

ORDER NO. 89

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION

Before Commissioners:

Dan G. Blair, Chairman;
Mark Acton, Vice Chairman;
Ruth Y. Goldway;
Tony L. Hammond; and
Nanci E. Langley

Modification of Mail Classification Schedule
Regarding Bound Printed Matter

Docket No. MC2008-3

ORDER ADDRESSING PROPOSED CLASSIFICATION
CHANGE FOR BOUND PRINTED MATTER



Washington, DC 290268-0001
July 16, 2008

TABLE OF CONTENTS

I.	BACKGROUND	2
A.	Docket No. R2006-1	2
B.	Docket No. C2008-2	3
C.	Docket No. R2008-1	4
II.	THE PROPOSED CLASSIFICATION CHANGE	5
A.	The Proposal Before the Commission	5
B.	Opposition to the Proposal	6
C.	Commission Information Requests	9
III.	COMMISSION ANALYSIS.....	11
A.	<i>De facto</i> Classification Change.....	11
B.	Recognition of the Distinct Roles of the Postal Service and the Postal Regulatory Commission.....	14
C.	Scope of Part 3020, Subpart E	16
D.	Applicability of Part 3020, Subpart E, to the Filing in this Docket	18
E.	Conclusion.....	23

Concurring Opinion of Commissioner Langley

Dissenting Opinion of Commissioner Goldway

Attachment: Change in Draft Mail Classification Schedule

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION

Before Commissioners:

Dan G. Blair, Chairman;
Mark Acton, Vice Chairman;
Ruth Y. Goldway;
Tony L. Hammond; and
Nanci E. Langley

Modification of Mail Classification Schedule
Regarding Bound Printed Matter

Docket No. MC2008-3

ORDER ADDRESSING PROPOSED CLASSIFICATION
CHANGE FOR BOUND PRINTED MATTER

(Issued July 16, 2008)

On March 20, 2008, the Postal Service filed notice with the Commission of a change in classification that would require all Bound Printed Matter (BPM) mailings, not just those that are destination-entered, to be paid by mailing permit effective May 12, 2008.¹ Thereafter, on March 27, 2008, the Postal Service filed a notice of amendment that would require all BPM Flats and Parcels be paid by permit imprint only.²

This request has been complicated by inappropriate Postal Service administrative actions as described at pages 12-17. Nonetheless, for the reasons

¹ Notice of the United States Postal Service of Classification Change, March 20, 2008 (Notice of Classification Change). A conforming change to the Mail Classification Schedule was included as an attachment to the notice.

² Notice of United States Postal Service of Amendment to Conforming Changes in Mail Classification Schedule Submitted with Notice of Classification Change, March 27, 2008 (Notice of Amendment). A revised change to the Mail Classification Schedule was submitted as part of the amendment.

discussed below, the Commission concludes that, on this record, the change was properly filed under 39 CFR §§ 3020.90 and 3020.91 and that the proposal is not inconsistent with 39 U.S.C. § 3642. Accordingly, the classification change will be accepted and allowed to go into effect.

I. BACKGROUND

This proceeding is an outgrowth of two earlier Commission proceedings, a rate proceeding in Docket No. R2006-1 and a complaint proceeding in Docket No. C2008-2. It also follows the proceedings in Docket No. R2008-1 that involved price adjustments proposed by the Postal Service for market dominant products.

A. Docket No. R2006-1

The proceeding in Docket No. R2006-1 began on May 3, 2006, with a filing by the Postal Service of a request for a recommended decision on proposed changes in domestic postage rates, fees and certain mail classifications. In that proceeding, the Postal Service proposed to restrict the ability of individuals to mail single-piece BPM at retail post office windows by instructing window clerks not to offer customers BPM as a mailing option. Instead, single-piece BPM would only be accepted at retail windows (or by a carrier) if the customer had pre-applied postage either by a customer-generated postage meter or by permit imprint.

In its Opinion and Recommended Decision, the Commission found that the changes proposed by the Postal Service constituted a classification change under the Postal Reorganization Act of 1970 (PRA), but that the Postal Service had failed to address the classification factors in section 3623(c) of that Act.³ The Commission rejected the Postal Service's proposed change for lack of evidentiary support. PRC Op.

³ The proceedings in Docket No. R2006-1 were conducted under the PRA, Pub. L. 91-375, 84 Stat. 719, 39 U.S.C. §§ 101, *et seq.* During the pendency of those proceedings, the Postal Accountability and Enhancement Act (PAEA), Pub. L. 109-435, 120 Stat. 3198 (2006) was enacted. The proceedings in the instant docket are governed by the PRA, as amended by the PAEA.

R2006-1, ¶ 5915. In doing so, however, the Commission expressly stated that it was not ruling on the merits of the proposed change. *Id.*, ¶ 5917. The Postal Service therefore remained free to propose the same, or a similar, change at a future date.

Although they disagreed with the Commission's characterization of its proposal as a classification change under PRA section 3623(c), the Governors of the Postal Service stated that Postal Service retail associates would continue to provide customers with information about BPM and would continue to accept pre-stamped BPM.⁴ The Governors stated further that they would consider whether any classification changes would be appropriate in the future. *Id.*

B. Docket No. C2008-2

On January 3, 2008, Douglas F. Carlson (Carlson) filed a complaint under 39 U.S.C. § 3662 alleging that the Postal Service had unlawfully restricted access to BPM service at retail windows in violation of 39 U.S.C. § 403(c).⁵ On February 4, 2008, the Postal Service filed an answer⁶ and a motion to suspend proceedings⁷ while the Postal Service and the Governors considered the possibility of making mail classification changes that would resolve the complaint. Thereafter, the Postal Service filed a Statement of Position defending the restrictions that it had placed on access to BPM services at retail windows as lawful.⁸ On March 20, 2008, the Postal Service filed an addendum to its Statement of Position announcing that it was simultaneously filing a

⁴ Decision of the Governors of the United States Postal Service on the Opinion and Recommended Decision of the Postal Regulatory Commission on Changes in Postal Rates and Fees, Docket No. R2006-1 (March 19, 2007) at 19.

