law, introduction of the concept is not objectionable *per se*. However, PostCom, et al. agrees with the initial comments of the U.S. Postal Service, Newspaper Association of America, and the Public Representative that the proposed provisions addressing the investigator ought to be clarified.² Our views, however, differ somewhat from those expressed by these interested parties. For instance, the point in the process at which an investigator might be deployed must be specified for, as we discuss below, there are certain functions associated with the consideration of complaints that the Commission cannot, or at the minimum, should not, delegate. Further, the role of the investigator, its powers and duties and responsibilities must be much more clearly defined.

I. The Proposed Rules Lack Clarity on Where in the Procedural Process the Role of an Investigator Begins.

The proposed rules concerning the investigator (Proposed Rules 3030.20 and 3030.21), fail to specify clearly when in the procedural process an investigator may be introduced. The Commission has stated that it may seek the assistance of an investigator

¹ Notice of Proposed Rulemaking Establishing Rules for Complaints, Docket RM2008-3, Order No. 101 at 11 (August 21, 2008) (hereinafter “Order No. 101”).

² See Initial Comments of the United States Postal Service, Docket No. RM2008-3 at 5 (Oct. 7, 2008); Comments of the Newspaper Association of America on Notice and Order of Proposed Rulemaking Establishing Rules for Complaints, Docket No. RM2008-3 at 11 (Oct. 6, 2008); Public Representative Comments on Proposed Rulemaking Establishing Rules for Complaints, Docket No. RM2008-3 at 4 (Oct. 6, 2008).

“*[i]f* the Commission finds a complaint to be justified and remedial action appropriate.”³

Proposed Rule 3030.20, however, also states that the Commission would “issue an appropriate order to appoint an investigator in accordance with section 3030.21” *if*, “after review of the information submitted pursuant to this part, the Commission determines that additional information is necessary to enable it to evaluate whether the complaint raises material issues of fact or law.”⁴

There is a fundamental difference in these two statements. The first one suggests that the Commission would appoint an investigator *only* if the PRC finds a complaint to be justified.⁵ This clearly suggests that the appointment of an investigator would occur *only after* the Commission made an initial finding that a complaint raised material issues of fact or law. By contrast, Proposed Rule 3030.20 suggests that the Commission may appoint an investigator to enable it to evaluate whether a complaint raises material issues of fact or law *before* the Commission has made that determination. The proposed rules thus lack clarity on whether they authorize the introduction of an investigator into the procedural process either *before* or *after*, or both *before and after* the Commission has made a determination regarding whether a complaint raises material issues of fact or law.

The Commission should resolve this ambiguity by making clear that it will not appoint an investigator *before* the Commission makes an initial determination that a material issue of fact or law exists. Section 3662(b) of Title 39 states:

“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*,

³ Order No. 101 at 11 (emphasis added).

⁴ Order No. 101 at 25.

⁵ The Commission has properly underscored that a complaint may be justified only if it raises material issues of fact or law under 39 U.S.C. §3662(b)(1)(A).

*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.”*⁶

Thus, the initial determination as to whether a complaint raises material issues of fact or law must, by the terms of the statute itself, be made by the Commission. We do not read the Commission’s Order as suggesting otherwise. Indeed, the Commission clearly contemplates that neither it nor the parties to the complaint (or potentially intervenors) is bound by the report of the “investigator.”

In the circumstances, the introduction of an “investigator” before the 3662(b) determination has been made is both inconsistent with the basic construct of the statute and the Commission’s goal of dealing with complaints as efficiently as possible. The construct of section 3662, if not its literal terms, makes clear that trial type proceedings (if any) are not to begin until the Commission has made the initial determination that such proceedings are necessary because of material questions of fact or law; the initial determination is to be made on the face of the complaint and the Postal Service’s responsive motion or answer. That is, the process of initially finding that a case does or does not present genuine issues of material fact or law is in the nature of summary disposition.⁷ In short, the statute simply does not contemplate any role for an “investigator” *before* an initial determination of materiality has been made.

⁶ 39 U.S.C. § 3662(b) (emphasis added).

