

UNITED STATES OF AMERICA  
Before The  
POSTAL RATE COMMISSION  
WASHINGTON, D.C. 20268-0001

Customized Market Mail )  
Minor Classification Changes )

Docket No. MC2003-1

REPLY BRIEF OF THE  
OFFICE OF THE CONSUMER ADVOCATE

Shelley S. Dreifuss  
Director  
Office of the Consumer Advocate

Kenneth E. Richardson  
Attorney

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The Office of the Consumer Advocate ("OCA") hereby submits its Reply Brief in this proceeding. The OCA filed an Initial Brief on May 8, 2003. Initial Briefs were filed on May 8, 2003, by the United States Postal Service ("USPS") and Valpak.<sup>1</sup>

The OCA and Valpak Initial Briefs opposed the Request of the USPS as well as the Stipulation and Agreement signed by several intervenors in this proceeding and filed by the USPS on April 30, 2003. This reply brief summarizes the grounds upon which OCA believes the Commission must reject the USPS Request and responds to the specific points raised by the Postal Service in its Initial Brief.

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<sup>1</sup> Valpak Direct Marketing Systems, Inc. and Vakpak Dealers' Association, Inc. filing collectively as Valpak.

### SUMMARY OF OCA POSITION

In the Initial Briefs, both the OCA and Valpak expressed strong concern about the deficient quantitative record offered by the USPS to support its Request. The USPS is unable to provide quantitative cost, volume and revenue data to support the permanent CMM mailing option classification. Consequently, the Commission should reject the Request as well as the Stipulation and Agreement filed by the USPS on April 30, 2003.

If the USPS chooses to pursue the CMM option, it must instead obtain appropriate cost, volume and revenue data and refile its Request for permanent classification *or* refile a request pursuant to other rules of the Commission for temporary service at a rate subject to later Commission review.

### GROUND FOR REJECTING THE USPS REQUEST AND STIPULATION AND AGREEMENT

The burden of proof is upon the USPS to make its case;<sup>2</sup> yet the USPS's testimony and other record evidence fail to provide a sound basis for a favorable recommendation for CMM. Even though this case is handled procedurally as a minor classification case, the Commission recommendation must nevertheless insure that the classification complies with the Postal Reorganization Act, particularly that the new mailing option will cover its costs. No credible cost, volume or revenue data has been offered. The USPS admits it did not perform any cost analysis of CMM service; nor did it do any significant market analysis. Further, the record does not contain any

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<sup>2</sup> In Order No. 1368 in this proceeding, the Commission noted, "[the Commission] is not responsible for assuring that the Postal Service sustains its burden of proof." "Order on Application of Rules for Minor Classification Changes," April 14, 2003 at 5.

quantitative evidence of the cost or market for CMM. OCA submits the Commission should not recommend a permanent classification that may lose money and not make a contribution to institutional costs, although the negative impact on the contribution may be minor.

Approval of the Request must be based on the record. This is a case of first impression under the minor classification rules and a favorable recommendation would establish terrible precedent: the Commission would be recommending a minor classification without quantitative costs, volume or revenue data. Further, as a minor classification case the Commission could set a precedent that it will approve "minor" cases even without data support if the Postal Service alleges that the impact cannot be readily and inexpensively measured.

THE USPS INITIAL BRIEF CLAIMS THAT CMM MEETS MINOR CLASSIFICATION RULES, COMPLIES WITH POSTAL REORGANIZATION ACT CRITERIA AND THAT THE SETTLEMENT IS SOUND, BUT THE BRIEF DOES NOT ADEQUATELY RESPOND TO THE CRUCIAL DEFICIENCIES IN THE USPS'S DIRECT CASE

The USPS's Initial Brief makes the following claims about CMM: that it has been adequately analyzed, meets the definition of a minor classification case, was appropriately constructed to limit the impact on postal operations, and will have minimal impact. The USPS concludes that CMM complies with the classification criteria of the Postal Reorganization Act, that the Commission should not be concerned about basing its recommendation on the settlement agreement, and that the settlement provides a sound basis for granting the USPS's Request. OCA responds in this reply brief, in turn, to each of the USPS contentions.

