

UNITED STATES OF AMERICA
Before the
POSTAL RATE COMMISSION
Washington, DC 20268

Periodic Reporting }

Docket No. RM2003-3

COMMENTS OF THE GREETING CARD ASSOCIATION

The Greeting Card Association (GCA) herein submits its comments in the above-named docket, pursuant to the Commission's Order No. 1377 (June 25, 2003). In summary, GCA supports the Commission's effort to improve the comprehensiveness and usefulness of postal data reports, while also recognizing that in its July 2, 2003, *Substantive Comments*, the Postal Service has expressed some legitimate concerns regarding protection of those circumscribed portions of the data that may be competitively sensitive. We will comment on some of the Postal Service's points as well as offering observations of our own.

I. The Postal Rate Commission's need for the proposed information collection.

The information covered by this proposed rulemaking is needed by the Postal Rate Commission (Commission) and the parties that appear before it in order to understand and analyze the increasingly complex and voluminous data and models underlying proposed rate or classification changes. The Commission, with the aid of

these parties, has the obligation to base its decisions on a sound understanding of such data and models. Because procedural fairness to the parties encompasses practicable, usable access on their part to such an understanding, the Commission must also take reasonable steps to insure that parties have such access. Consequently it has authority, under 39 USC § 3603, to require reporting that will enable both it and the parties to deal with the information provided and utilized by the Service in a filing under § 3622 or § 3623. The reporting proposed in this docket, by better informing the Commission and the parties, would make compilation, analysis, and decisional use of the administrative record more efficient.

In *Substantive Comments of the United States Postal Service*, filed on July 2, 2003 (hereinafter cited as “*Substantive Comments*”), the Service emphasizes the limits placed on the Commission’s role by the Postal Reorganization Act, and argues that the reporting proposed in this Docket would enable the Commission to perform analyses, validation exercises, and hypothetical-case experiments not required by the process of responding to a Postal Service request filed under 39 USC § 3622. *Substantive Comments*, pp. 8 et seq.¹

¹ The Service views the question not simply as one of jurisdiction, but also as a potential threat to the *procedural* soundness of recommended decisions and the associated Governors’ decisions implementing rates. It describes instances where Commission-developed analyses or dispositions were overturned on review for a perceived failure to satisfy the trial-type hearing requirement of 39 USC § 3624(a), and concludes that

Even accepting, for argument's sake, the Service's premise concerning the Commission's limited role², it still seems clear to us that the proposed information-gathering would better enable the Commission to perform that role. The Commission was meant by Congress to be, and is, an expert body.³ Even if it were true that the

To make readily and frequently available to the Commission the large amounts of detailed financial and informational information now requested, when not required by a compelling and legitimate Commission function, would be to unnecessarily create the possibility, or, at least, the appearance, that such information will be put to the illegitimate purposes condemned by the *Newsweek* and *MOAA* courts

Substantive Comments, p. 13. For reasons described in the text, GCA believes that the data *are* required by legitimate Commission functions. The suggested danger of extra-record determinations can and should be met, as it normally is, by appropriate caution on the Commission's part in conducting proceedings, and not by foregoing beneficial information. The Service points to a hypothetical, and remote, danger; the undesirable effects of misapprehending the underlying facts (or simply of being unable to use them owing to lack of time in the ten-month case schedule) appear to us a substantially more pressing concern.

² The Commission is in fact not limited solely to responding to Postal Service requests; it can initiate classification changes (as long as no rate change is involved), and try and issue recommended decisions on rate complaints filed by interested parties. 39 USC §§ 3623(b), 3662.

³ According to the Supreme Court,

. . . Congress recognized that the increasing economic, accounting, and engineering complexity of ratemaking issues had caused Members of Congress, "lacking the time, training, and staff support for thorough analysis," to place too much reliance on lobbyists. House Report, at 18. *Consequently, it attempted to remove undue price discrimination and political influence by placing ratesetting in the hands of a Rate Commission, composed of "professional economists, trained rate analysts, and the like," id., at 5, independent of Postal Service management, id., at 13, and subject only to Congress' "broad policy guidelines," id., at 5*

Commission had *no* functions other than holding hearings and issuing recommended decisions on Postal Service rate requests, it would be better able to perform that duty if it is continuously, currently, and fully informed on the types of data that will come before it – linked to particular proposed rates – in a § 3622 request.

II. The scope of 39 USC § 3603. Because we believe the Commission has a legitimate need for the best reasonably available data, so that it can maintain and bring to bear the most effective possible expertise, we also believe that § 3603 empowers it to make the proposed improvements to the periodic reporting program. Section 3603 is a “necessary and proper” provision designed to help the Commission perform its duties effectively and efficiently.⁴ Since its duties centrally include acting as an *expert* decisionmaker on matters arising under ch. 36 of title 39, it seems clear that obtaining the information covered by this docket regularly and systematically, in usable form, and in a timeframe allowing it to be given mature consideration is a legitimate need. It is true, as the Postal Service points out⁵, that § 3624(b) authorizes the Commission – “[i]n order to conduct its proceedings with utmost expedition consistent with procedural fairness to the parties” – to enact certain types of rules of practice. But this subsection

National Association of Greeting Card Publishers v. U.S. Postal Service, 462 U.S. 810, 822 (1983) (italics added).

⁴ It authorizes the Commission to “promulgate rules and regulations and establish procedures . . . and take any other action they deem necessary and proper to carry out their functions and obligations. . . .”

