

**BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON DC 20268-0001**

RULES FOR COMPLAINTS

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Docket No. RM2008-3

**REPLY COMMENTS OF
MAGAZINE PUBLISHERS OF AMERICA, INC.,
ALLIANCE OF NONPROFIT MAILERS,
AND AMERICAN BUSINESS MEDIA
(October 27, 2008)**

The Magazine Publishers of America, Inc. ("MPA"), Alliance of Nonprofit Mailers ("ANM") and American Business Media ("ABM") respectfully submit these joint reply comments pursuant to Order No. 101, Notice and Order of Proposed Rulemaking Establishing Rules for Complaints (August 21, 2008). These comments reply to two points made in the initial comments: (1) the proposals of the Newspaper Association of America concerning the allocation of the burden of proof; and (2) the proposal of Valpak Direct Marketing Systems, Inc., and Valpak Dealers' Association, Inc. that the Commission abandon its policy of appointing Public Representatives in rotation from a pool of Commission employees. We discuss each point in turn.

I. ALLOCATION OF THE BURDEN OF PROOF

NAA contends that the Postal Service should bear the ultimate burden of proof in all complaint cases under 39 U.S.C. § 3662, as well the initial burden of production with respect to challenged rates or service standards that have not yet been evaluated by the Commission in an annual compliance review proceeding. NAA Comments at 8-9.

This proposed allocation of the burden of proof, however, is contrary to the first sentence of 5 U.S.C. § 556(d), which states that “Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.” In a complaint proceeding under the 39 U.S.C. § 3662, the party seeking a Commission determination that existing rates or services are unlawful is the “proponent of” the relevant “rule or order,” and therefore bears the burden of proof. Nothing in Title 39 establishes a different allocation of the burden of proof.¹

That rates or classifications may have taken effect under 39 U.S.C. § 3622 without full-blown adversarial scrutiny does not warrant a contrary result. Section 3622 does not purport to carve out any exception to the allocation of the burden of proof established by 5 U.S.C. § 556(d). Moreover, the relatively light-handed pre-implementation review given to proposed rate changes under 39 U.S.C. § 3622(d)(1)(C) reflects the deliberate policy choices made by Congress in PAEA. Whether the pre-effectiveness review of rate changes is rigorous or light, the burden of proof shifts to the party challenging the rates once they take effect. This shift in the burden of proof depends not on the rigor of the pre-effectiveness review, but on the fact that a party seeking to overturn rates that are already in effect is the “proponent of a rule or order” within the meaning of 5 U.S.C. § 556(d).

¹ Section 556(d) clearly applies to complaint proceedings under 39 U.S.C. § 3662. 5 U.S.C. § 556(a) states that “This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section. 5 U.S.C. § 554 specifically applies, with certain exceptions not relevant here, “in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing.” 5 U.S.C. § 554(a). And 39 U.S.C. § 3663 specifically provides that Commission decisions in complaint cases shall be reviewed under the Administrative Procedure Act, 5 U.S.C. § 706, “*on the basis of the record before the Commission.*” (Emphasis added.)

NAA also gains nothing by seeking to distinguish between “lawful” rates (i.e., rates that the regulator has specifically found to be just and reasonable after an on-the-record adjudication) and “legal” rates (i.e., rates which the regulator has allowed to take effect without making a specific finding of reasonableness). NAA Comments at 6 & n. 8. Whatever the relevance of the lawful-vs.-legal distinction to postal ratemaking, the case law that established the distinction under the Interstate Commerce Act made clear that, once rates have taken effect, a complainant challenging those rates bears the overall burden of proof *regardless of* whether those rates are “lawful” or merely “legal.” See *National Association of Recycling Industries, Inc. v. ICC*, 627 F.2d 1341, 1344 (D.C. Cir. 1980) (even if the ICC approved a general rate increase based only on “the broad issue of the railroads’ need for increased revenues,” a shipper filing a subsequent complaint against the reasonableness of particular individual rates would bear the burden of proof).