The USPS Initial Brief contends CMM was adequately analyzed and sensibly designed. (USPS Init. Brief at 1-4.) Throughout the Initial Briefs, OCA and Valpak fully refuted that contention. The USPS claims that its analysis, (which seems to have amounted to guesswork), constituted adequate analysis. In fact, the core of the strenuous OCA and Valpak objections to the CMM Request is the total lack of rigorous analysis of potential CMM costs, volumes and revenues. The USPS analysis consisted of only a scanty review presented by two witnesses, in direct testimony. But interrogatories determined immediately that no data or studies other than two informal focus groups were conducted by the USPS as part of the product analysis.<sup>3</sup>

Limited financial and marketing analysis should not, and cannot, be properly considered adequate to support a new classification under the Postal Reorganization Act. The Commission is required to maintain the standards of the Postal Reorganization Act and not rubber-stamp niche classification requests. The moniker "minor classification case" relates to the Commission's threshold determination as to the nature of the classification proposed regarding the impact on rates, eligibility, or institutional cost contribution. The moniker does not mean, and should not mean, that being a minor classification case allows rates to be determined with "hand-waving speculation," as Valpak pointed out the in its Initial Brief. (Valpak Initial Brief at 13.)<sup>4</sup>

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<sup>3</sup> Tr. 2/78; OCA/USPS-T1-8 redirected to witness Hope, Tr.2/80-84, OCA/USPS-T1-29 redirected to witness Hope, Tr. 2/76-7, OCA/USPS-T1-2; Tr. 2/24-25, OCA/USPS-T1-2. Also see OCA Initial Br. at 18-20.

<sup>4</sup> The USPS also re-argues the issue of whether the CMM Request fits within the definition of an expedited minor classification case. (USPS Init. Br. at 4-6.) The Commission resolved that issue in Order No. 1368 in response to OCA's motion to reject the Request to apply the minor classification rules or to suspend the proceedings, filed on April 3, 2003. In any event, as OCA stated in the Initial Brief, fitting the Request within the minor classification rules does not conclude the proceedings. The USPS must still meet its evidentiary burden to enable the Commission to determine whether or not CMM complies with the provisions of the Postal Reorganization Act.

OCA does not specifically contest the USPS claim that CMM will have minimal effect on postal operations. (USPS Init. Br. 6-10) But, having the characteristic of "minimal impact" does not justify Commission approval merely because, without more, there may be minimal impact. Minimal impact is not the test established in the Postal Reorganization Act. In fact, it is not even one of several test criteria enumerated in the Postal Reorganization Act.

Further, in OCA's view, the impact is not known and the Commission must know the impact before approving a new *permanent* classification. The uncertainty of the impact is increased because, according to the argument of the USPS, costs do not bear a relationship to the pricing<sup>5</sup> and the potential market is untested. If sales are extremely light, start-up cost may not be recovered. If, on the other hand, CMM mailings happen to explode on the upside, losses resulting from under-pricing could be in the millions.<sup>6</sup> Or, if CMM is overpriced as Valpak suggests, there may be discrimination. Finally, because the classification would be permanent, if any of these situations occur, there is no satisfactory mechanism for the Commission to readily correct the wrong of approving a classification without sufficient data to insure the §3622(b)(3) requirement will be met.<sup>7</sup>

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<sup>5</sup> The USPS has contended the irregular CMM pieces are dissimilar to the parcels for which the RSS rate was developed.

<sup>6</sup> If, for example, the USPS lost only 10 cents per CMM piece, then a CMM volume of 100 million pieces (a small portion of total Standards Mail), the USPS would lose \$10 million. Whether this volume is realistic, can only be surmised as the USPS testimony only estimated a "low volume" for CMM and did not estimate a potential volume range. While the Postal Service projects the initial usage of CMM to be low, the market research indicates a strongly positive response to CMM that could result in much greater volumes of CMM in the future. For example, nearly all advertising firm executives who attended the focus group sessions gave the strongest possible agreement to the question whether they would be likely to send an irregular piece of advertising mail. Tr. 2/57 (witness Ashe's response to interrogatory OCA/USPS-T1-18). At page 15 of LR 2, researchers report that: "Advertisers and their agencies *love* the Customized MarketMail™ concept . . . ." (Emphasis added).

