

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Rules for Complaints

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Docket No. RM2008-3

**VALPAK DIRECT MARKETING SYSTEMS, INC. AND
VALPAK DEALERS' ASSOCIATION, INC.
REPLY COMMENTS REGARDING PROPOSED RULES
GOVERNING THE DISPOSITION OF COMPLAINTS
(October 27, 2008)**

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

Initial comments were filed by Greeting Card Association, Newspaper Association of America, Pitney Bowes Inc., David B. Popkin, Time Warner Inc., the Public Representative, the United States Postal Service, and Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. jointly (hereinafter "Valpak"). Valpak submits these reply comments in response to initial comments filed in this docket.

I. NAA’S INITIAL COMMENTS DEMONSTRATE THAT POLICY AND FAIRNESS CONSIDERATIONS REQUIRE THE COMMISSION TO ADDRESS AND PRESCRIBE BURDEN OF PROOF RULES GOVERNING 39 U.S.C. SECTION 3662 COMPLAINT PROCEEDINGS.

A. PAEA Obligates the Commission to Address and Determine the Burden of Proof in a Complaint Proceeding.

The Newspaper Association of America’s (“NAA”) Initial Comments insightfully reveal that the proposed rules for processing of complaints under 39 U.S.C. section 3662 as enacted by PAEA contain no provisions governing allocation of the **burden of proof** between complainant and the Postal Service. *See* Comments of the Newspaper Association of America on Notice and Order of Proposed Rulemaking Establishing Rules for Complaints (“NAA Initial Comments”), pp. 4-5. Since “[t]he statute itself does not assign the burden of proof,” NAA urges the Commission **not** to follow its previous practice of **not** assigning a burden of proof in the complaint process, but, in light of the “substantial revisions to the ratemaking process and the relative roles of the Commission and Postal Service accomplished by the PAEA,” to place the “ultimate burden of proof on the Postal Service.” *Id.*, pp. 5-6.

In Order No. 101, the Commission recognized that “the PAEA [has] changed and expanded the Commission’s complaint authority,” observing that “[t]his enhancement of the Commission’s complaint authority reflects Congress’ intent for complaints to become one of the **major tools to achieve the PAEA goal of increased accountability and transparency** of the Postal Service to the public it services.” Order No. 101, p. 4 (emphasis added). Although the Commission’s proposed rules take into account the fact that “PAEA [has] altered the scope of the Commission’s complaint jurisdiction” (Order No. 101, p. 4), the Commission apparently thus far has assumed that it could fulfill its enhanced statutory duties, as it had done

under the former Postal Reorganization Act of 1970 (“PRA”), without rules allocating the burden of proof between complainants and the Postal Service.

Order No. 101 summarizes the adjudicative power **under PRA** as follows: “if the Commission found a complaint to be justified, its remedial authority consisted of issuing a public report or a recommended decision to the Governors of the Postal Service.” Order No. 101, p. 3. **Under PAEA**, however, Order No. 101 notes the following dramatic change in that power: “[t]he Commission is authorized to order the Postal Service to come into compliance with the statute and remedy the effects of any non-compliance, *see* 39 U.S.C. 3662(c), order fines for deliberate non-compliance, § 3662(d), and have the district courts of the United States enforce these administrative orders, § 3664.” *Id.*, p. 4.

In short, while under the PRA the Commission’s complaint authority was only reportorial or recommendatory, under the PAEA its authority is legally binding and judicially reviewable. It would have been helpful if Congress had addressed the burden of proof issue expressly, but since section 3662 is “silent” as to allocation of burden of proof, it is now necessary for the Commission to address and promulgate rules governing that burden in a PAEA complaint hearing. *See Schaffer v. Weast*, 546 U.S. 49, 51-56 (2005).

B. The Commission’s Rules Governing the Burden of Proof in PAEA Complaint Proceedings Must Conform to the “Ordinary Default Rule,” Subject to Certain Exceptions.

It may be possible that the Commission could fulfill minimally its statutory obligation to address and resolve burden of proof issues by waiting until they arise in litigating specific complaints. It would be preferable, however, for the Commission to take advantage of its

rulemaking power in this docket to allocate such burdens before being forced to address those issues ad hoc in a contested complaint proceeding.