⁵ Douglas F. Carlson Complaint on Bound Printed Matter, January 3, 2008, at 4 (Carlson Complaint). The complaint was filed following the December 20, 2006 effective date of the PAEA.

⁶ Answer of the United States Postal Service, February 4, 2008 (Answer).

⁷ Motion of the United States Postal Service to Suspend Proceedings Temporarily, February 4, 2008 at 1 (Postal Service Motion).

⁸ Statement of Position of the United States Postal Service, March 7, 2008 (Statement of Position).

notice of a change of classification to amend the product description for BPM.⁹ The Postal Service's notice of classification change was docketed in the instant docket. In light of the BPM classification change, the Postal Service asserted that there were no longer any material issues of fact or law to resolve in Docket No. C2008-2 and, therefore, requested the Commission to dismiss Carlson's complaint. Addendum to Statement of Position at 2-3.

On April 2, 2008, the Commission issued an order dismissing the Carlson Complaint without prejudice. See PRC Order No. 68. The Commission noted that although it was required by 39 U.S.C. § 3662 to act on the complaint by April 2, 2008, the comment period on the related BPM classification change in Docket No. MC2008-3 would not expire until April 9, 2008. If the Commission were ultimately to determine that the classification change was not inconsistent with the requirements of the PAEA, then the complaint would be rendered moot. *Id.* at 5-6. Under the circumstances, the Commission concluded that the best course of action was to dismiss the complaint as moot, but without prejudice should it subsequently determine that the classification change was inconsistent with the PAEA. *Id.* at 6. Because of the relationship between the complaint and the issues presented in Docket No. MC2008-3, the Commission stated that it would incorporate by reference into Docket No. MC2008-3 all pleadings in Docket No. C2008-2. *Id.*

C. Docket No. R2008-1

While the complaint proceeding was pending in Docket No. C2008-2, the Postal Service, on February 11, 2008, filed its first notice of market dominant price adjustment pursuant to 39 U.S.C. § 3622(d)(1)(C) of the PAEA. Under the PAEA annual price changes for each class of market dominant mail cannot exceed the change in the Consumer Price Index for All Urban Consumers (CPI-U). 39 U.S.C. § 3622(d)(1)(A).

⁹ Addendum to Statement of Position of the United States Postal Service, March 20, 2008 (Addendum to Statement of Position).

Unused rate authority can be banked for future use. 39 U.S.C. § 3622(d)(2)(C). In its filing, the Postal Service indicated that the percentage change in prices for Package Services mail, of which BPM Flats and Parcels are components, was, on average, 2.875 percent. PRC Order No. 66 at 43. The percentage change for each of the five products that compose Package Services was set forth in Table III-4 of Order No. 66. *Id.*

Table III-4

Package Services Product	Rate Change (%)
Single-Piece Parcel Post	3.30
Bound Printed Matter Flats	0.42
Bound Printed Matter Parcels	2.10
Media/Library Mail	4.54
Inbound Surface Parcel Post	2.62 [†]

[†] Prices for Inbound Surface Parcel Post (at UPU rates) are determined by the Universal Postal Union. The Postal Service indicates that the prices are adjusted annually, with the most recent change taking place on January 1, 2008. *Id.* at 19, n.1.

Banked authority for Package Services equaled 0.025 percent. *Id.* In Order No. 66, the Commission confirmed that the prospective price increases for the Package Services class would not exceed the 2.9 percent price cap. *Id.* at 44.

II. THE PROPOSED CLASSIFICATION CHANGE

A. The Proposal Before the Commission

The Postal Service amended its initial proposal in this docket to require that all BPM mailings be paid by permit imprint only. Notice of Amendment at 1. The amendment also restated the requirement that destination-entered BPM is subject to an annual mailing permit fee. In response to inquiries from the Commission, the Postal

Service proposed to eliminate the minimum volume and weight requirements for permit imprint mailings.¹⁰ The Commission issued notices of the March 20 and March 27 Postal Service filings on March 21 and 28, 2008, respectively. Comments on the two filings were ultimately due on April 9, 2008. On April 2, 2008, the Commission designated a Public Representative to represent the interests of the general public.¹¹

B. Opposition to the Proposal

On April 9, 2008, comments criticizing the proposal were submitted by the following parties: Carlson;¹² David P. Popkin (Popkin);¹³ the American Postal Workers Union, AFL-CIO (APWU);¹⁴ Pitney Bowes Inc.;¹⁵ and the Public Representative.¹⁶ On May 12, 2008, comments were filed by Sass Pugh (Pugh), a single-piece BPM mailer.¹⁷

Several of the complaining parties attack the proposal as discriminatory. Carlson Comments at 2-4, Popkin Comments at 7, and APWU Comments at 2. These parties argue that the additional costs and administrative complexity imposed on single-piece BPM mailings will constitute an insurmountable barrier to small mailers who will be forced to use more expensive alternatives and that the proposal is therefore unlawful under section 403(c) of the PRA. Pitney Bowes Comments at 2-3.

¹⁰ See Note 21, *infra*, and accompanying text.

¹¹ Notice Designating Public Representative, April 2, 2008.

¹² Douglas F. Carlson Comments on Proposed Classification Change for Bound Printed Matter, April 9, 2008 (Carlson Comments).

¹³ Initial Comments of David B. Popkin, April 9, 2008 (Popkin Comments).

¹⁴ Comments and Motion for a Stay of Proceedings of American Postal Workers Union, AFL-CIO, April 9, 2008 (APWU Comments). APWU filed comments as a user of the mails. APWU Comments at 1.