<sup>7</sup> The early-filed Joint Reply Brief dismisses OCA's contention that CMM may burden other types of Standard Mail because, it says, if the rate is incorrect, "based upon data collected once the service has

The USPS's claim that CMM complies with the Postal Reorganization Act criteria is not capable of resolution. (USPS Init. Br. at 10-11.) The Commission cannot ascertain that the most significant requirement in the Postal Reorganization Act, §3622(b)(3), will be met. Compliance with that section is imperative.<sup>8</sup> Without compliance with that section, meeting other statutory criteria is beside the point.

The Joint Reply Brief of several parties claims OCA's legal position on cost-revenue relationships is in error on grounds that §3622(b)(3) relates to requirements at the subclass level rather than to types of mail within a subclass.<sup>9</sup> OCA and Valpak disagree.<sup>10</sup> The Joint Reply Brief fails to recognize that this case involves a request for a new permanent classification of mail. Without meaningful cost estimates for new permanent services, the Commission is unable to determine the contributions of the various parts of the classes of mail. Fairness to existing products requires the Commission obtain data to determine the impact of new services. As OCA pointed out in the Initial Brief, the Commission Order establishing the minor classification rules

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been initiated, the rate level can be reevaluated." Joint Reply Br. at 5. The brief fails to comprehend a significant difficulty with the USPS case. cost data will not be collected by the USPS and the rate level can not be reevaluated with the volume and revenue data the USPS is committing to collect. See the early filed Joint Reply Brief of Advo Inc., American Spirit Graphics Corporation, AOL Time Warner Inc., Direct Marketing Assoc., In., Magazine Publishers of America, Inc., Mail Order Association of America, and Parcel Shippers Association filed May 14, 2003.

<sup>8</sup> *Bulk Small Parcel Service, 1992*, "Opinion and Recommended Decision," Docket No. MC93-1 at 140. ("We have taken particular care to recommend rates for the BSPS category that will conform to the §3622(b)(3) imperative.")

<sup>9</sup> Joint Reply Brief, *supra*, at 6. The OCA views the question of the RSS rate resulting in revenues that are less than costs as arising in an entirely different factual context of determining a rate for an existing service and at the same time avoiding rate shock. In the instant proceeding, OCA cautions against inducing *new* volumes of CMM mail that might only serve to create even larger losses for the Postal Service. OCA agrees with the Commission's policy to move slowly on RSS increases.

<sup>10</sup> See Valpak Init. Br. at 2-4.

discussed new services, "[t]he Commission agrees that new services adopted to meet competitive or other perceived needs must be offered at compensatory rates..."<sup>11</sup>

Moreover, on this record, the Commission cannot declare, with certainty, compliance with §403(a) (requiring postal services at "reasonable rates"). Without adequate cost data regarding the application of an off-the-shelf rate, one simply does not know whether the rate is fair and reasonable. The Commission might choose to anoint the rate as a "good enough" guess, but OCA submits the Postal Reorganization Act demands more.

As for the provisions of §3623(c), we cannot determine how fair and equitable the classification is without more cost and market analysis. The USPS theory seems to be just the opposite--if it has a small enough service volume, then it doesn't matter whether it is fair and equitable because the expense of reasonably estimating the costs is not warranted. As far as value is concerned, OCA indicated in its Initial Brief that it has no argument with the USPS attempts to provide a beneficial service that fills a gap in the mailer options. (OCA Init. Br. at 9.) Also, while there is no evidence of impact on competition, it does not follow that there would not be a negative impact on alternative delivery services specializing in delivering unique items. CMM has been handled with such a low profile, with no initial pilot tests or other experimental market tests, that CMM may not have come to the attention of possible competitors who may be harmed by the service.<sup>12</sup> Again, the problems go to the USPS's approach to this classification: an

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<sup>11</sup> *Rules of Practice and Procedure*, Docket No. RM95-4, Order No. 1110, May 7, 1996 at 5.