The decision of the Court of Appeals in *Council of Forest Industries of British Columbia v. ICC*, 570 F.2d 1056 (D.C. Cir. 1978), is particularly instructive. The case arose from a complaint against a subset of a broad group of rate increases previously approved by the ICC in the aggregate, but not individually, to enable the railroad industry to recover the overall effects of inflation:

In theory the ICC does not consider or determine the lawfulness of particular rates in general revenue proceedings. The crucial issue in such proceedings is the need of the carriers for increased revenues, not whether any particular application of the increase is just or reasonable. Nevertheless, the effect of the ICC approval of a general increase is to *shift the burden of proof from those favoring an increase to those opposing it*. Once the general increase has been approved, specific increases within the approved limit are subject to attack only in proceedings under [former 49 U.S.C.] Sections 13(1) and 15(1) [the counterparts to 39 U.S.C. § 3662 in the 1978 version of the Interstate

Commerce Act]. This burden-shifting procedure is presumably justified by the need for quick action and the assumption that once a general need has been demonstrated most individual increases will be found just and reasonable.

Id. at 1060 (emphasis added). Assuming *arguendo* that the legal-vs.-lawful distinction applies to postal ratemaking under PAEA, *Council of Forest Industries* and similar cases demonstrate that a Commission decision allowing proposed rate changes to take effect under even the relatively light-handed standard of review established by 39 U.S.C. § 3622(d) is sufficient to shift the burden of proof to complaints that subsequently challenge such rates under 39 U.S.C. § 3662.

The undersigned parties emphasize that this general rule does not bar the Commission from shifting the initial burden of production in appropriate circumstances. In particular, a shift of the burden of proof would clearly be appropriate where the Postal Service, despite having primary or sole possession of the relevant data, failed to produce any information on a disputed factual issue, or failed to respond fully to legitimate discovery requests.

II. DESIGNATION OF INDIVIDUAL COMMISSION EMPLOYEES TO SERVE AS THE PUBLIC REPRESENTATIVE

After the enactment of PAEA, the Commission replaced its practice of generally maintaining a single, fixed Consumer Advocate in favor of a new policy of selecting Public Representatives in rotation from a pool of Commission employees. The change apparently was intended to provide for a greater diversity of perspectives and to reduce the institutional risk that the public representative could become overly insular. Valpak, in its comments, urges the Commission to abandon this reform. Valpak Comments at 7-15. Nothing in 39 U.S.C. § 505, or PAEA generally, requires this step.

Valpak relies on the language of Section 505, which provides that:

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.

39 U.S.C. § 505. Valpak reasons that this provision, by directing the Commission to designate “an officer” in “*all* public proceedings” to “represent the interests of the general public,” necessarily requires that the *same individual* play this role in each such proceeding. Valpak Comments at 9-11 (emphasis added). The most obvious flaw in this logic, however, is that what Section 505 requires the Commission to do in “all public proceedings” is merely to designate “*an* officer.” 39 U.S.C. § 505 (emphasis added).

Valpak interprets Section 505 as if it had been written as follows:

The Postal Regulatory Commission shall designate a *single individual* who shall serve as *the* officer of the Postal Regulatory Commission and who shall represent the interests of the public in all public proceedings (such as developing rules, regulations, and procedures).

This, however, is not what Congress actually enacted.

Valpak notes that 39 U.S.C. § 3662(a) provides that “an officer of the Public Regulatory Commission representing the interests of the general public” is an “interested person” who may file a rate or service complaint under Section 3662. Valpak Comments at 11-12. An obvious way for the Commission to maintain a rotating body of public representatives consistently with Section 3662(a), however, is to provide that the individual who served as the officer of the Commission in the most recent annual compliance review shall be authorized to exercise the authority of the officer of

the Commission to file complaints under Section 3662 until a successor officer of the Commission is appointed for the next annual compliance review.

Respectfully submitted,

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October 27, 2008