¹⁵ Comments of Pitney Bowes Inc. in Response to Notice of Classification Change for Market Dominant Products, April 9, 2008 (Pitney Bowes Comments).

¹⁶ Public Representative Comments in Response to Notices of Classification Change for Market-Dominant Bound Printed Matter Postal Products, April 9, 2008 (Public Representative Comments).

¹⁷ While Pugh's comments (Pugh Comments) were filed beyond the comment deadline, the Commission is accepting them for filing and will address them below.

Closely related to these allegations of unlawful discrimination are claims that the proposed change can be expected to produce a rate shock. Popkin Comments at 3-4. See *also* Carlson Comments at 4. Two of the parties, Carlson and APWU, expressly allege that the rate impact is unfair under section 403(a) of the PRA. Carlson Comments at 4, and APWU Comments at 2. In this connection, APWU also argues that the Postal Service has not demonstrated that the rates meet the needs of the BPM category of mail users as required by section 403(b)(2). APWU Comments at 2. Pugh, who operates a small bookstore business, estimates that if single-piece BPM rates are eliminated, his postage costs will increase from \$2,000 to more than \$5,000 per year. The Public Representative also acknowledges the potential for rate shock. Public Representative Comments at 3.

Carlson and Popkin both allege that the proposed classification is inconsistent with 39 U.S.C. §§ 3642(b)(3)(B) and (C) because the Commission has failed to provide an adequate comment period to obtain “the views of those who use the product involved” as required by subsection (B); and because the Postal Service has not addressed the “likely impact of the proposed action on small business concerns” as required by subsection (C). Carlson Comments at 3; and Popkin Comments at 6-7. While Pitney Bowes supports the Postal Service’s attempt to promote efficiency of operations, reduce the costs of retail window transactions, and promote expanded retail access authorizations, it believes that the proposed change is overbroad and could adversely affect small businesses that use postage meters by eliminating postage meters as a payment option for BPM. Pitney Bowes Comments at 2. This, Pitney Bowes asserts, is contrary to section 3642(b)(3)(C)’s requirement that the Commission assess the likely impact of the proposed change on small business concerns. *Id.*

Popkin states that if the Commission concludes that the Postal Service has adequately supported its proposal, it should require that “the eligibility for Media Mail be expanded to include all of the present criteria of Bound Printed Matter.” Popkin Comments at 7.

APWU argues that by moving acceptance of single-piece BPM from retail windows to mail acceptance units, the acceptance cost to both the Postal Service and to single-piece mailers will increase. APWU Comments at 2. APWU argues further that the Postal Service has failed to demonstrate that its proposal satisfies the requirements of 39 U.S.C. § 3622 because: (1) it fails to show that the proposal takes into account simplicity of structure for the entire schedule and simple identifiable relationships between the rates and fees charged for various classes of mail as required by section 3622(c)(6); and (2) it fails to show that it has taken into account "the available alternative means of sending and receiving ... mail matter at reasonable costs" as required by section 3622(c)(4). *Id.* at 3.

Because of the alleged deficiencies in the Postal Service's presentation, APWU has moved to stay this proceeding until the Postal Service complies with the Commission's rules 64(b), (c), and (d) by providing adequate information for the Commission to consider the proposal. *Id.* The Postal Service filed an answer in opposition to the APWU motion on April 16, 2008.¹⁸

By contrast, the Public Representative asserts that subpart E applies when proposed classification changes do not rise to the level of a product modification or transfer of a product from either the market dominant or competitive product list to the other list. Public Representative Comments at 4. While a significant change in product descriptions could trigger the requirements of 39 U.S.C. § 3642 if it were deemed to modify or transfer a product list, the Public Representative concludes that the change proposed by the Postal Service does not eliminate an entire rate subcategory and therefore does not trigger the review requirements of section 3642. *Id.* at 7. The Public Representative suggests that the appropriate place to consider the policy issues raised by the Postal Service's filing is in a complaint proceeding. *Id.* at 7. It bases this

¹⁸ Response of the United States Postal Service in Opposition to Motion of the American Postal Workers, AFL-CIO, for a Stay of Proceeding, April 16, 2008 (Postal Service Response to APWU).

conclusion on its reading of the discussion explaining subpart E of part 3020 of the Commission's rules in Order No. 43.¹⁹ *Id.* at 4-7.

The Public Representative submits that there would be a number of competing considerations that could warrant consideration in a complaint proceeding. *Id.* at 6. On the one hand, the proposed classification changes will limit some BPM mailers to more expensive mailing options. *Id.* The loss of access to the retail window raises questions regarding whether the Postal Service has justified the proposed classification change on the basis of cost savings or other reasons of managerial economy. *Id.* On the other hand, the PAEA does not necessarily give mailers the right to continue receiving particular services or rates that were available under the PRA. *Id.*

C. Commission Information Requests

The Commission issued two information requests seeking clarification of the planned classification change. First, the Commission asked the Postal Service to specify the circumstances, if any, under which a mailer could mail BPM pieces at the single-piece BPM rates and to describe how such mail would be entered for mailing.²⁰ CIR No. 1 also requested the Postal Service to list, by product, the single-piece mailings that are an exception to the requirement that permit imprint mailings contain at least 200 pieces or weigh at least 50 pounds. The Postal Service responded that single-piece BPM rates would be available to mailers who paid by permit imprint noting that it was amending section 5.1.2 of the DMM to provide an exception to the 200 piece or 50-pound minimum requirement for non-presorted BPM.²¹ The Postal Service stated further that the standards for deposit and acceptance of permit imprint mailings are the

¹⁹ Docket No. RM2007-1, Order Establishing Ratemaking Regulations For Market Dominant and Competitive Products, PRC Order No. 43, ¶¶ 4027-4032.

²⁰ Commission Information Request No. 1, April 1, 2008 (CIR No. 1).