<sup>12</sup> Or to the attention of potential users, for that matter.

unwarranted rush for expedition before gaining sufficient cost and market knowledge about the product to justify permanent approval.

THE USPS SEES A MINIMAL IMPACT FROM CMM DUE TO THE RELATIVELY LOW VOLUME BUT DOES NOT CONSIDER THE POTENTIAL IMPACT OF REVENUE LEAKAGE SIGNIFICANTLY REDUCING NET CONTRIBUTIONS

The USPS goes to great length in its Initial Brief to demonstrate the relatively low volume of CMM mail that will likely follow from the CMM rate being significantly greater than the regular Standard Mail rate. (USPS Init. Br. At 7-10.) If CMM volume is too low, there is a chance that not even the start-up costs would be recovered. This notion is not far-fetched. Other recently introduced USPS services have failed to recover start-up costs.<sup>13</sup>

In arguing that CMM volumes will be low, the USPS overlooks another facet underlying the nature of CMM that could lead to even substantially lower volumes and lower net institutional contribution to Standard Mail than even the USPS admits. Under CMM, the potential for significant revenue leakage is great. Consider the revenue leakage possibility with the realistic situation alluded to in the marketing report (Library Reference USPS-LR-2) (hereafter "Report") that advertisers have a limited budget for an advertising campaign. Suppose, for instance, there is an "overall budget" for advertising expenses for the advertisement that will be mailed using the CMM option.<sup>14</sup>

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<sup>13</sup> See *Mailing Online Experiment*, Docket No. MC2000-2, "Opinion and Recommended Decision" at 5, 8-12.

<sup>14</sup> USPS-LR-2 at 27. "...any Innovators who are not so constrained by costs will be willing to entertain production of Customized MarketMail pieces as long as they fit *within the overall budget they have allocated for the campaign*" (Emphasis supplied.)

To the extent the low CMM volumes replace other advertising mail that would have been sent as Standard Mail at the basic rate, then it is a simple mathematical calculation that the institutional contribution could be reduced significantly as a result of diminished volumes. That is because if CMM replaces current Standard Mail at the basic rate, there would be fewer pieces of CMM mailed than under the current alternative and total USPS revenues would be less.

For example, if CMM replaces advertising mail sent at the Standard Mail basic piece rate and if the same amount of advertising dollars were available for postage in both instances, there would be 40 percent less CMM volume than would have been mailed under the Standard Mail basic rate, because the standard basic rate of 34.4 cents is 40 percent less than the CMM rate (23/57.4). Even assuming the residual shape surcharge (RSS) recovers all of the attributable costs of the irregular piece (and the USPS has not produced data to establish this), any contribution to institutional costs would thus come from the basic rate of 34.4 cents. As a matter of simple arithmetic, the net contribution from the use of CMM rather than Standard Mail basic would be reduced by the same percentage that the volume of CMM mail is less than the volume of Standard Mail basic rate that otherwise would have been mailed, *i.e.* 40 percent. Thus, through revenue leakage, under that very realistic scenario, CMM mail would actually lower the institutional contribution by 40 percent below that currently obtained from the mail that otherwise would have been mailed as Standard Mail basic.

The record ignores this possibility or the effect of such a possibility. The market Report discussed the matter only briefly. In the focus group it was suggested CMM mail is so unique it may attract new advertisers and "is not likely to replace conventional

standard mail" (USPS-LR-2 at 19.) However, there is no further follow-up of this thought except that it is parroted in the record by witness Ashe that CMM is expected to complement rather than replace Standard Mail. (Ashe at 6.) Once again, the lack of pilot test or market test data leaves the Commission without information to determine the true market for CMM.

