Affairs, Office of Management & Budget, New Executive Office Building, NW., Room 10235, Washington, DC 20503.

Steven R. Cohen,

Acting Director.

[FR Doc. 01–7385 Filed 3–23–01; 8:45 am]

BILLING CODE 6325–40–P

POSTAL RATE COMMISSION

[Docket No. C2001–1; Order No. 1307]

Notice and Order on Complaint Concerning Sunday and Holiday Mail Collections

AGENCY: Postal Rate Commission.

ACTION: Notice and order on complaint docket no. C2000–1.

SUMMARY: This document addresses a complaint and related motion practice concerning Sunday and holiday mail collections. It established deadlines for certain actions. It also addresses other aspects of the filing.

DATES: Notice and order issued March 20, 2001; complainant's filing due April 3, 2001; participants' responses due April 10, 2001.

ADDRESSES: Send filings to the attention of Steven W. Williams, acting secretary, 1333 H Street NW., suite 300, Washington, DC 20268–0001.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, 202–789–6820.

SUPPLEMENTARY INFORMATION:

Authority to Consider the Complaint 39 U.S.C. 3662

Background

On October 27, 2000, Douglas F. Carlson filed a complaint with the Commission pursuant to 39 U.S.C. 3662, rate and service complaints, alleging that the Postal Service has made changes to the nature of mail service without first seeking an advisory opinion from the Commission as required by section 3661(b).[1] He alleges that the Postal Service has made changes to the nature of mail service on either a nationwide or a substantially nationwide basis by eliminating: (1) Sunday collection and processing of outgoing First-Class Mail; (2) processing of outgoing First-Class Mail on several holidays; and (3) normal mail collections on Christmas eve and possibly on New Year's eve. As a second basis to sustain his section 3662 complaint, Carlson further alleges that the current level of Sunday, holiday, Christmas eve, and New Year's eve service does not conform to the requirements delineated in the Postal Service's postal operations manual (POM).

Carlson requests that the Commission issue a public report documenting the alleged Postal Service's noncompliance with collection and outgoing mail processing on Sundays, holidays, Christmas eve, and New Year's eve as delineated in the POM. Furthermore, he requests that the Commission consider conducting a hearing to determine: (1) The extent to which the Postal Service provides collection service on Christmas eve and New Year's eve; (2) the extent to which customers have access to collection and processing of outgoing First-Class Mail on holidays; and (3) whether the Postal Service provides adequate postal services within the meaning of section 3661(a) when customers do not have access to outgoing First-Class Mail service on Sundays, holidays, or for any two consecutive days.

Postal Service Answer and Motion to Dismiss

On November 27, 2000, the Postal Service filed an answer to the Complaint concurrent with a motion to dismiss.[2] The answer demonstrates considerable agreement as to the events that have occurred, but disagreement in interpreting these events as they relate to the requirements of the Postal Service. Procedurally important, the Postal Service acknowledges that it did not seek advisory opinions for any of the three service changes alleged by Carlson. The facts that follow briefly describe the Postal Service's position on Sunday, holiday, and holiday eve service, and the significance of the POM.

The Postal Service admits that Sunday collection and outgoing mail processing were eliminated effective February 14, 1988. The Service specifically denies that an advisory opinion was required to take this action. The Service acknowledges that this policy change was never incorporated into the POM. However, the Service states that the POM is in the process of being amended to reflect the current policy.

The POM discusses Sunday and holiday collections ''to ensure that the mail will connect with dispatches of value * * *.'' Specifically for Sunday collections, the Postal Service alleges that there are no longer dispatches of value because outgoing mail processing does not occur on Sundays. Therefore, the Postal Service infers that the POM does not require Sunday collections. Answer at 4–12.

The Service concedes that in the 1970s and early 1980s it tended to do more processing of outgoing mail on holidays than it does now. The Service states that collection and outgoing mail processing tend not to be done on several widely observed holidays, and outgoing mail processing is now rare on Christmas day and New Year's day. However, the Service denies outgoing mail processing has been phased out over time. If a holiday occurs on a Monday, the Service admits that there may be two consecutive days without collections or outgoing mail processing.