²¹ Response of the United States Postal Service to Commission Information Request No. 1, April 7, 2008 (Response to CIR No. 1).

generally applicable requirements of DMM § 604.5.1.11. *Id.* Finally, the Postal Service indicated that in addition to the exception that it planned to implement for non-presorted BPM, there is a generally applicable exception in DMM § 604.5.1.2 applicable to single-piece mailings that meet the eligibility criteria for that exception. *Id.*

CIR No. 2 contained questions seeking information regarding the potential for volume shifts within the Package Services class that might result from the proposed reclassification of BPM single-piece mailings.²² The purpose of these questions was to ensure that volume shifts would not result in the Package Services Class exceeding the 2.9 percent cap on price increases established in Docket No. R2008-1. CIR No. 2, Question 1.

The Postal Service responded that it found “itself unable to provide meaningful estimates of potential volume shifts in response to the instant classification change.”²³ This inability to estimate volume shifts was allegedly due to a number of factors, including the fact that the classification change that is the subject of the instant proceeding was “not ... the first step taken by the Postal Service in seeking to minimize BPM transactions at retail windows.” *Id.* at 1. The “first step” consisted of “certain administrative changes” made “[i]n conjunction with the implementation of the Docket No. R2006-1 rates in May of 2007....” *Id.* Those “administrative changes” produced a “substantial reduction in the number of BPM pieces entered using non-permit forms of postage....” *Id.* That reduction occurred “at retail windows in the latter part of FY 2007.” *Id.* at 2. Because those changes were implemented during May 2007, “the FY2007 billing determinants used for cap compliance ... reflect a mix of a time period before the ... administrative changes ... and a time period after those changes ... [and, as a result,] ... [u]sing unadjusted FY 2007 billing determinants as the measure of before-change volumes ... would confound instances of potential shifting caused by the new classification change with instances of potential shifting caused by the previous

²² Commission Information Request No. 2, April 18, 2008 (CIR No. 2).

²³ Response of the United States Postal Service to Commission Information Request No. 2, May 2, 2008, Question 1, at 4 (Response to CIR No. 2).

administrative changes [footnotes omitted].” *Id.* Looking solely at a comparison of FY06Q4 and FY07Q4 volumes “it seems evident that many of those [single-piece BPM] pieces have already shifted somewhere, and thus no longer remain in the pool of candidates likely to be affected by this [*i.e.*, Docket No. MC2008-3] classification change.” *Id.* With respect to those mailers who remained in the pool and subject to the Docket No. MC2008-3 classification change, any estimate of the number of such mailers that would find it economical to use a permit imprint authorization would be speculation and “would be, in many respects, similar to attempting to adjust billing determinants based on forecasts of mailers’ responses to price changes.” *Id.* at 4.

Given its alleged inability to estimate the potential volume shifts that could result from the proposed classification change, the Postal Service stated in response to CIR No. 2, Question 4, that it could not perform a recalculation of the percentage change in rates by Package Services product; the average percentage change in Package Services rates as a class; or the unused (*i.e.*, “banked”) rate adjustment authority. *Id.* at 7. Notwithstanding its alleged inability to provide the requested estimate, the Postal Service states that it is “reasonable to suggest that most, if not all, remaining retail BPM mailers ... might ... obtain ... a permit imprint ... [and that] ... [i]f a substantial majority ... switch from being retail customers to permit mailers, ... [then] ... the effect on price cap compliance ... would be negligible.” *Id.* at 3.

III. COMMISSION ANALYSIS

A. *De facto* Classification Change

The Postal Service’s proposed classification change in this docket was intended to resolve the complaint in Docket No. C2008-2 which had alleged that the Postal Service was unlawfully restricting access to BPM service at retail windows. Unfortunately, the Commission’s review of the proposed classification change has been complicated by the very actions complained of by Carlson in his complaint. The Carlson Complaint alleged, among other things, that:

4. On May 14, 2007, the Postal Service ceased to offer single-piece Bound Printed Matter service at retail windows.

9. ... Since May 14, 2007, the Postage Rate Calculator has not provided rates for Bound Printed Matter or mentioned the existence or availability of this service.

13. Postal Service policy ... confirms that Postal Service window clerks may provide information about Bound Printed Matter only when customers specifically inquire about or request the service....

17. Notice 123, *Ratefold*, effective July 15, 2007, declares on page 15 that 'Nonpresorted Bound Printed Matter is not available in postal retail outlets. It is only available to mailers who can affix the correct postage using stamps, postage meter, or PC Postage.'

18. Section 100 of the *Domestic Mail Manual*, omits Bound Printed Matter from the list of "Retail Mail" services.

In its Answer, the Postal Service admitted each of the foregoing allegations.²⁴

Consistent with those admissions, the Postal Service subsequently acknowledged that BPM had been removed from the mailing options automatically displayed on the sales terminals used by retail window clerks, but that retail associates would accept BPM pieces already stamped and prepared for mailing and that customers who expressly inquired about BPM or sought to buy postage in order to prepare their mailpieces would be served the same as any other customer making an inquiry or purchasing postage. Postal Service Statement of Position at 3-4.

Thus, the Postal Service concedes that during May 2007, it proceeded to implement essentially the same proposal that the Commission had previously rejected as a *de facto* classification change intended to "eliminate an existing, often less-expensive, mailing option...." PRC Op. R2006-1, ¶ 5916. While the Governors may have disagreed with the Commission's conclusion in Docket No. R2006-1 that the

²⁴ Answer at ¶¶ 4, 9, 13, 17 and 18.