Consider the further possibility of additional reductions in the institutional contributions from replacement mail. If an advertising budget is fixed, and the production costs are higher than normal,<sup>15</sup> then the absolute postage dollars available for that campaign is much less. Again, with a fixed advertising budget for a particular product, to the extent more of the budget is spent for design and production costs for the advertising piece than would be spent normally, then there is less budget available for postage.<sup>16</sup> The result would be even fewer pieces mailed than in the scenario posited above. Again, assuming as we did, above, that the 23 cent RSS is just barely sufficient to cover all attributable costs, the institutional contribution available from the 34.4 cent rate would be further reduced by the percentage reduction in the amount available for postage. To the extent the CMM mailing is an alternative to other Standard Mail, the contribution to institutional cost will be less, even assuming the RSS recovers all costs attributable to irregular shape pieces, which has not been demonstrated in this record.

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<sup>15</sup> "[D]esign and production costs for odd-shaped pieces will be higher than standard size letters or postcards." USPS-LR-2 at 27.

<sup>16</sup> It is understood that this is not necessarily the case, even with a fixed budget, because the mailer may opt to spend no more money on production costs than previously by reducing the number of mailpieces produced.

THE COMMISSION IS NOT REQUIRED TO ACCEPT THE TESTIMONY OF THE  
USPS WITNESSES MERELY BECAUSE THE CREDIBILITY OF THE TESTIMONY  
WAS NOT CHALLENGED BY ANOTHER WITNESS

The USPS suggests OCA has failed to come forward to respond to its case and thus suggests that, therefore, its evidence must be accepted by the Commission. (USPS Init. Br. at 11-12.) OCA submits that the USPS errs on two counts. First, as noted below, the case law cited by the USPS is inapposite. Second, and more fundamentally, OCA is contending that the USPS has not presented enough hard quantitative evidence to demonstrate the proposed classification meets the requirements of the Postal Reorganization Act.

OCA contends the USPS has not provided enough evidence in this record to warrant acceptance of the new classification-they have not met their burden of proof. Valpak's Initial Brief puts the matter another way, stating the USPS has failed to establish a *prima facie* case. The Commission's Order No. 1368 noted the USPS's submission has a "lack of case-specific quantitative data" with "somewhat limited" "available qualitative data."<sup>17</sup> With these deficiencies the Commission must be concerned that the classification does not meet statutory requirements. The Commission recently articulated its view of its duties in cases in which there is substantial agreement among intervenors on issues of fact:<sup>18</sup>

Establishing whether the rates proposed in the [R2001-1] settlement agreement comport with the Postal Reorganization Act requirements depends upon finding adequate factual support in the evidentiary record of this proceeding. Consequently, the Commission must appraise the extent to which record evidence indicates that the agreed-upon rates are

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<sup>17</sup> Order No. 1369 at 6.

<sup>18</sup> *Postal Rate and Fee Changes, 2000*, "Opinion and Recommended Decision," Docket No. R2001-1 at 22.

compatible with applicable statutory considerations, such as the §3622(b) ratemaking factors. This assessment of record evidence is the Commission's established practice in deliberating on agreed-upon mail classification changes in proceedings under §3623, and responds to the Administrative Procedure Act's requirement that agency decisions in formal, on-the-record proceedings be grounded on support by substantial record evidence. [Citation to:] 5 U.S.C. §706(2)(E).

The Commission also stated that: "Even if participants unanimously agree upon a proposed rate, the Commission can not lawfully recommend that rate if the record shows it would fail to recover the attributable costs of the pertinent subclass or service."<sup>19</sup>

The Commission's application of evidentiary standards in the R2001-1 case is instructive. Although R2001-1 was a rate, not a classification, case, the Commission was faced with a nearly unanimous settlement agreement that had resulted in virtually no counter-evidence being filed by intervenors. The Commission underscored, however, that unanimity carries no weight in influencing its findings of fact, but merely determines the procedures that will be followed in an uncontested case. The evidentiary standard applied is constant across all on-the-record cases, whether settled or not – the Commission's recommended decision must be *grounded on support by substantial record evidence*. It is clear that the Postal Service has failed utterly to provide substantial record evidence to support its proposal. Rather than the conventional cost estimates that have become familiar in previous Postal Service requests for new classifications, the Postal Service has served up the thinnest possible

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<sup>19</sup>

*Ibid.*

gruel – an “implicit assumption” that the RSS rate will be high enough to cover the costs of CMM.<sup>20</sup>