The Postal Service acknowledges instances of Christmas eve, and possibly New Year's eve, final collections occurring prior to the times posted on the collection boxes, and that customers were not given prior notice that this would happen. However, the Postal Service notes that the POM allows the Service to make exceptions to the specific level of service provided. The Service denies that service exceptions were not granted, as alleged by Carlson.

The Postal Service notes that the POM allows exceptions to be made to holiday and holiday eve service levels. There is evidence that the POM and the Domestic Mail Manual (DMM) exception provisions are in conflict. However, the Service denies the allegation that the provisions in the POM control the provisions in the DMM. The Postal Service also contends that the POM is not intended to be relied upon by the general public.

The Postal Service separately discusses allegations of providing service inconsistent with the POM, Sunday collections, and holiday and holiday eve collections as part of the motion to dismiss as allowed by rule 84(b)–(c). The Service first states that the provisions of the POM ''are not necessarily commensurate with the policies of the [Postal Reorganization] Act.'' It then asserts that the complaint fails to allege that the complainant is not receiving postal services in accordance with the policies of title 39. From this, the Postal Service concludes that the allegations regarding the POM are outside the scope of section 3662 and should be dismissed. In conjunction with the above argument, the Postal Service argues that the Commission lacks jurisdiction to entertain a complaint, such as the instant complaint, which does not allege that

[1] Douglas F. Carlson complaint on Sunday and holiday collections, filed October 27, 2000 (complaint).

[2] Answer of the United States Postal Service and motion to dismiss, filed November 27, 2000 (answer).

the service provided is not in accordance with the policies of title 39.[3] Answer at 12–13.

The Postal Service indicates that it is amending the POM to eliminate the discrepancies from actual practice cited in the complaint. Thus, there is no need to pursue analysis of this situation because it will soon cease to exist. The Postal Service alleges that the complaint overstates the significance of the POM provisions cited by blurring the distinction between collection and mail processing. Furthermore, the complaint does not cite any provision of the POM that mandates a level of outgoing mail processing on Sundays, holidays, Christmas eve and New Year's eve. Id. at 13–14.

The Postal Service requests that the Commission dismiss the portions of the complaint regarding the elimination in 1988 of Sunday collections and outgoing mail processing. The Service argues that common sense principles of equity and laches suggest that 13 years is an inordinate amount of time to wait before bringing this matter before the Commission. It summarizes that there would be no practical utility in reviewing this history at this time. In addition, the Service argues that its actions were reasonable under the circumstances, and its ability to expediently comply with the Omnibus Budget Reconciliation Act of 1987 (OBRA) legislation with the least possible harm to the mailing public would have been frustrated by first having to seek an advisory opinion. Id. at 14–16.

The Postal Service argues that the holiday and holiday eve collection issues are generally temporary and local in nature, and do not rise to the level of a nationwide change in service. Because this is an ''individual, localized, or temporary service issue not on a substantially nationwide basis,'' the Service concludes that this issue should not be considered by the Commission and thus, dismissed. Furthermore, the Service states that it needs the latitude to assess local conditions and adjust its operations accordingly. Id. at 16–18. In summation, the Postal Service concludes that the complaint fails to raise a matter of policy to be considered by the Commission, and, citing the requirements of section 3662, as implemented by rule 82, therefore should be dismissed.

Carlson Motion for Extension of Time

The deadline for filing answers to the Postal Service motion to dismiss passed on December 4, 2000. On December 7, 2000, Carlson filed a motion for extension of time to answer the Postal Service motion.[4] Carlson requested a deadline of December 11, 2000 to serve an answer on the Postal Service, and estimated three additional days for delivery of the associated document. The Carlson response to Postal Service motion to dismiss was subsequently filed on December 14, 2000. The Postal Service does not oppose this request, and the late filing will not prejudice any interested party. The Commission grants the Carlson motion for extension of time in as far as allowing the late filing of the Carlson response.[5]

Carlson Response to Motion to Dismiss

Carlson filed a response in opposition to the motion to dismiss on December 14, 2000.[6] Carlson states that his Complaint is brought pursuant to section 3662 which allows interested parties who believe that they are not receiving postal services in accordance with the policies of title 39 to lodge a complaint with the Commission. He cites the alleged failure of the Postal Service to provide the level of service delineated in the POM and failure of the Postal Service to seek an advisory opinion when changing its policy on collections as the bases for arguing that postal customers are not receiving postal services in accordance with the policies of title 39.