Indeed, the Commission already has proposed rules governing contents of the complaint and answer (*see* proposed rules 3030.10 – 3030.14), each of which implicates proof burdens. Also, the Commission already has offered one proposed rule that tangentially addresses burden of proof issues — stating that upon “find[ing] the complaint raises material issues of fact or law [the Commission would] begin proceedings on the complaint.” *See* proposed **rule 3030.30**. However, instead of breaking the Congressional silence on how the Commission gets from the pleading stage of a complaint proceeding to the actual proceeding itself, proposed rule 3030.30 merely lays down a rule governing **sufficiency of the complaint**. It does not address, or provide for, the next step in the proceeding, namely, which party — complainant or the Postal Service — must come forward with evidence in support of allegations contained in the complaint.

As the Supreme Court recently observed, “the term ‘**burden of proof**’... encompass[es] two distinct burdens: the ‘**burden of persuasion**,’ *i.e.*, which party loses if the evidence is closely balanced, and the ‘**burden of production**,’ *i.e.*, which party bears the obligation to come forward [sometimes called the “burden of going forward”] with the evidence at different points in the proceeding.” Weast, 546 U.S. at 56 (emphasis added).

PAEA’s 39 U.S.C. section 3662 appears to contemplate two different decision points in a routine complaint proceeding:

First, subsection (b)(1)(A) requires the Commission find that a complaint “**raises material issues of fact or law**,” before beginning “proceedings on such complaint.”

Second, subsection (c) requires the Commission to find whether the complaint is “**justified.**”

However, none of the proposed rules governing the complaint process assigns to any party, with respect to either of these decision points, either the burden of persuasion or the burden of production.

According to the Supreme Court, in the absence of any directions from Congress, the Commission would “begin with the **ordinary default rule** that [complainants] bear the risk of failing to prove their claims.” Weast, 546 U.S. at 56 (emphasis added). Thus, ordinarily “the party seeking relief” would have both the burden of persuasion and the burden of production. *See id.* This ordinary rule, however, is subject to **exceptions either** (i) based upon an overall appraisal of Congressional policy indicating a contrary intent (*see Weast*, 546 U.S. at 59-60), or (ii) “based upon considerations of fairness [that dictate against] plac[ing] the burden upon a [complainant] of establishing facts peculiarly within the knowledge of his adversary.’” *See Weast*, 546 U.S. at 60.

C. The Complainant Should Bear the Burden of Proof to Show the Existence of a Material Issue of Fact or Law, Except When a Claim Is Based Upon Information and Belief.

As NAA’s Initial Comments demonstrate, the plain language of section 3662(b)(1)(A) requires a “complainant [to] show only the existence of a **material issue of fact or law.**” NAA Initial Comments, p. 3 (emphasis added). However, as NAA’s Initial Comments also demonstrate, “[n]either the statute nor the proposed rule [3030.30] requires that the complainant prove the merits of its contentions or ... that it has any particular likelihood of

success.” *Id.* Rather, it is enough that the complainant come forward with evidence to support the allegations required of a complaint by proposed rule 3030.10(a)(1)-(3) and (5).

In the event that a complaint is based upon information and belief, **the complainant** may sustain his burden of proof by coming forward with (i) such evidence as he has, together with (ii) evidence to support a claim that the necessary facts could not be reasonably ascertained, as provided in proposed rule 3030.10(a)(6). As the NAA Initial Comments explain, “[i]n most cases, **the Postal Service will hold most of the relevant information** in the form of data, documents, or other types of information ... much of which will be subject to claims of confidentiality[,] [thereby] greatly hinder[ing] the ability of a complainant to assemble facts to present to the Commission.” NAA Initial Comments, pp. 3-4 (emphasis added). In such instances, where such facts are peculiarly within the knowledge of the Postal Service, **the Postal Service** should be required to come forward with evidence that there are no material facts at issue. *See United States v. N.Y., N.H. & Hartford Railway Co.*, 355 U.S. 253, 256, n.3 (1957).

D. The Postal Service Should Bear the Burden of Persuasion that its Rates and Business Practices Are Compliant with the Law and Regulations.

According to proposed rule 3030.10(a)(2), a complainant must “identify and explain how the Postal Service action or inaction violates applicable statutory standards or regulatory requirements.” In explanation of this requirement, Order No. 101 states that it, like all of the other pleading requisites, is “designed to elicit all the information necessary for the Commission to be able to make an informed judgment about whether or not the complaint raises a material issue of fact or law under section 3662(b)(1)(A).” Order No. 101, p. 6.

Thus, complainant would have the **burden of production**, that is, **coming forward with evidence** to which he has access to support his allegations of a violation of an applicable statute or regulation — termed “**a material issue of fact or law.**” But, having done so in the complaint, when the matter proceeds to litigation before the Commission, PAEA does not, and the Commission should not, impose upon the complainant the **burden of persuasion** that such a violation has occurred.