This proceeding is not a trial in a court of law where the trier of fact has no interest in the outcome of the case and will grant summary judgement in the absence of rebuttal evidence. The Commission has broader responsibilities to administer the policies of the Postal Reorganization Act. If the case presented by the Postal Service is insufficient to convince the Commission that the policies affecting national interests enunciated in that law will be met, then it must reject the requested classification. Just today, the Commission explicitly acknowledged the balancing of interests that it is required to perform under the Postal Reorganization Act. In its opinion in Docket No. MC2002-2,<sup>21</sup> the Commission stated that while it attempted to give “the maximum possible deference to the terms” of the Capital One/USPS contract, it still had to make a specific finding that the recommended new classification insured basic fairness for all other postal ratepayers. Had the Postal Service’s Request been merely a case between it and potential CMM customers in a civil court, the court would not have needed to concern itself with the effect of its decisions on non-litigants. The Postal Rate Commission is not free of this responsibility. It must be certain that CMM covers its costs so as not to impose an unfair burden on non-CMM ratepayers.

The Commission must look to its own practices and cases to determine whether the USPS has complied with the standard of proof needed for a new classification.

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<sup>20</sup> Tr. 2/79 (witness Hope’s response to interrogatory OCA/USPS-T1-13, redirected from witness Ashe). It is amusing that the Postal Service could not even take the trouble to make an overt assumption, but limited itself to an “implicit” one.

<sup>21</sup> *Experimental Rate and Service Changes to Implement Negotiated Service Agreement with Capital One*, Docket No. MC2002-2, “Opinion and Recommended Decision” at 148.

OCA's Initial Brief discussed Commission cases and suggested policy reasons why the Postal Service has failed to meet the standards for a favorable recommendation.

The USPS also suggests the Commission must accept the testimony of its witnesses because their testimony has not been specifically refuted by counter-evidence. (USPS Init. Br. at 11-2.) . The USPS seems to be implying that the parties were required to request hearings and produce a rebuttal case in order to refute the USPS witnesses. That is an extreme position and it is unlikely the USPS is making such a claim. However, *Dickinson*<sup>22</sup> is cited as standing for the proposition that because there was no evidentiary presentation providing clear and convincing grounds challenging the credibility of the USPS witnesses case, their testimony must be accepted. The USPS is applying an overly broad interpretation to that case and it is not applicable here. The *Dickinson* case involved a matter relating to the sincerity of the witness's testimony regarding his religious beliefs (which were supported by facts regarding the witnesses' activities) No evidence rebutted the testimony. A later Supreme Court case summarized the holding:

It is well-settled that mere disbelief in the sincerity of a registrant, based on no objective evidence of insincerity, will not suffice to deny a con-[405 U.S. 1006 , 1011] scientious objector claim once a prima facie case is made out. *Dickinson v. United States*, [346 U.S. 389](#)

That is not the case here. OCA does not contest the sincerity of the USPS witnesses, only the total lack of factual *quantitative* support for their conclusions. In fact, the witnesses' own responses to interrogatories undercut their conclusions as they admit

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<sup>22</sup> *Dickenson v. U.S.*, 345 U.S. 389, 396-97 (1953).

there are no any studies to support the cost, volume and revenues estimates needed to support their conclusions.

Further, OCA's position is that the facts regarding costs, volumes and revenues are not known because the USPS did not provide enough supporting data for the Commission to make a well-founded decision. The Commission has a statutory responsibility to recommend rates that conform to the policies of the Postal Reorganization Act. It is not appropriate, nor is the Commission required, to accept baseless conclusions in the USPS's direct case.

Even more objectionable is the implication of the USPS argument. The USPS says, in effect, that unless there is an evidentiary presentation challenging each case filed by the USPS, the Commission is bound by the direct case in the absence of other clear and convincing evidence. Certainly an evidentiary case countering the Postal Service's direct case is not required in every instance. That would clearly be unsound law. Not only do the interrogatory responses undercut the credibility of the conclusions of the USPS witnesses, the Commission may rely upon its own expertise in ruling upon the issues in this proceeding.