Postal Service's proposed change constituted a classification change, that disagreement, by itself, did not permit the Postal Service unilaterally to implement the *de facto* classification change rejected by the Commission. *Id.*, n.4. At the time the Governors issued their decision in Docket No. R2006-1, the rates and classes for market dominant products, which included BPM, remained subject to modification in accordance with the pre-PAEA provisions of the PRA. See 39 U.S.C. § 3622(f). Faced with the Commission's decision in Docket No. R2006-1, the only options available to the Governors were those enumerated in 39 U.S.C. § 3625.²⁵

The consequences of the Postal Service's actions are revealed in its response to CIR No. 2 in the present proceeding. In that response, the Postal Service characterized its unilateral implementation of the classification changes that had been rejected by the Commission as an "administrative change." In the Postal Service's own words, this "administrative change" produced a "substantial reduction" in BPM volumes entered at retail windows during the latter part of FY 2007. While exact numbers are not available, the Postal Service notes that "a reduction in non-permit indicia single-piece BPM of at least 15 percent" at all mail entry points occurred between FY 2006 Quarter 4 and FY 2007 Quarter 4. Response to CIR No. 2, Question 1, at 2. Over this same period, data from POS terminals show a 60 percent decline in the BPM pieces paid with postage affixed and entered at the retail window. *Id.* The information made available by the Postal Service in the instant proceeding supports Carlson's contention that beginning on May 14, 2007, the Postal Service effectively implemented a classification change

²⁵ Under section 3625 of the PRA, which governed the proceedings in Docket No. R2006-2, the Governors had two alternative means of challenging Commission recommended decisions: allow the decision to take effect, under protest, and either seek judicial review or return the decision for reconsideration and a further recommended decision; or reject the recommended decision and resubmit its request for reconsideration and a further recommended decision.

without Commission review or authorization and that that classification change in fact resulted in a significant reduction in single-piece BPM volumes at retail windows.²⁶

A further consequence of the Postal Service's "administrative change" involves the Commission's subsequent review of the Postal Service's compliance with the rate cap in Docket No. R2008-1. The Postal Service did not follow the requirements of rule 3010.23(d) that it make "reasonable adjustments to the billing determinants [for Package Services in Docket No. R2008-1] to account for the effects of classification changes such as the introduction, deletion, or redefinition of rate cells."²⁷ As a result, questions now exist regarding the Postal Service's compliance with the rate cap for Package Services and the accuracy of the banked rate authority previously determined by PRC Order No. 66 (March 17, 2008). The failure to make adjustments in Docket No. R2008-1 may also adversely affect the next market dominant rate adjustment proceeding.²⁸

B. Recognition of the Distinct Roles of the Postal Service and the Postal Regulatory Commission

The Commission understands that situations may arise in which reasonable persons disagree over the applicability of regulatory requirements. This was not one of those situations. Here, the Commission had ruled in Docket No. R2006-1 that the changes proposed by the Postal Service constituted a classification change under 39 U.S.C. § 3623 and that the classification change lacked adequate record support. At

²⁶ Having dismissed Carlson's Complaint on the basis of the Postal Service's representation that the classification change would resolve the complaint, the Carlson Complaint is no longer before the Commission. However, that dismissal was without prejudice and, in light of the new information now available, Carlson is free to renew his complaint or modify it to reflect additional information.

²⁷ See United States Postal Service Notice of Market-Dominant Price Adjustment, Attachment USPS-R2008-1/4, February 11, 2008.

²⁸ The Commission expects the Postal Service to be prepared to present data on BPM volumes that will enable the Commission in the next market dominant price adjustment proceeding to review and assess compliance with the cap and the appropriate banked amount. Similarly, the Commission expects the Postal Service to have available data on BPM mailings adequate to meet the Commission's needs in the next annual compliance proceeding.

that point, the Postal Service had a choice to either accept the Commission's ruling, challenge the ruling as provided by 39 U.S.C. § 3625, or file for a classification change with appropriate supporting information. Instead, within three months of the Commission's ruling, the Postal Service implemented essentially the same proposal unilaterally, an action which, as discussed above, has complicated the Commission's ability to review the proposed classification change filed in the instant docket and to assess the arguments presented by the opponents of that change.²⁹

The recent Postal Service failure to comply with the clear requirements of the PRA with regard to BPM can not be ignored. This must not be the template for Postal Service action in the future, under the PAEA.

The PAEA established a new system of government checks and balances while providing the Postal Service with significant new authority, including the flexibility to implement rate and classification changes with only limited prior review. The Commission has erected a system of rate regulation designed to provide the Postal Service with the flexibility envisioned by the PAEA. The Nation's mailing community has the right to expect that the Postal Service will scrupulously respect and adhere to the relatively few and reasonable limitations on that expanded authority.

This proceeding represents the first time the Postal Service has announced an intended modification in the Mail Classification Schedule (MCS) to alter the availability of an existing market dominant product. This is the type of change that the PAEA intended should, in general, be a prerogative of management. Yet as described below, the Postal Service failure to respect the PRA restrictions on classification changes, coupled with its failure to attempt to meet the requirements of the new Commission rules applicable to rate filings, has given rise to several important and difficult issues.

²⁹ The difficulties presented to the Commission in the present case by the Postal Service's earlier "administrative change" may require the Commission to re-evaluate its regulations in subpart E of part 3020 to insure that better information is available to assess future changes proposed under that subpart.

Furthermore, as evidenced by both the various amendments and additional review offered by the Postal Service in response to questions raised during this proceeding, neither the proposal nor its implications were appropriately and adequately considered prior to filing.

After carefully evaluating these circumstances, as described in detail below, the Commission concludes it should not prevent the classification adjustment from becoming effective.³⁰ At the same time, the Commission hereby advises the Postal Service that it must exercise increased care to insure that it complies with statutory requirements and applicable implementing regulations. The PAEA contemplates that as interested parties gain experience with the system for regulating rates and classes for market dominant products, revisions may be necessary. If the Postal Service proves unable, or unwilling, to meet its new obligations, it will be necessary to amend the rules to provide additional protections for the mailing public.