⁷ *Cf.* Order Denying Motion of the United States Postal Service to Dismiss Complaint and Notice of Formal Proceedings Order No. 92, Docket C2008-3 at 2 (August 1, 2008). *See also* Summary Disposition (Rule 217), 18 C.F.R. § 385.217. *See e.g.*, Consumers Power Co., Order Granting Intervention, Denying Motion for Summary Disposition and Establishing Hearing Procedures, PR97-1-004, 120 F.E.R.C. P. 61252, 2007 WL 2725280, at *3 (F.E.R.C. Sept. 19, 2007) (denying summary disposition and clearing the way for proceedings); *North Atlantic Utilities v. Transcontinental Gas Pipe Line Corp.*, Docket Nos. RP95-420-000, TM95-12-29-000, 73 F.E.R.C. P. 61081, 1995 WL 604888, at *2 (F.E.R.C. Oct. 16, 1995) (granting summary disposition due to finding of lack of genuine issues of material fact).

Nor would the intervention of an “investigator” at this preliminary stage of the complaint process further the Commission’s stated objective of administrative efficiency. Indeed, so far as we can determine, the introduction of the investigator in the preliminary stages of the complaint process would only add another layer to the process – a layer consisting of a form of discovery other than through “conventional means” precipitating the likelihood of “conventional” discovery and a report which is not binding on any of the parties to the process. The Commission’s initial determination must, by the terms of the statute, be made within 90 days of the filing of the Complaint and not within 90 days of the filing of a report. The consequence of a failure by the Commission to act within that time frame is automatic and the introduction of an investigator before an initial determination will, at best, make it difficult for the Commission to act within the statutory time frame and, at worst, lead to untoward results.

For these reasons, we submit that the Commission should, by rule, stipulate that investigators may be appointed by the Commission, but only after the Commission has made an initial determination, as mandated by Section 3662(b) that a particular complaint raises substantial and material questions of fact or law and that further “proceedings” under Section 5 of the Administrative Procedure Act, 5 U.S.C. § 554 are necessary to resolve those issues.

II. The Proposed Rules Lack Clarity on the Precise Nature of Activities in Which an Investigator May Engage.

The proposed rules lack clarity as to the precise nature of activities in which an investigator is to partake. The Commission has stated that an investigator would serve as “a neutral fact gatherer in order to develop the record” and that the investigator’s findings would be public and in writing to provide the parties with an opportunity to comment on

the findings prior to a decision by the Commission.⁸ Traditionally, however, the parties themselves have taken on the role of supplying the PRC with materials for the record, and the Commission has taken on the task of requesting the parties to provide supplemental information if necessary for the record.⁹ By having the investigator take on the role of obtaining information from the parties, a role previously reserved for the Commission, the proposed rules leave room for the interpretation that the investigator may in actuality be an extension of the Commission – a body which must ultimately serve as a decision-maker – rather than a neutral, uninterested party.

The proposed rules also lack clarity on whether the Commission intends an investigator to play a role in ADR. Throughout the Order, the Commission has underscored that the proposed rules encourage the settlement of disputes and the option of ADR procedures.¹⁰ The Commission has stated that while the parties would remain advocates, an investigator would serve in a “neutral” capacity as a fact gather.¹¹ Such language, in light of the Commission’s emphasis on ADR and settlement, leaves room for the interpretation that the PRC intended the investigator to play a role as a neutral in ADR proceedings. Indeed, the Commission has also stated that the PRC might use an investigator “to ensure that any proposed remedial action is tailored narrowly to address the violation without causing undue or unnecessary disruption.”¹² In such an instance, the proposed rules lack clarity on whether the investigator would still be serving as a

⁸ Order No. 101 at 12.

⁹ See Order No. 101 at 11.

¹⁰ Order No. 101 at 6.

¹¹ Order No. 101 at 12.

¹² Order No. 101 at 11.

neutral or as a decision-maker with authority to influence the scope of a remedy, or as a mediator to bring the parties to settlement on remedial issues.

Of the possibilities apparently envisioned by the Commission for the investigator, the one that is the most problematic – even in the post-initial determination process – is that of a “fact gatherer.” Fact gathering is inherently a part of the decision making process; and it is a function that can only properly be delegated by the Commission to a member of the Commission or an Administrative Law Judge. 5 U.S.C. § 556(b). While there was a time in its history when the Commission did, in fact, use the services of an Administrative Law Judge, it is far from clear that that is what the Commission intends to do under the proposed rules. At all events, we are gravely troubled by the notion of someone who is literally engaged in “fact gathering” and then reporting facts publicly but lacks the qualifications of an Administrative Law Judge.