The other case cited by the USPS, *White Glove*,<sup>23</sup> is equally inapposite but for different reasons. It does not stand for the proposition cited, that where the USPS's direct case was not challenged it must be accepted because there are "no clear and convincing grounds challenging the credibility of the testimony." (USPS Br. At 12.) In *White Glove*, the court found that where testimony was uncontradicted and unimpeached it was erroneous for the judge to reject the testimony without pointing out

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<sup>23</sup> *White Glove Bldg. Maintenance, In. v. Brennan*, 518 F..2d 1271 1276 (9<sup>th</sup> Cir. 1975).

any inherent improbability in the testimony and that it was improper to rule against the testimony "without a detailed explanation of his reasons," and was therefore arbitrary. The court did not hold the uncontradicted evidence must be found dispositive because it was uncontradicted. On its face, such a conclusion would yield unreasonable results as it would thus effectively require that every witness be challenged or be accepted. Instead, the court held in *White Glove* that if such testimony is not followed, the judge must explain the reasons for rejecting it. The *White Glove* opinion discussed other similar cases that explained more fully the applicable principle. For instance, the *White Glove* court quoted *Yip Mie Jork*:<sup>24</sup>

the trier of fact need not accept uncontradicted testimony when good reasons appear for rejecting it, such as the interest of the witness, and improbabilities and important discrepancies in the testimony. However, when uncontradicted testimony has been rejected without good reason we have reversed. (citations omitted.)

In the current CMM case, OCA is not suggesting that the Commission ignore the testimony of Ashe and Hope or to fail to give reasons for rejecting their conclusions in its recommendation. Rather, OCA contends the USPS testimony cannot be relied upon because it is without foundational quantitative support necessary to meet the standards of the Postal Reorganization Act. The testimony also does not meet the standards that the Commission should apply as a matter of policy to niche classification requests. By specifically stating its reason for rejecting the testimony of the USPS witnesses, the Commission can readily conform to the principles that the court relied upon in *White Glove* and other similar cases.

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<sup>24</sup> *Yip Mie Jork v. Dulles*, 237 F.2d 383, 385 (9<sup>th</sup> Cir. 1956).

The USPS also references the *Randall*<sup>25</sup> case for the same proposition. Again, the principle discussed in that case is not controlling here. The *Randall* principle does not prevent the Commission from rejecting the USPS testimony even though no evidentiary presentation was placed in the record directly challenging the USPS witnesses. The USPS Initial Brief states the *Randall* proposition that the judge must "expressly state clear and convincing reasons for rejecting the uncontroverted evidence." (USPS Br. at 12.) In OCA's view, it is the total lack of evidentiary support for their conclusions that diminishes the credibility of their conclusions. That reason, if clearly stated in the Commission's recommendation, is enough as to reject the USPS evidence. The Commission can, and must, utilize its own expertise in ruling upon matters of policy and law. (cite) The Commission is not bound to grant applications under the Postal Reorganization Act where data is inadequate to support the request.

THE COMMISSION SHOULD NOT BASE ITS DECISION UPON THE STIPULATION  
AND AGREEMENT BUT MUST DO AN INDEPENDENT ANALYSIS TO DETERMINE  
WHETHER CMM IS CONSISTENT WITH THE TERMS OF THE POSTAL  
REORGANIZATION ACT

The USPS's Initial Brief also suggested the Commission should have no reservation about basing its recommendation on the settlement agreement as it offers a sound basis for acceptance. (USPS Init. Br. at 11-15.) The Commission should do an independent analysis of the record apart from the settlement offer. The Commission did this in Docket No. R74-1 where there was a non-unanimous settlement. In Docket No. R94-1, despite a settlement supported by many parties and opposed by others, the

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<sup>25</sup> *Randall v. Comfort Control, Inc.*, 725 F.2d 791 (D.C. Cir. 1984).

Commission, after reviewing the record, found it could not recommend the rates in the settlement, was not bound by the settlement, and needed to make significant revisions to the cost and revenue estimates to which the participants had stipulated. (See Op. R2001-1 at 20.)