To support his argument based on the POM, Carlson traces the requirements of the Act to the promulgation of the rules and regulations delineated in the POM. From this, Carlson infers that the POM contains the Postal Service's rules and regulations establishing an efficient system of collecting mail. Therefore, he concludes, a customer not receiving collection service as set forth in the POM is not receiving postal services in accordance with the policies of the Act, and may file a complaint. Response at 4–5.

The second basis used by Carlson to show that postal customers may not be receiving postal services in accordance with the policies of title 39 is through an alleged violation of a provision of the Act. Section 3661(b) requires the Postal Service to seek an advisory opinion under specific circumstances when it decides to change the nature of a postal service. If the Postal Service does not request an advisory opinion when required, Carlson concludes that a complaint may be filed. Id at 4–5.

The response also provides rebuttal to many of the allegations made by the Postal Service in the answer. Id at 5–19. This material will not be reviewed here, but will be drawn upon as necessary in the Commission's analysis of the Postal Service motion to dismiss.

Subsequent Motion Practice

The Postal Service filed a motion for leave to reply to alleged misstatements of material fact and an erroneous standard for initiating a proceeding contained in Carlson's answer.[7] This motion is granted. The Postal Service reply was received on December 26, 2000, and will be considered.[8] The USPS Reply contains additional argument on the statutory requirements for initiating a complaint, and on the approximately 12-year delay in initiating a complaint regarding Sunday service. The Postal Service also argues the distinction between the policy of discretion over the level of holiday service and the policy of curtailing holiday service.

[3] The Service cites PRC order no. 1088 as support for the premise that the Commission lacks jurisdiction to enterain complaints which fail to allege that the service provided is not in accordance with the policies of title 39. In PRC order no. 1088, the Commission ruled that the violation of a criminal statute, 18 U.S.C. 1721, did not fall within the scope of 39 U.S.C. 3662. The Service's interpretation is much broader than what was actually stated in that order. In the instant complaint, the service provided (or not provided), collection and processing of mail, is within the scope of section 3662.

[4] Douglas F. Carlson motion for extension of time to respond to Postal Service motion to dismiss, filed December 7, 2000.

[5] Historically, the Commission liberally grants reasonable extensions of time to file documents when no party is prejudiced by such an extension. Recognizing this practice, participants should note that the requirement to observe the ''filing date'' of a document is an integral part to many of the Commission's rules. Motions for extensions of time that request the Commission to wave a filing date requirement and replace it with a service date requirement, without more, do not adequately reflect the requirements of the Commission's rules. Therefore, in as far as the Carlson motion requests the observance of a service deadline, the motion is denied.

The expected filing date is described in Carlson's motion. This date was met. The Commission will consider the Carlson motion as a motion for extension of time with a requested filing deadline of December 14, 2000.

[6] Douglas F. Carlson answer in opposition to Postal Service motion to dismiss, filed December 14, 2000. Douglas F. Carlson answer in opposition to Postal Service motion to dismiss—erratum, filed December 20, 2000. Douglas F. Carlson answer in opposition to Postal Service motion to dismiss—erratum, filed January 7, 2001. (Response).

[7] Motion of the United States Postal Service for leave to reply to Douglas F. Carlson answer in opposition to Postal Service motion to dismiss, filed December 26, 2000.

[8] Reply of the United States Postal Service to Douglas F. Carlson answer in opposition to Postal Service motion to dismiss, filed December 26, 2000 (USPS reply).

Carlson's final reply was received on January 7, 2001.[9] This reply provides additional argument and reiterates the basis of the complaint. This additional pleading is also accepted and will be considered.

Commission Analysis

This Complaint is brought pursuant to rate and service complaints, 39 U.S.C. 3662. The subject of the complaint is Sunday, holiday, and holiday eve service. It does not involve rate issues, or subchapter II, permanent rates and classes of mail, issues. The applicable part of section 3662 states:

> Interested parties * * * who believe that they are not receiving postal service in accordance with the policies of this title may lodge a complaint with the Postal Rate Commission in such form and in such manner as it may prescribe.

39 U.S.C. 3662. Thus, to sustain a complaint, the complainant must show (1) that the complainant is receiving (or not receiving) the service in question, and (2) a belief that the service in question is not in accordance with the policies of the Act.