⁵ *Substantive Comments*, p. 14.

does not appear to limit the scope of § 3603. That section authorizes the Commission to “promulgate rules and regulations *and establish procedures*, subject to chapters 5 and 7 of title 5” (italics added). The § 3624(b) language aims at securing expedition and procedural fairness – indispensable objectives, clearly, but separate from and not in conflict with the substantive expertise the Commission is expected to apply in reaching its decisions. And as § 3603 distinguishes between “promulgat[ing] rules and regulations” and “establish[ing] procedures,” it also appears that purely procedural rules for the conduct of hearings are not the only proper subject of Commission rulemaking.

Consequently, GCA believes that the proposed information-gathering would be within the Commission’s legitimate authority as an expert agency charged with rendering informed decisions, and that availability of the required information would assist the Commission and the parties in making the best use of the ten-month schedule allowed by the Act⁶, as well as of their own resources.

⁶ It is understandable that the Service does not wish to give opponents “a ‘head start’ on analyzing and formulating responses” to its proposals, *Substantive Comments*, p. 36. But it is possible to distinguish between materials prepared for litigation under ch. 36 of the Act and those generated by the Service in conducting its own operations and finances, and currently disclosed – for selected periods – in a Commission proceeding. Lack of reasonable access to the latter can amount to an unfair disadvantage for other parties who must try, within a limited timeframe, to understand and analyze a Postal Service filing.

III. Confidentiality issues. The Postal Service discusses in considerable detail⁷ its need to protect potentially sensitive commercial information from unnecessary disclosure and its related objections to the proposed rulemaking. While much of this discussion is couched in legal terms, we believe that at least some of the difficulties it describes or hypothesizes are susceptible of more purely practical solution. We agree that the issue is a real one – at least insofar as successful price competition is a factor in the Service’s ability to maintain or improve its market share in competitive markets and preserve or increase total contribution to institutional costs, to the potential benefit of all mail users.

Initially, GCA would observe – in view of the high level of generality with which the Service presents its arguments – that most of its traffic, and revenue, are not subject to competition⁸ of a kind that could be affected by the disclosure problems the Service raises. The statutory monopoly on letter mail and the Service’s established practical position as the dominant carrier of periodicals mean that competitive threats in which price is central exist most directly in the expedited and parcel markets, and, in a less direct way, for saturation advertising. According to figures which it supplied to the

⁷ Id., pp. 24-36.

⁸ In discussing the interpretation of 39 USC § 410(c)(2), the Service makes it plain that competitive concerns are of prime importance. *Substantive Comments*, p. 32.

President's Commission on the United States Postal Service⁹, about seven percent of the Service's total revenue comes from Priority Mail and three percent from parcel services. First-Class Mail, which is predominantly letters within the meaning of the Private Express Statutes, accounts for 55 percent, and Standard Mail, much of it also covered by the monopoly, for another 24 percent.¹⁰ We say this not to minimize the importance of the mails that face competition, or of their contribution to institutional cost, but only to suggest that their special needs should be dealt with by creating confidentiality provisions tailored to those types of mail; the entire information-gathering project need not be halted in order to do so.¹¹

As the Commission pointed out in the initiating Notice¹², Rule 102(a)(10) now recognizes a timing distinction between billing determinant data for most mail and those

⁹ See *Briefing for the President's Commission on the United States Postal Service* (January 8, 2003), p. 12.

¹⁰ We understand, of course, that even monopoly letter mail is subject to inroads from substitutes – principally, e-media. But the type of information the Commission is proposing to collect seems relevant to direct competition (especially price competition) rather than to potential substitution of an entirely different medium with widely disparate per-message costs.

¹¹ The Postal Service distinguishes between the occasional disclosure, in rate cases, of data essentially like those proposed to be collected, and its (possible) disclosure on a regular annual basis. It argues that the former, now required, should not be expanded into an annual requirement. *Substantive Comments*, p. 33. It is probably quite true that current data would be of more use to a competitive rival than data perhaps two or three years old. Still, as we note below, this is an issue affecting *competitive* subclasses and, more specifically, those affected by price competition.

¹² Order No. 1358 (January 8, 2003), p. 7.

for Priority Mail, Express Mail, and parcel post. These classes are recognized as competitive. Billing determinants for them may be filed up to a year after the time for filing other such data. GCA would suggest exploring ways to extend this competitive/noncompetitive distinction in the reporting requirements. For example, the Service perceives important differences between its interpretation of § 410(c)(2) and the interpretation – less favorable to confidentiality – which it ascribes to the Commission. For subclasses identified as presenting competitive problems, it should be possible to devise a more “pro-confidentiality” mechanism for regulating public disclosure of materials to be reported under the proposed rule than would apply to other data. Reported data relating solely to such subclasses, for instance, might, by rule, be given (qualified) privileged treatment without the necessity for a prior request from the Service. Restrictions on the categories of persons to whom competitively sensitive information may be disclosed are also possible.¹³ Also for such identified mail classes, it might be worthwhile for the Commission to consider whether the delayed reporting mechanism used for billing determinants in competitive classes could be extended to other aspects of competition-sensitive data.

IV. Summary and conclusion. GCA believes that the reporting amendments proposed in this rulemaking are an appropriate way for the Commission to carry out its statutory functions, would be beneficial in the trial and decision of rate and classification

¹³ Cf. the rule on in camera treatment of certain information, 39 CFR § 3001.31a.

cases, and should be pursued. Because all mail users can benefit when the Postal Service succeeds in preserving or expanding its traffic in competitive classes, we would also urge the Commission to identify those areas in which the Service's concerns regarding disclosure of competition-sensitive data are of practical significance and to incorporate appropriate protective measures in the final rule.

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Respectfully submitted,

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