It is, however, possible that the Commission does not literally mean that the “investigator” will engage in a fact finding function. Rather, the Commission may mean that the investigator will serve more as an administrator of the discovery and litigation process (akin to a special master) in an effort to streamline and reduce the extent of motions practice that sometimes attends discovery before the Commission and to simplify and expedite the conduct of the hearings and similar matters. If that is the case, then the Commission needs to make its intentions clear in a way that neither the rules nor the Order now does.

Finally, there is the possibility that the Commission intends the “investigator” to actually serve as a mediator: the Commission may envision that once a determination of substantial and material fact or law has been made, the mediator may serve as a neutral

party to see whether settlement is possible or to narrow and identify the issues that remain in dispute. While the notion of an investigator is, as we have pointed out, unprecedented among administrative agencies, regulatory agencies have increasingly resorted to alternative dispute procedures as a cost effective means of resolving or at least managing complaint proceedings.¹³ Moreover, if the Commission is going to charge the “investigator” with ADR or ADR-like responsibilities, then those functions need to be kept clearly separate from any aspect of fact finding, including administration. Neutrality on the part of the mediator is absolutely indispensable if that sort of program is to work. It is for that reason that the FERC has established a dispute resolution service which exists independently of the Commission and the FCC allows parties to the relevant disputes to voluntarily engage in alternative dispute resolution of a third party during which time FCC action on the complaint is held in abeyance.

Non-binding alternative dispute resolution – *i.e.*, mediation – is a perfectly legitimate tool to promote the efficient administration of justice and is widely used, not only by administrative agencies, but by federal and state courts. It is sometimes thought that mediation works best where the dispute is binary and susceptible to quantification – money damages – but there is certainly no reason of policy to foreclose the possible use by the Commission of mediation as a part of a process to induce settlement once it is determined that material issues of fact or law exist. It is, however, imperative that the mediator have no other involvement in the process other than the attempt to bring the

¹³ Conforming Changes, Final Rule, Order. No. 699, RM07-7-000, 120 F.E.R.C. P. 61134, 2007 WL 2235790, at *2 (F.E.R.C. Aug. 7, 2007); 18 C.F.R. §375.302(y). Implementation of the Cable Television Consumer Protection and Competition Act of 1992 and Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act-Sunset of Exclusive Contract Prohibition, Federal Communications Commission, Final Rule, 72 Fed. Reg. 56,645, 56,657 (Oct. 4, 2007); 47 C.F.R. § 76.1003(i).

parties together and to assist them in finding a remedy (if appropriate) that is narrowly tailored and acceptable to the protagonists. Thus, the notion of an investigator who serves as both a fact gatherer or litigation administrator and also as a mediator is problematic.

For these reasons, PostCom, et al. respectfully submits that the Commission needs to reconsider and more clearly define the role that it envisions the investigator will play in the complaint process under Section 3662. We understand that the appointment of an investigator is discretionary and, therefore, the Commission may wish to some extent to define the scope of the investigator's responsibilities on a case-by-case basis as circumstances may warrant. However, if the fundamental purposes of Section 3662 are to be realized and the Commission's role of efficient administration of complaints is to be achieved, the parameters in which the investigation will operate and the scope of responsibilities that an investigator may have must be established with reasonable precision in the rules themselves. To do otherwise threatens to add further complexity, confusion and delay to the orderly resolution of potentially meritorious complaints that may come before the Commission.

Conclusion

For these reasons, PostCom, et al. respectfully submits that the Commission should, by rule, specify that an investigator may be designated, but only in cases in which the Commission has previously determined that material questions of fact or law exist that must be the subject of trial type proceedings under the Administrative Procedure Act. The Commission must also clearly define the role that investigators must play in those

proceedings and, if mediation is intended, must stipulate that mediation will be the sole function of that investigator in any particular case.

Respectfully submitted,

Ian D. Volner
Tara M. Sugiyama
Venable LLP
575 7th Street, NW
Washington, DC 20004-1601
idvolner@venable.com
jtmallon@venable.com

**Counsel for Association for
Postal Commerce**

David M. Levy
Sidley Austin LLP
1501 K Street, NW
Washington, DC 20005
dlevy@sidley.com

**Counsel for Alliance of Nonprofit Mailers and
Magazine Publishers of America, Inc.**

Jerry Cerasale
Senior Vice President for Government Affairs
The Direct Marketing Association
1615 L Street, NW, Suite 1100
Washington, DC 20036
www.the-dma.org

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