The Postal Service argues that the complaint fails to allege that the complainant is not receiving postal services in accordance with the policies of the Act. Answer at 12–13. Carlson replies that he has demonstrated a clear belief that he is not receiving the services in question. He states that he is not receiving outgoing mail collection and processing on Sunday, he has given examples of failure to provide holiday outgoing mail processing in an area that he has lived, and he states that the curtailment of holiday eve service could affect anyone traveling through the affected areas. Response at 5–7.

The Commission finds the complaint sufficiently alleges the complainant is not receiving the services in question. Although the Complaint fails to state specifically that Carlson is not receiving the services in question, it is also clear from the complaint that no one, including Carlson, is receiving Sunday collections and outgoing mail processing. The complaint also demonstrates a sufficient personal nexus to the holiday and holiday eve service issues. The holiday service issue allegedly has occurred in an area in which Carlson resided, and the nature of the holiday and holiday eve service issues logically may affect a broad spectrum of mailers, including Carlson. Finally, the allegations surrounding the holiday and holiday eve issues may indicate, upon further examination, that these service issues approach the nationwide magnitude of the Sunday collection and outgoing mail processing allegations, where no mailer is receiving the services in question.

Once the complainant shows that he is receiving (or not receiving) the service in question, he must then demonstrate a belief that the service in question is not in accordance with the policies of the Act. Carlson attempts to demonstrate this belief using two separate arguments. One argument, although loosely based on the Postal Service requirement to develop and promote adequate and efficient postal services, section 3661(a), is more accurately characterized as based on the Postal Service's alleged failure to seek an advisory opinion as required by section 3661(b). The other argument is based on the Postal Service not conforming its actual service practice to the specifications delineated in the POM.

Carlson's argument that the Postal Service's failure to seek an advisory opinion as required by section 3661(b) is sufficient to demonstrate a reasonable belief that the services in question are not in accordance with the policies of the Act is examined first. The question before the Commission in the motion to dismiss becomes whether a section 3662 rate and service complaint is sustainable based upon the Postal Service's alleged failure to follow a procedural provision of the Act, specifically section 3661(b).[10] The Commission has previously stated: ''[T]o the extent that the section 3662 complaint mechanism has been viewed as a remedial supplement to the review of substantially nationwide service changes required under section 3661, consideration of a Postal Service action purportedly in violation of section 3661 in a complaint proceeding appears compatible with the statutory scheme of the Reorganization Act.'' Order no. 1239 at 14 (footnote omitted). Although that order viewed this contention as a novel approach, the conclusion was that a complaint may be heard on this basis.

The Commission finds that to properly exercise its discretion and hear a complaint under this basis, the section 3662 ''belief'' that the complainant is not receiving postal services in accordance with the policies of the Act must be reasonable, and not merely a naked assertion. The complainant does not have to ''prove'' a violation of the statute. An opportunity to develop evidence and make a case is provided if the complaint is heard. In the instant complaint, to determine if the belief is reasonable the Commission must consider whether the complainant has at least made a colorable claim alleging a violation of section 3661(b).[11]

The starting point is a review of the requirements of section 3661(b). Section 3661(b) states:

> When the Postal Service determines that there should be a change in the nature of postal services which will generally affect service on a nationwide or substantially nationwide basis, it shall submit a proposal, within a reasonable time prior to the effective date of such proposal, to the Postal Rate Commission requesting an advisory opinion on the change.

The statute places the burden upon the Postal Service to determine whether to request an advisory opinion from the Commission when it is contemplating a change to a service. To make this determination, the Postal Service must resolve two factual issues. First, does the change involve a change to the nature of a postal service, and second, does the change generally affect service on a nationwide or substantially nationwide basis? If both factual conditions exist, the Postal Service must submit a proposal requesting an advisory opinion from the Commission, prior to the effective date of such proposal.

The pleadings show that the Postal Service has not requested an advisory opinion on alleged changes to either Sunday, holiday or holiday eve service. The Postal Service admits to the elimination of Sunday collection and outgoing mail processing. This arguably rises to the level of a ''change in the nature of postal services which will generally affect service on a nationwide or substantially nationwide basis.''