Rather, as NAA’s Initial Comments amply demonstrate, PAEA’s overall policy of public accountability and transparency is best served by placing upon the Postal Service the **burden of persuasion** that its rates and practices are compliant with the applicable statutes and regulations. *See* NAA Initial Comments, pp. 6-8. Indeed, as Order No. 101 points out, the Commission’s enhanced complaint authority was designed not primarily to vindicate **individual interests** of the complainant, but “the PAEA goal of increased accountability and transparency of the Postal Service **to the public** it serves.” Order No. 101, p. 4 (emphasis added). Further, as Order No. 101 also acknowledges, the Commission’s enhanced complaint authority was a product of Congressional recognition that the mailing public would not have the same due process rights to participate actively in the Postal Service’s ratesetting process, as it did under PRA.

Unless the **Postal Service** has both the **burden of persuasion** and the **burden of production** to show that its rates and business practices are compliant with the law and regulations, the public interest in accountability and transparency might never be realized, the Postal Service having been granted under the PAEA a “unique informational advantage.”

Compare NAA Initial Comments, p. 8, *with* Weast, 546 U.S. at 53, 60-61. Considerations of

fairness, therefore, dictate that the “ordinary default rule” whereby a complainant would have both the burden of persuasion and production would not apply because it would place upon the complainant “the burden ... of establishing facts peculiarly within the knowledge of” the Postal Service. *See Weast*, 546 U.S. at 60.

Lastly, should the Postal Service attempt to respond to a complaint by raising an **affirmative defense**, as provided for in proposed rule 3030.14(a)(4), the Postal Service should be assigned both the **burden of persuasion** and the **burden of production**, there being no exception to the ordinary default rule that “the burden[s] lie[] ... upon the party seeking relief.” *See Weast*, 546 U.S. at 58. This allocation would be consistent with the common law rule that the burden of producing evidence and of persuasion in support of an affirmative defense is generally allocated to the same party. *See Dixon v. United States*, 548 U.S. 1, 8 (2006). Additionally, placing such burdens on the Postal Service would be commensurate with its having “information relevant to the facts” upon which its affirmative defense would be based. *See Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust Fund for Southern California*, 508 U.S. 602, 626 (1993).

II. INITIAL COMMENTS HAVE RAISED IMPORTANT QUESTIONS ABOUT USE OF AN INVESTIGATOR UNDER PROPOSED RULE 3030.21.

The Commission’s proposed rules provide for the possibility of it appointing an investigator to assist with examining issues raised by a complaint and performing some fact-finding. Proposed rule 3030.21. This issue was addressed by the Postal Service, by the Public Representative, and by NAA, which observed that the proposed rules provide little guidance

with respect to how an investigator's powers, functions, and responsibilities operate, or when and how the Commission intends to employ an investigator. *See, e.g.,* NAA Initial Comments, p. 11.

Likewise, the Postal Service suggests that “the proposed rules should provide a framework for establishing the investigator's authority and procedures, and guidelines indicating how investigators are expected to be deployed.” USPS Initial Comments, p. 6. The Postal Service proposes limiting an investigator to having contact with only one Postal Service person in every case: “The Postal Service envisions that whenever the Commission decides to deploy an investigator, he or she would first contact the Postal Service through a central contact point....” USPS Initial Comments, p. 7.

If the Postal Service's proposal were limited to the initial appointment of an investigator, it is unobjectionable. However, if it were intended to indicate that the Commission's investigator would be accompanied by a Postal Service lawyer at all times while seeking information from the Postal Service, then the same courtesy should be extended to the complainant. The Postal Service explains its proposal as one to assist the Commission in its duties, and this rationale would apply with equal force to the procedure for gathering information from the complainant.

Likewise, NAA offers suggestions and questions surrounding the “role and powers” of the Commission's investigator. Consistent with the Commission's description that “[t]he parties remain advocates for their positions...” (Order No. 101, p. 12), NAA suggests that the Commission “ensure that the investigator does not in practice derail legitimate complaints,” or that the investigator “supplant[] a complainant's control of the development and presentation of

its case.” NAA Initial Comments, p. 11. Furthermore, NAA asks whether an investigator would be able to invoke the Commission’s subpoena power and whether an investigator would be recused from the Commission’s decision-making responsibilities. *Id.*, p. 12.