C. Scope of Part 3020, Subpart E

The Postal Service's proposed classification change was filed in this docket under subpart E of part 3020, which governs changes to products in the Mail Classification Schedule that do not trigger the requirements of 39 U.S.C. § 3642. PRC Order No. 43, ¶ 4030. Subpart E was adopted to insure up-to-date descriptions of Postal Service products. Accurate product descriptions are important for users of the mail to understand and utilize Postal Service products and services and to present their positions before the Commission. PRC Order No. 26, ¶ 4039. Accurate product descriptions are also important to the Commission because it must rely on those descriptions in carrying out its regulatory responsibilities. *Id.* Balanced against the need for accurate and timely product descriptions is the Postal Service's need for flexibility to manage its product offerings. In recognition of this latter need, the

³⁰ The Commission, the Postal Service, and mailers have been working closely and cooperatively to implement the spirit, as well as the letter of the PAEA. This decision is consistent with that effort.

Commission stated its intent not to exercise pre-implementation authority over classification changes that do not trigger the provisions of 39 U.S.C. § 3642, provided the resulting products “conform to the statutory requirements of the PAEA.” Order No. 43, ¶ 4030. Notice and comment procedures were adopted for the limited purpose of insuring that changes were properly filed under subpart E. *Id.*, ¶ 4032.

By contrast, subparts B, C, and D of part 3020 govern modifications to the MCS that trigger the requirements of 39 U.S.C. § 3642.³¹ Section 3642 covers the addition of new products, the removal of existing products, and the transfer of products between product lists.³² Commission approval of a change under subpart B, C, or D requires compliance with applicable statutory provisions and rules, including 39 U.S.C. § 3622 (for market dominant products); § 3633 (for competitive products); and § 3642 (for both market dominant and competitive products). Order No. 26, ¶¶ 4023, 4024, 4033, and 4038.

During the proceedings that culminated in the adoption of part 3020, a number of parties expressed concern that the Postal Service might attempt to use subpart E to circumvent the procedures and standards of subpart B. Order No. 43, ¶ 4027. The Commission expressly acknowledged “that there is a continuum of possible classification changes from those only requiring the Postal Service to inform the Commission of a classification change to those triggering the requirements of 39 U.S.C. § 3642.” *Id.*, ¶ 4028. The Commission stated further that if and when compliance with statutory requirements became an issue, its complaint procedures would be available to persons who opposed a change filed under subpart E. *Id.*, ¶ 4029. In addition, there

³¹ Subpart B governs changes initiated by the Postal Service; subpart C governs changes initiated by users of the mail; and subpart D governs changes to the MCS that are initiated by the Commission.

³² In proposing part 3020 of its Rules of Practice and Procedure, the Commission expressly stated that modifications to product lists covered by subparts B, C, and D would “add a product to a list, remove a product from a list, or ... transfer a product between lists.” Order No. 26, ¶ 4019. The final regulations adopted by Order No. 43 made no change to the scope of subparts B, C, or D, as proposed by Order No. 26.

would be opportunities to comment in the context of the annual compliance process and in connection with the Commission's evaluation of service standards.

This is the first proceeding in which the Commission has had to confront the threshold question of where on the "continuum of possible classification changes" a particular proposal by the Postal Service falls. More precisely, the issues before the Commission are whether the classification change filed by the Postal Service was properly filed under subpart E, and, if so, whether it has been shown to be "not inconsistent" with the PAEA. If the change was not properly filed under subpart E, or if it was properly filed but not adequately supported, the question becomes what further steps the Commission should take with respect to the filing.

D. Applicability of Part 3020, Subpart E, to the Filing in this Docket

In the current proceeding, all parties, including the Postal Service, acknowledge that the filing of the proposed change to the MCS is legally required. The threshold question is whether the Postal Service's proposal was properly filed under subpart E of part 3020, or should have been filed under subpart B of part 3020. The resolution of that question has important implications for the disposition of the Postal Service's filing.

The Postal Service takes the position that its proposed changes do not trigger the provisions of 39 U.S.C. § 3642 because they do not result in the addition of a product to the market dominant product list, the removal of a product from the market dominant product list, or the transfer of a product between the market dominant and competitive product lists. Postal Service Response to APWU at 1-2. Carlson and Popkin claim that the practical effect of imposing a permit imprint fee and changing mailing procedures would be to deny small mailers the single-piece BPM option. Carlson Comments at 3, and Popkin Comments at 5. In effect, they argue that the proposed change will remove a product from the market dominant product list thereby subjecting the proposal to the requirements of section 3642. The mere imposition of the permit imprint mailing requirement for single-piece BPM could, by itself, have resulted in

excluding small mailers from the market dominant product single-piece BPM because of the 200-piece and 50-pound requirement for non-presorted BPM set forth in section 5.1.2 of the DMM. However, the Postal Service has anticipated that result by stating in its response to CIR No. 1 that it intends to amend section 5.1.2 of the DMM to provide an exception to the 200-piece or 50-pound minimum requirement for non-presorted BPM. The Public Representative also points to this latter change in concluding that the single-piece BPM option will remain available to small mailers. Public Representative Comments at 2.

Carlson, Popkin, and the Public Representative all raise the possibility that small mailers will be compelled to resort to more expensive products as an alternative to single-piece BPM. Carlson suggests that the imposition of a permit imprint fee and the change in mailing procedures will be an insurmountable barrier to the ability of small mailers to use single-piece BPM mail. Carlson Comments at 3. After comparing the present and proposed methods of mailing BPM, Popkin asserts that the proposed methods will discourage small mailers from making a permit imprint mailing. Popkin Comments at 4-5. The Public Representative also raises the possibility that small mailers may move to more expensive alternative products. Public Representative Comments at 3. Most of the alternatives identified by Carlson, Popkin, and the Public Representative would be substantially more expensive than single-piece BPM.³³ Rates for First-Class, Priority, or Express Mail would be much more expensive. Rates for Parcel Post would be 100-200 percent higher, and rates for Media Mail would be as much as 60 percent higher. Popkin Comments at 3-4.