Carlson and the Postal Service differ on whether the holiday and holiday eve service concerns rise to the level of a change in the nature of a postal service, or of the nationwide or substantially nationwide applicability of the actual service levels. The Postal Service raises a factual dispute as to whether local offices are exercising discretion on holiday and holiday eve service levels

[9] Douglas F. Carlson response to Postal Service reply to answer in opposition to motion to dismiss, filed January 7, 2001 (Carlson reply).

[10] A purpose of section 3661(b) is to provide the opportunity for public input to inform a review of the policy requirement that ''the Postal Service shall develop and promote adequate and efficient postal services,'' section 3661(a), whenever the Postal Service seeks to change the nature of a postal service which will generally affect the service on a nationwide or substantially nationwide basis.

[11] The Commission finds that a colorable claim standard is appropriate to screen out complaints without merit. A higher standard would not be appropriate because it may require the Commission to hear evidence on the complaint prior to ruling on the initial motion to dismiss. In many cases, such a ruling may also be conclusive as to the outcome of the complaint.

or, as Carlson alleges, it has in fact instituted a de facto policy change in the nature of a postal service. There is also disagreement as to the nationwide or substantially nationwide applicability of Carlson's allegations. In the opinion of the Commission, Carlson has provided sufficient basis to make a colorable claim as to whether the Postal Service should have requested an advisory opinion pursuant to section 3661(b). Because Carlson has made a colorable claim of a substantially nationwide change in service, the Complaint is sustainable on this basis.

Carlson's second argument, based on the POM, attempts to establish a direct relationship between the POM and the policies of the Act. To summarize, Carlson alleges that the provisions of the POM flow from the policies of the Act. Therefore, if the Postal Service is not providing the level of service delineated in the POM, it is not providing the level of service required by the policies of the Act. Separately for each service in question, he alleges that the Postal Service is not providing the level of service delineated in the POM. Therefore, he concludes, the Postal Service is failing to provide the level of service that the policies of the Act require. The Postal Service argues that the provisions of the POM are not necessarily commensurate with the policies of the Act. For this reason, including the contention that Carlson did not allege that he was not receiving the services in question (discussed above), the Postal Service argues that the Complaint should be dismissed. Answer at 12.

The Commission generally concurs with the Postal Service that various provisions of the POM may not necessarily rise to the level of interpreting or implementing a policy of the Act. The significance of the POM in relation to the policies of the Act can only be determined after examining the specific provisions of the POM and the related policies of the Act, in conjunction with the surrounding facts of the allegation. The Commission is not attempting to diminish the significance of the POM, but only trying to put its significance in proper perspective. There are many instances where examining the POM could provide valuable insight into the Postal Service's interpretation of a specific policy of the Act. The Postal Service providing service inconsistent with provisions of the POM is not conclusive to answering whether the Postal Service is providing service inconsistent with the policies of the Act.

However, as described above, the Complainant demonstrates a reasonable belief that the service in question is not in accordance with the policies of the Act. The failure to obtain an advisory opinion, when required by section 3661(b), indicates that the service in question might not be in accordance with the policies of the Act. Once a party has demonstrated a proper basis for bringing a complaint, the Commission is given discretion on whether or not to hear the complaint. The statute simply states: ''The Commission may in its discretion hold hearings on such complaint.'' 39 U.S.C. 3662.

The Commission adopted a rule to guide it in determining when to apply its discretion to hold hearings, as granted in section 3662, which states in part:

> The Commission shall entertain only those complaints which clearly raise an issue concerning whether or not rates or services contravene the policies of the Act; thus, complaints raising a question as to whether the Postal Service has properly applied its existing rates and fees or mail classification schedule to a particular mail user or with regard to an individual, localized, or temporary service issue not on a substantially nationwide basis shall generally not be considered as properly raising a matter of policy to be considered by the Commission.

39 CFR 3001.82. This empowers the Commission to entertain complaints raising rate and service issues that contravene the policies of title 39 and that have nationwide implications. The Commission generally considers that the following types of complaints are not a matter of policy that have nationwide implications and thus, will not be entertained: (1) Whether the Postal Service has properly applied its existing rates and fees or mail classification schedule to a particular mail user, or (2) complaints with regard to an individual, localized, or temporary service issue.