Both the Postal Service and NAA raise important issues, and clarification of such issues would help parties (including the Postal Service) understand the role of an investigator if and when the Commission should appoint one. However, the Postal Service and NAA comments both assume that the Commission’s investigator has a role throughout pendency of the complaint proceeding. This view appears inconsistent with proposed rule 3030.21, which indicates it should be understood in the context of proposed rule 3030.20 — that an investigator would be used only prior to the Commission’s determination either to begin proceedings or to dismiss the complaint under proposed rule 3030.30. Proposed rule 3030.20 provides that the Commission may appoint an investigator if the Commission decides “that additional information is necessary to enable it to evaluate whether the complaint raises material issues of fact or law....” Also, the positioning of proposed rule 3030.21 prior to proposed rule 3030.30 could lead to an inference that an investigator will be used prior to the Commission’s determination to begin proceedings or dismiss the case.¹ Additionally, the Commission states that, with the assistance of an investigator, it “may be able to resolve a complaint at an early stage of the proceeding” (Order No. 101, p. 11). Therefore, if the

¹ At odds with the text of proposed rules, however, is the Commission’s discussion of proposed rule 3030.21: “If the Commission finds a complaint to be justified and remedial action appropriate, the Commission might seek the assistance of an investigator to ensure that any proposed remedial action is tailored narrowly to address the violation without causing undue or unnecessary disruption.” Order No. 101, p. 11. This particular purpose does not appear to be reflected expressly in the text of the proposed rule.

investigator is appointed prior to the Commission's finding that a complaint is sufficient, to gather "additional information" only as to the threshold issue of "material issues of fact or law," some of the points raised by the Postal Service and NAA could be mooted.

III. VALPAK AGREES THAT THE COMMISSION NEEDS TO HAVE AN OFFICER OF THE COMMISSION WHO CAN INITIATE COMPLAINTS UNDER RULE 3030.2.

The Initial Comments of David B. Popkin ("Popkin Initial Comments") note that the proposed rule says "a duly appointed officer of the Commission representing the interests of the general public may file a written complaint with the Commission." Popkin Initial Comments, p. 1. He then observes that "[s]ince the OCA has been disbanded, there is some question as to whether ... the officer of the Commission will only be appointed when **some other group** in the Commission perceives the need for filing a written complaint to serve the needs of the general public for a specific concern." *Id.* (emphasis added).

The Popkin Initial Comments explain the "Catch-22" situation created by (i) the Commission's proposed rules and (ii) its current procedures. Namely, proposed rule 3030.2 authorizes an officer of the Commission to **initiate** a complaint, whereas the Commission's current procedure is to appoint a Public Representative only **after** a docket has been opened, **following** receipt of a formal complaint. Consequently, Mr. Popkin argues that not one of the Commission's rotating Public Representatives is ever likely to have the authority to file a written complaint under proposed rule 3030.2, with the result that the interest of the general public will be ill-served. Valpak is in agreement that PAEA requires the Commission have a

permanent Public Representative, with full authority to take initiatives such as those authorized by proposed rule 3030.2. *See* Valpak Initial Comments, at 13-15.

IV. VALPAK AGREES THAT THE “MEET AND CONFER” RULES IN PROPOSED RULE 3030.10(A)(9) SHOULD BE IMPROVED.

Order No. 101 states that “the proposed rules provide the mailing public with an avenue for bringing their concerns to **appropriate** Postal Service personnel.” (*Id.*, p. 11, emphasis added.) Initial comments by three parties — the Postal Service, the Public Representative, and David B. Popkin — all raise issues with the proposed “meet and confer” rule as it is contained in proposed rule 3030.10(a)(9).

The Initial Comments of the Postal Service note that the Postal Service has “nearly 700,000 postal employees [who] may have participated [or conferred with complainant].” USPS Initial Comments, p. 2. The Postal Service argues that the complaint should include copies of correspondence between the complainant and the Postal Service. The Postal Service’s recommendation about including copies of correspondence makes sense, but it still does not solve the problem of the “meet and confer” requirement with **appropriate** Postal Service personnel.

The Initial Comments of the Public Representative state that:

from the standpoint of the general public, the requirement [of Section 3030.10(a)(9)] **is vague** and may lead to misunderstandings **as to the extent of the effort necessary to meet and confer** ... it would be helpful to individuals who may be filing complaints, but who are unfamiliar with the Postal Service’s organization, if the rules provide some guidance as to the level of management and the type of locations where one is expected to contact the Postal Service to meet and confer. More

useful would be **the designation of a contact point** by the Postal Service for those persons seriously considering filing a complaint. [Public Representative’s Initial Comments, pp. 2-3 (emphasis added).]