APWU argues that the effect of the proposed change will be to increase costs to both mailers and the Postal Service although it offers no suggestion of the magnitude of these alleged increases. APWU Comments at 2.

³³ An exception would be Media Mail postage for mail sent to the farthest zones. Those rates would be less than single-piece BPM rates. However, eligibility restrictions on Media Mail would preclude this option for some mailers.

On its face, the magnitude of the rate differential between single-piece BPM and alternative Postal Service products cited by Popkin and the Public Representative could have a significant impact on small business entities. Ultimately, however, the impact will depend upon the ability and willingness of mailers to adapt to the new procedures. Carlson and Popkin claim that mailers will be unable or unwilling to make single-piece BPM mailings under the new procedures and will be forced to more expensive alternatives. The Postal Service counters by arguing that although it is “unable to provide meaningful estimates of potential volume shifts in response to the instant classification change[,] ... [i]t is reasonable to suggest that most, if not all, remaining retail BPM mailers are familiar with the product and mail it with sufficient regularity or in sufficient volume that they might find it appropriate to obtain or use a permit imprint.”³⁴ The Postal Service goes on to state that “customers who already can use permit imprint will likely pay non-presorted BPM postage in that way following implementation of the classification and DMM changes ... [and that the volume of] ... non-permit indicia non-presorted BPM ... currently entered by such customers, or by other such mailers who will find it feasible to acquire authorization to use permit imprint is not known, but believed to be large.” Response to CIR No. 2, Question 3. On the record before us, the Commission cannot conclude that the dire predictions of Carlson and Popkin are more likely to occur than the Postal Service’s more optimistic prediction that a significant number of current BPM mailers will use permit imprints for single-piece BPM mailings.

Similarly, the cost increases projected by Pugh assume that single-piece BPM mail will cease to be available and that his only recourse will be bulk BPM (for which he claims not to qualify), Parcel Post, or Priority Mail. In fact, the single-piece BPM rate option will remain available to those obtaining a permit. The question is whether Pugh and others will be unable to avail themselves of the single-piece BPM mailing option.

³⁴ Response to CIR No. 2, Question 1, at 4. The “remaining retail BPM mailers” are those mailers who continued to mail single-piece BPM following the Postal Service’s 2007 “administrative change.”

Without evidence to support Pugh's claim, the Commission cannot assume that the single-piece BPM option will, as a practical matter, no longer be available.

While the Commission recognizes that the permit imprint fee and revised mailing procedures may deter some small mailers from seeking to avail themselves of the single-piece BPM option, the Commission cannot, on the current record, find that those changes constitute the removal of a product from the market dominant product list as contemplated by section 3642. It remains for either the mailing decisions of future small single-piece BPM mailers or a more comprehensive evidentiary presentation to demonstrate whether or not the single-piece BPM option will, or is likely to, continue to be available.³⁵ In the meantime, what is certain is that single-piece BPM, albeit subject to revised mailing requirements, is and will be available to those mailers who elect to meet those revised requirements.³⁶ The Commission, therefore, concludes that the Postal Service properly filed its proposed changes under subpart E.

Further, for the reasons described above, the comments filed in response to this change are not, in and of themselves, sufficient to support Carlson's, Popkin's, and APWU's allegations that the Postal Service has: violated the fair and reasonable rate requirement of 39 U.S.C § 403(a); failed to provide services that meet the needs of different categories of mail users as required by section 403(b); or violated the prohibition on undue or unreasonable discrimination contained in section 403(c). Carlson Comments at 2-3, Popkin Comments at 7, and APWU Comments at 2. Nor is

³⁵ Both Carlson and Popkin assert that subsection 3642(b)(3)(B) bars the proposed classification change. Both claim that the problem under subsection 3642(b)(3)(B) is that the Commission has allegedly failed to provide an adequate period for comment by persons who used single-piece BPM. Carlson Comments at 3, Popkin Comments at 6. The Postal Service filings in this docket were made on March 21 and 28, 2008. The comment deadline established by the Commission was April 9, 2008. Three single-piece BPM mailers filed timely comments—Carlson, Popkin, and APWU. One other person, Pugh, expressed views on the proposal in a filing made after the April 9, 2008 comment deadline. Although untimely, Pugh's comments are being accepted for filing. None of these commenters requested additional time, and no other potential commenters requested the opportunity to submit views after the established deadline. The Commission finds it met its responsibilities under section 3642(b)(3)(B). Moreover, as the Commission noted in Order No. 43, the PAEA provides interested persons alternate means to seek relief. PRC Order No. 43, ¶ 4029.

the Commission persuaded by APWU's claims that the Postal Service has failed to provide supporting justification that demonstrates compliance with 39 U.S.C § 3622. APWU Comments at 3. As we have previously determined, *supra*, the requirement for such justification applies only to classification changes covered by subparts B, C, and D of part 3020, not subpart E.³⁷

Although the parties opposing the Postal Service's proposed change have not shown that the proposal is either improperly filed under subpart E or is inconsistent with section 3642, they raise potentially serious issues that, with a more complete record, might demonstrate a need to re-evaluate the proposed change. As Order No. 43 suggests, a change that is accepted under subpart E can be challenged subsequently either by complaint or in the context of an annual compliance proceeding.