The Postal Service acknowledged, and the Commission agreed, that approval requires the Commission's independent review to establish the settlement's terms are consistent with the Postal Reorganization Act, particularly §3622(b)(3) as the fundamental benchmark. The Commission said in the opinion ruling on the settlement offer in Docket No. R2001-1 that "the Commission can not lawfully recommend that rate if the record shows it would fail to recover the attributable costs of the pertinent subclass or service" and that, in turn, "depends upon finding adequate factual support in the evidentiary record made in this proceeding." (Docket No. R2001-1 Op. at 22.) The Commission also noted that opposition to the stipulation and agreement, together with a suggested alternative outcome as OCA suggests here, required the Commission to "adequately address the alternative proposal in making rate recommendations." (*Id.* at 22-23.)

The USPS suggests that accepting the stipulation and agreement would not create a binding precedent, citing two court cases.<sup>26</sup> (USPS Init. Br. at 13.) The USPS is only partially correct. As the *Kelly* case cited by the USPS states "a settlement that is forced onto a party is effectively converted into a decision 'on the merits,' see, e.g.,

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<sup>26</sup> The USPS cites to *Kelly v. FERC*, 96 F.3d 1482, 1489-90 (D.C. Cir. 1996); *Office of Consumer's Counsel v. FERC*, 783 F.2d 206 (D.C. Cir. 1986). We do not dispute the principle applied in those cases that settlements generally do not have precedential weight. For the reasons discussed, we do not object to the settlement terms on those grounds. Rather, we are concerned the current records fails to provide support for a finding consistent with statutory requirements and the potential for future repetition of the evidentiary and procedural approach of the USPS.

*Mobil Oil Corp. v. FPC*, 417 U.S. 283 (1974)." The parties to the settlement have agreed to be bound by its terms but not other non-signatories such as Valpak. The other case cited by USPS, *Consumers Counsel*, notes that an agency's authority to accept a settlement "is bounded by the limits of its authority and the necessity for rational decisionmaking."<sup>27</sup> That is OCA's point in this case.

Nevertheless, of concern to OCA is that, if approved, the evidentiary and procedural approach of the USPS with this minor classification case could be duplicated many times over with pernicious effect. The USPS could systematically request minor classifications without, as here, any cost or market support whatsoever, obtain Commission acceptance through settlement with mailers who are not apparently impacted by the proposal, and file a settlement for approval. But the Commission cannot ignore the Postal Reorganization Act by approving a settlement with the mere statement that the settlement is not a binding precedent. The effects of a recommendation for a *permanent* classification would be binding on all mailers until the USPS chooses to modify it.

Also, contrary to the USPS contention, adopting the stipulation and agreement would risk broader and unintended consequences through the application of the settlement terms in the future. The collection of volume and revenue data will not begin to respond to the shortfall of information in this record. Cost data should be required as a policy to insure that CMM together with future minor classifications, to the extent they follow the CMM Request template, do not become a significant drain on USPS

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<sup>27</sup> *Office of Consumers Counsel v. FERC*, 783 F2d 206 at 234.

resources.<sup>28</sup> As we said in the Initial Brief, if no data is provided to support the Request, the USPS can follow-up with this procedure and soon have a series of confusing services which may lose money and which the USPS may continually claim the matter is too minor to warrant a cost analysis. (See OCA Init. Br. at 23-4.)

### CONCLUSION

Wherefore, OCA respectfully requests that the Commission reject the Request and the settlement offer. The USPS may then select an alternative course of action if it chooses to pursue the CMM option by obtaining better cost and market information and/or in the meantime applying for a temporary classification change under one of the various alternatives available in the Commission's rules. In any event, market tests and cost analyses to provide evidentiary support will be necessary before the Commission can reasonably recommend a permanent classification for CMM.

Respectfully submitted,

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SHELLEY S. DREIFUSS  
Director  
Office of the Consumer Advocate

KENNETH E. RICHARDSON  
Attorney

1333 H Street, N.W.  
Washington, D.C. 20268-0001  
(202) 789-6830; Fax (202) 789-6819

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<sup>28</sup> The Commission's rules have established the policy to obtain cost data, the decision here will determine whether the Commission will follow its policy.