Carlson's allegations, if proven, certainly may rise to the level of clearly contravening the policies of title 39. The level of service issues have substantially nationwide implications. The Sunday service issue occurs on a nationwide and not on an individual, localized, or temporary basis. Finally, there is a sufficient allegation that the holiday and holiday eve service issues may occur at least on a substantially nationwide basis and are not localized or temporary in nature. Rule 82 does not provide sufficient cause to dismiss this complaint. However, the Commission will exercise its prerogative and examine other factors to determine whether to exercise discretion to hear various aspects of the instant complaint.

Commission's Discretion on the Sunday Service Issue

The Postal Service presents three arguments for dismissing the Sunday service section of the complaint that the Commission considers in exercising its discretion on whether to hear this portion of the complaint. The Service states that more than 12 years have passed since it eliminated Sunday collections and outgoing mail processing. Because such a long time has passed, the Postal Service argues that equity and laches dictate that the Commission should exercise its discretion and dismiss this part of the complaint. Second, the Postal Service alleges that it acted reasonably under the circumstances. The Service states that it had to rapidly respond to the requirements of the OBRA in a way that would cause the least inconvenience to the mailing public. Thus, an advisory opinion would have been a meaningless gesture. Therefore, this section of the complaint should be dismissed. Finally, the Service argues that the complaint should be dismissed because there is no practical purpose to dredging up ancient history. Answer at 14–16.

Carlson succinctly states that the Postal Service has provided no legal authority in support of its decision to bypass the requirements of section 3661(b). Carlson reply at 18. The Commission agrees. Eliminating one out of the possible seven days for collection and mail processing reduces mail service, and this appears to be a change in the nature of a postal service.[12] The effect that this has had on postal customers can only be speculated. The level of service change has unquestionably occurred at the national level. The statute does not provide for exceptions to seeking an advisory opinion, and in fact contemplates that changes may be made before the section 3661 proceeding is concluded. Therefore, the Commission must conclude that the Postal Service was required, but failed, to seek an advisory opinion as required by section 3661(b)

[12] There is no bright line for determining when a reduction in collection and mail processing service is a change in the nature of a postal service. A one out of seven day reduction appears to be a substantial reduction. However, the Commission recognizes the possibility that the Postal Service might have been able to show that this reduction had only a minor impact on the actual nature of the postal service. A timely and properly instituted section 3661(b) proceeding would have allowed for public participation and the development of a record on the impact that this change would have on mailers. If the impact was more substantial than first assumed by the Service, alternatives to comply with the OBRA could have been considered.

prior to implementing this change in the level of Sunday service.

However, the Postal Service's failure to seek an advisory opinion is not the only consideration. The Commission agrees with the Postal Service argument that there is no practical benefit to reviewing a policy change that occurred more than 12 years ago. There is little relevance in discussing the impact that this service change would have on mailers, when mailers have been operating under this level of service for more than 12 years.[13] Carlson does not allege any benefit to reinstituting 7-day a week collection and mail processing, nor does he allege any detriment caused by the current 6-day a week collection and mail processing service level. Furthermore, the Commission is not aware of any timely anecdotal or mailer initiated discussions concerning the sufficiency of the current level of service. For these reasons, the Commission shall exercise its discretion and grant the Postal Service motion to dismiss in the area of Sunday service.

Commission's Discretion Concerning the POM

Carlson makes a logical argument that relates the provisions contained in the POM to the policy requirements of the Act—up to a point. The persuasiveness of the argument becomes weak in two areas. First, Carlson's argument does not account for the relationship between the Postal Service and the Commission. This relationship is similar to a partnership. Each partner has explicit responsibilities of their own, plus a vast area of responsibilities that both partners share to some varying degree. The POM is a Postal Service generated and maintained document. It is an ''internal'' document to the extent that the POM is used by the Postal Service to explain its policies, regulations or procedures to its employees.[14]

Second, failure to follow a provision of the POM is not per se conclusive in determining that the Postal Service has failed to follow a policy of the Act. There are provisions of the POM that may be very significant in relation to the policies of the Act. The procedure contained in Discontinuance of Post Offices, section 123.6, is an example of a provision that has a strong relationship with the policies of the Act. Other provisions have varying degrees of significance. A determination of a provision's significance requires a thorough examination of the specific POM provision, the specific policy requirement, and the surrounding facts of the specific case.

However, focusing on the POM, in this case, may do little more than highlight inconsistencies between a Postal Service document, and actual policy and practice. A more prudent focus would be on the sufficiency of the Postal Service's actual policies and practice.