Lastly, Pitney Bowes asserts that the proposed change is overbroad because the elimination of the postage meter payment option is not necessary to achieve the Postal Service's only stated objectives of streamlining transactions at retail windows or minimizing programming complexities at kiosks and other distributed postal solutions. Pitney Bowes Comments at 2. In its response to Question 5 in CIR No. 2, the Postal Service states that payment by postage meter or information-based indicia were excluded from authorized payment methods because they can be entered at retail which is inconsistent with the Postal Service's objective of eliminating the retail window as a point of acceptance. Nevertheless, the Postal Service states that it will give further consideration to modification of its classification change to permit alternative entry for both of those postage payment methods. Response to CIR No. 2, Question 5. Given

³⁶ Accordingly, we reject Popkin's flawed argument that except for Parcel Post, BPM will be the only product with a bulk rate that will not have a single-piece rate. Popkin Comments at 6.

³⁷ For analogous reasons, we are denying APWU's motion to stay proceedings in this docket for the Postal Service's alleged failure to comply with rule 64 of the rules of practice. That rule applied to Postal Service requests for approval of classification changes under section 3623 of the PRA. Section 3623 of the PRA was repealed by the PAEA and the transitional period between the PRA and the PAEA has expired. Accordingly, rule 64 does not apply in this proceeding.

the Postal Service's intention to give consideration to further modifications that would make postage meter payment available at alternative entry points, the Commission will take no action on the issue raised by Pitney Bowes.

E. Conclusion

For the foregoing reasons, the Commission finds that the proposed change is properly filed under subpart E of part 3020 of the Commission's regulations and is not inconsistent with section 3642. Accordingly, the Commission directs that the draft Mail Classification Schedule be modified to require that all BPM Flats and Parcels be paid by permit imprint only. The language in the attachment is illustrative until the Commission formally adopts a Mail Classification Schedule, which it anticipates doing later this year.

It is Ordered:

1. The comments of Sass Pugh are accepted for filing.
2. The motion for a stay of proceeding included within Comments and Motion for a Stay of Proceeding of American Postal Workers Union, AFL-CIO, filed April 9, 2008, is denied.
3. The draft Mail Classification Schedule is modified to require that all BPM Flats and Parcels be paid by permit imprint only.

By the Commission.

Steven W. Williams
Secretary

Concurring Opinion of Commissioner Langley

I join in the majority opinion because under the Commission's rules, single-piece bound printed matter had not been identified by the Postal Service or the Commission as a separate product.

I am mindful, however, that a central regulatory facet of the PAEA, upon which mailers rely, is the Consumer Price Index rate cap. The Postal Service, as guided by the Commission's regulations, holds substantial authority and discretion to adjust rates within that rate cap constraint as applied at the class level. However, individual rate changes within a class are factored into the calculation. Rule 3010.23(d). Unless these rules are followed, the reliability of the cap calculation is jeopardized. As the majority opinion notes, "... questions now exist regarding the Service's compliance with the rate cap for Package Services and the accuracy of the banked rate authority" Order at 14.

Through its action, the Postal Service has effectively denied mailers the opportunity to comment on the merits of a classification change. In addition, the Service implemented a classification change without notifying the Commission in advance. The Postal Service, in this case, prevented an accurate calculation of the true impact of the rate change in this case, thereby creating the possibility of an unwarranted banked amount.

The CPI rate cap can fulfill its key function as an important consumer protection mechanism by governing the extent of increases from year to year on market dominant products only if the cap is applied accurately. I look forward to working with my fellow Commissioners in protecting the value and integrity of the rate cap within the framework of the PAEA.

Commissioner Nanci E. Langley

Dissenting Opinion of Commissioner Goldway

This opinion essentially allows the Postal Service to change the mailing requirements for a product so as to all but exclude its use by individual consumers and small businesses. Bifurcating a product and imposing unreasonable and unwieldy restrictions upon it with the intention of discouraging its use, as a *sub rosa* alternative to canceling the product outright, is unfair to consumers, single piece mailers and small businesses.

Moreover, the surreptitious manner in which this product was altered in specific contravention to the PRC's directive in 2007 could create a precedent for the willful disregard of our agency's oversight and regulatory functions. This change the Postal Service has undertaken virtually eliminates access to a long-standing product for a class of people without clout or representation — small businesses and individuals. It is simply unacceptable to me and is, I believe, not consistent with the PAEA or the intent of the Commission's recently adopted regulations.

I concur with Carlson and Popkin that the change constitutes the removal of a product from the market-dominant product list, thereby subjecting the proposal to the procedural requirements of section 3642. While the Postal Service should have flexibility to make changes as necessary, a full and open airing of views should precede any changes that eliminate market dominant products, especially if those products have been in place for many years and are relied upon by small businesses and consumers.

My colleagues have noted that the Postal Service unilaterally removed the Bound Printed Matter rate information from the computer terminals used by window clerks. In addition, the Service has omitted BPM rates from its APC self-service terminals. Most egregiously, it is my belief that the Postal Service quietly and without notice removed the BPM rate option from its online website without providing any notification to consumers that they were not receiving full and accurate rate information.

The Commission dismissed Mr. Carlson's Complaint without prejudice (meaning it could be refiled without legal impediment) and the matter was continued in the Mail Classification case filed by the Postal Service. Upon the issuance of this unfortunate opinion, should Carlson or other interested parties seek relief by filing a Complaint with the Commission, I hope my colleagues will give the issues raised here a more comprehensive review.

Commissioner Ruth Y. Goldway

CHANGE IN DRAFT MAIL CLASSIFICATION SCHEDULE

The following material represents changes to Package Services, Bound Printed Matter Flats and Bound Printed Matter Parcels, in the draft Mail Classification Schedule.

The strikethrough text signifies that the text has been deleted and shall no longer be considered for the draft Mail Classification Schedule text. The underlined text signifies that the text is new, and shall be considered in addition to all other draft Mail Classification Schedule text.

PACKAGE SERVICES

Bound Printed Matter Flats

Bound Printed Matter Parcels

Postage for Bound Printed Matter Flats and Bound Printed Matter Parcels must be paid by permit imprint only. In addition, an annual mailing permit fee is required for destination-entered Bound Printed Matter Flats and Bound Printed Matter Parcels is required.