Valpak agrees with the Public Representative on this issue. Since the Commission’s stated purpose for the “meet and confer” rule is to foster settlement at any time, but especially before involving the Commission and opening a formal complaint docket,² it clearly would be helpful in achieving the stated objective for would-be complainants to be directed to persons within the Postal Service who have authority to deal with and settle such matters. It appears likely that the Postal Service, in its own self-interest, might take this reasonable step of designating a responsible official even if there were no Commission rule requiring it. Nevertheless, it would seem an eminently sensible requirement in any event.

V. VALID COMPLAINTS MUST BE TREATED AS COMPLAINTS, NOT “RATE OR SERVICE INQUIRIES.”

The Commission apparently anticipates receiving a number of communications, some (perhaps the vast majority) of which will not fulfill the “form and manner” requirements for complaints, and which, therefore, cannot be construed as complaints filed under section 3662. “The Commission believes also that its enhanced authority under the PAEA may encourage more individuals to seek the Commission’s assistance in resolving their issues with the Postal Service.” Order No. 101, p. 11. At the same time, section 3662 gives the Commission the

² “The proposed rule [3030.10] ... requires an attempt to resolve the complaint **before involving** the Commission.” (Order No. 101, p. 14.) “The Commission believes that its policy favoring settlement is important and should be in a separate rule [3030.40] to emphasize its importance....” (*Id.*, p. 15.)

authority only to deal with complaints. The Commission would handle those “non-compliant” communications as “rate or service inquiries” according to Order No. 101. In an attempt to be responsive to such rate or service inquiries, the Commission has devised a procedure for referral to the Postal Service that is somewhat akin to the “meet and confer” rule in proposed rule 3030.10(a)(9), but which has no authorization or support in section 3662.³ See Valpak’s Initial Comments, pp. 16-20.

The potential mischief that can arise under the proposed “two-tier” system is illustrated by the Public Representative’s Initial Comments, which state that:

If the complaint relates to a rate or service issue and applies to an individual, then only after the filing may the Commission determine, *sua sponte*, to treat the complaint as an inquiry where the initial filing requirements are more limited. [Public Representative Initial Comments, p. 2.]

The Public Representative cites no statutory authority that would enable the Commission, on its own initiative, to downgrade a properly filed complaint to the lower status of an “inquiry” without any kind of hearing or finding. However, once a party has fulfilled the Commission’s form and manner requirements for filing a complaint, the Commission then has a duty under section 3662 either to begin proceedings or dismiss the complaint if it does not raise one or more material issues of fact or law.

Further, the Public Representative cites no statutory authority for the Commission to exercise oversight of a “rate or service inquiry” which did not rise to the level of a complaint.

³ “Additionally, these proposed rules are intended to provide for some residual remedy for mailers in the potential situation where the Postal Service does not adequately deal with mailers’ individual concerns.” Order No. 101, p. 5.

Lastly, Time Warner Inc.’s Initial Comments demonstrate how the existence of a two-tier system — where the Commission can simply decide to treat a valid complaint under PAEA as a “rate or service inquiry” — could lead the Commission into error. Time Warner urges the Commission to husband its resources by using a standard for discriminating between those complaints that merit a hearing from those which do not — “rely[ing] on the discretion of the Commission in performing this triage function.” Time Warner Inc. Initial Comments, pp. 4-5. However, PAEA addresses the requirement for a complaint; if the Commission were to follow Time Warner’s lead and exercise discretion to disregard valid complaints, it would act without authority, in conflict with PAEA’s requirements.

In supporting an unlimited discretionary standard, Time Warner cites the statutory “requirement that a sum of at least \$75,000 be in dispute in order to invoke the civil diversity jurisdiction of the federal courts. *See* 28 U.S.C. § 1332(a).” Time Warner Inc. Initial Comments, p. 5, n.1. Indeed, Congress had the authority to require that “\$75,000 be in dispute” in diversity cases, and Congress had the authority to impose such a threshold requirement on complaints, as it did when it required “material issue of fact or law” as the threshold.⁴ When that standard is met, PAEA requires the Commission to handle the complaint as such, and not, in its discretion, disregard it.

⁴ The statute limits the Commission to considering only those complaints that raise “material issues of fact or law” as to violations of specified statutes. *See* 39 U.S.C. § 3662(b)(1)(A)(i).

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