The POM is often useful to explain how an actual Postal Service policy, regulation or procedure relates to provisions of the Act. The POM may be used as evidence of the Postal Service's intent, interpretation or implementation of that policy, regulation or procedure. The Postal Service needlessly places itself in a precarious position when an internal manual, such as the POM, and the actual Postal Service policy or procedure, do not correspond. This may require the Postal Service to explain its actual policy, regulation or procedure, and why the actual policy, regulation or procedure does not correspond to its written documentation.

Commission's Discretion Concerning Holiday and Holiday Eve Service

What remains of the instant complaint are the holiday and holiday eve service issues based on the Postal Service's alleged failure to seek an advisory opinion as required by section 3661(b). The determination that Carlson has at least made a colorable claim that the Postal Service has violated section 3661(b) is discussed above. This allowed the section 3662 complaint to proceed to this stage. The remaining determination is whether the Commission will exercise its discretion to hear this portion of the complaint.

As a preliminary matter, the Commission considers whether the Postal Service policy on holiday and holiday eve service levels is clear and understandable, or is it likely to cause confusion to the mailing public. It may reasonably be argued that the policies of the Act include the requirement that the public be adequately and clearly informed of what postal services are available, and also of when existing services are to be discontinued. At this point in the proceeding, the Commission does not have an adequate record describing the Postal Service policy as to holiday and holiday eve service, and as to whether that policy has recently been changed. The existing policy may be ambiguous, and possibly confusing to the mailing public. Complainant should be given the opportunity to fully develop a record on this issue. Therefore, the Commission denies the Postal Service request to dismiss this portion of the complaint.

Because the Commission has decided to hear this portion of this complaint, the final section of section 3662 provides direction as to the appropriate course of action. It states,

> If a matter not covered by subchapter II of this chapter is involved, and the Commission after hearing finds the complaint to be justified, it shall render a public report thereon to the Postal Service which shall take such action as it deems appropriate.

39 U.S.C. 3662. This statement applies to all section 3662 issues that are not related to permanent rates and classifications. It directs the Commission to hold hearings of an unspecified degree of formality. See 39 CFR 3001.85–86. Section 3662 acts to limit the authority of the Commission to rendering a public report to the Postal Service on its findings. Further, it allows the Postal Service the discretion to take such action as it deems appropriate on the findings in the public report.

Although the Commission has agreed to hear this portion of the complaint, it finds it necessary to frame the issues in such a way to ensure that an adequate record will be developed. This is done to increase the probability that a final report will be beneficial to the Postal Service, the Complainant, and the mailing public.

The Commission would like to determine whether current Postal Service policy is clear, concise, and not deceptive to the mailing public. The first issue that the Commission would like to resolve is whether postal customers are adequately informed when the Postal Service temporarily or permanently modifies its holiday and holiday eve collection and mail processing schedules. This includes the issue of mail collections occurring prior to the time indicated on the collection receptacle. Accurately informing the mailing public of Postal Service policy is important. The failure to accurately inform the public of a policy has the potential to rise to a failure or denial to provide a particular service.

The second issue is to determine the actual Postal Service policy on holiday and holiday eve collection and mail processing. This includes an examination of the Postal Service's alleged policy of ''exceptions'' or ''discretion'' and whether the exception, or frequent use of discretion, has effectively changed stated policy. The

[13] The passage of time may properly be considered in exercising discretion to hear a service related complaint. In contrast, the passage of time would have considerably less influence on a rate-related complaint where the complainant alleged that a rate is ''illegal,'' because the passage of time would be unlikely to cure the illegal rate.

[14] The term ''internal'' is not meant to infer that the POM is in any way privileged, or cannot be used as evidence of a Postal Service policy, regulation or procedure.

exceptions or discretion topic also should include exploration of what are the decision-making criteria, and at what levels are the decisions implemented at, i.e., national, regional, local, or facility specific. Discussion of all issues will be aided by developing a record of the historical trends that have occurred in holiday and holiday eve service levels.

The Commission does not contemplate consideration at this time of whether the level of holiday and holiday eve service is adequate under section 3661(a). Carlson has not made a specific allegation that these service levels are not adequate. As with the Sunday service issue, the Commission is not aware of any timely anecdotal or mailer initiated discussions concerning the sufficiency of the current level of service. However, the complainant will be given the opportunity to modify his complaint and make this allegation if he is going to enter evidence in support of an allegation that holiday and holiday eve service levels are not adequate. This opportunity is granted to curtail the possibility of a future complaint that would necessarily cover much of the same territory that will be covered in the instant complaint.

The burden is on the complainant to go forward with the case. The first action that must occur is for the complainant to inform the Commission of the time required to develop his case. This includes several items. First, the complainant shall inform the Commission if he is going to modify his complaint, as stated above, and if so, the date when this filing will be made. Second, the complainant shall state the number of days requested for discovery. Third, the complainant shall indicate the nature of the presentation he expects to make in support of this complaint. The complainant shall provide the Commission with the information requested by April 3, 2001. At this time, the complainant should submit any other requests for time along with a description of the contemplated task. Other participants may respond regarding this filing by April 10, 2001.

Representation of the General Public

In conformance with 39 U.S.C. 3624(a), the Commission designates Ted P. Gerarden, director of the Commission's office of the consumer advocate (OCA), to represent the interests of the general public in this proceeding. Pursuant to this designation, Mr. Gerarden will direct the activities of Commission personnel assigned to assist him and, when requested, will supply their names for the record. Neither Mr. Gerarden nor any of the assigned personnel will participate in or provide advice on any Commission decision in this proceeding. The OCA shall be separately served with three copies of all filings, in addition to and contemporaneous with, service on the Commission of the 24 copies required by rule 10(d). 39 CFR. 3001.10(d).

Ordering Paragraphs

It is ordered:

1. The unopposed Douglas F. Carlson motion for extension of time to respond to Postal Service motion to dismiss, filed December 7, 2000, is granted.

2. The unopposed motion of the United States Postal Service for leave to reply to Douglas F. Carlson answer in opposition to Postal Service motion to dismiss, filed December 26, 2000, is granted.

3. The motion to dismiss included with the answer of the United States Postal Service and motion to dismiss, filed November 27, 2000, is granted in part, and denied in part, consistent with the body of this ruling.

4. The Carlson filing providing the information requested in the body of this ruling concerning going forward with this case is due by April 3, 2001. Other participants may respond regarding this filing by April 10, 2001.

5. Ted P. Gerarden, director of the office of the consumer advocate, is designated to represent the general public in this proceeding.

6. The acting secretary shall arrange for publication of this notice and order in the **Federal Register**.

By the Commission.

Steven W. Williams,

Acting Secretary.

[FR Doc. 01–7439 Filed 3–23–01; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 24895; 812–2440]

Lindner Investments and Lindner Asset Management, Inc.; Notice of Application

March 20, 2001.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of an application for an order under sections 6(c), 12(d)(1)(J), and 17(b) of the Investment Company Act of 1940 (the ''Act'') for exemption from sections 12(d)(1)(A) and (B) and 17(a) of the Act, and under section 17(d) of the Act and rule 17d–1 under the Act to permit certain joint transactions.

SUMMARY OF THE APPLICATION: The requested order would permit certain registered management investment companies to invest uninvested cash in an affiliated money market fund in excess of the limits in sections 12(d)(1)(A) and (B) of the Act.

APPLICANTS: Lindner Investments (''Trust'') and Linder Asset Management, Inc. (''Adviser'').

FILING DATES: The application was filed on February 7, 2001 and amended on March 9, 2001.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicant with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on April 16, 2001, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, Commission, 450 Fifth Street, N.W., Washington, D.C. 20549–0609. Applicants, 7711 Carondelet, Suite 700, St. Louis, MO 63105.

FOR FURTHER INFORMATION CONTACT: Nadya, B. Roytblat, Assistant Director, at (202) 942–0693 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the Commission's Public Reference Branch, 450 Fifth Street, N.W., Washington, D.C. 20549–0102 (tel. 202–942–8090).

Applicant's Representations

1. The Trust is a Massachusetts business trust registered under the Act as an open-end management investment company. The Trust currently offers six portfolios (together with any registered open-end management investment company or series thereof that is advised by the Adviser, the ''Funds''), including the Lindner Government Money Market Fund (together with any future Fund that is a money market fund and complies with rule 2a–7 under the