

BEFORE THE
POSTAL RATE COMMISSION

PERIODIC REPORTING

DOCKET NO. RM2003-3

RESPONSE OF UNITED PARCEL SERVICE
TO SUBSTANTIVE COMMENTS OF THE
UNITED STATES POSTAL SERVICE
(July 16, 2003)

United Parcel Service submits these comments in support of the adoption of Proposed Rule 102.

It is important to keep in mind what Proposed Rule 102 would require. The Commission has not proposed to establish an annual audit or investigation of the Postal Service's rates. See Substantive Comments of the United States Postal Service (July 2, 2003) revised July 3, 2003 ("Postal Service Comments") at 2. Nor does the proposed rule establish a system of "oversight responsibility" or authorize "day-to-day monitoring of detailed [Postal Service] operations and finances." *Id.* at 7. No hearings would be held; no proceedings of any type would be conducted; and no comments by the public on the contents of the filings required by the proposed rule are solicited. Rather, the proposed rule is merely an information reporting requirement under which the Postal Service would file between rate cases basic costing information (1) that the Postal Service routinely files at the beginning of a rate case, (2) most or all of which it inevitably collects or produces in any event in compiling a report which it already files annually, *i.e.*, the "PRC Version" of the Cost and Revenue Analysis ("CRA") report.

Once it becomes clear that Proposed Rule 102 would merely require the Postal Service to file on a periodic basis the same costing information which the Postal Service already collects and which the Commission relies on to fulfill its statutory ratemaking responsibilities, the question raised by the proposed rule becomes simple and straightforward: May an agency which recommends rates on the basis of technical expertise require that the information needed to maintain that expertise be filed periodically where the agency is unquestionably entitled to receive that information when a proceeding is pending? UPS thinks the answer is clear: of course it can.

The Postal Service argues that the Commission's role is a limited one. See Postal Service Comments at 8-9, 11. However, when it comes to designing the rates which the general public pays, Congress provided "that ratemaking . . . authority [was] vested primarily in [the] Postal Rate Commission." *National Association of Greeting Card Publishers v. United States Postal Service*, 462 U.S. 810, 821 (1983) ("NAGCP"), quoting *S. Rep. No. 91-912* at 4 (1970).¹ While it has become customary for the Postal Service to submit proposed rates to the Commission when it files a rate case, the statute does not require the Postal Service even to suggest appropriate rates. Instead, the statute contemplates that the Commission will develop the rates it thinks appropriate, and not merely review and modify Postal Service rate proposals. See 39

1. The dictum in *United Parcel Service, Inc. v. United States Postal Service*, 455 F. Supp. 857, 883 (E.D. Pa. 1978), *affirmed*, 604 F.2d 1370 (3d Cir. 1979), *cert. denied*, 446 U.S. 957 (1980), quoted in *Governors of the United States Postal Service v. Postal Rate Comm'n*, 654 F.2d 108, 117 (D.C. Cir. 1981) and cited by the Postal Service (Postal Service Comments at 8-9) does not suggest otherwise. Those cases -- both of which were decided before *NAGCP* -- involved vastly different questions from that presented by the information reporting requirement at issue here.

U.S.C. § 3622(a) (providing in part that “The Postal Service *may* submit such suggestions for rate adjustments as it deems suitable.”) (emphasis added).

At times, the Postal Service seems to question in its filing whether the Commission has authority to require the filing of *any* periodic reports between cases. See, e.g., Postal Service Comments at 5-7, 14. However, the Postal Service has accepted, at least implicitly, the Commission’s authority to do so by filing various types of reports on a periodic basis for many years. If the Commission’s authority to require periodic reporting is in fact being called into question, the answer to that question is, again, clear. Section 3603 of the Postal Reorganization Act, 39 U.S.C. § 3603, explicitly 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 Such rules, regulations, procedures, and actions shall not be subject to any change or supervision by the Postal Service.”

Section 3603 does not limit the Commission’s rulemaking authority to the adoption of rules governing the conduct of ratemaking or classification proceedings pending before it. That subject is dealt with in Section 3624 of the statute. Thus, *all* rules and regulations which the Commission deems “necessary and proper” to carry out its functions and obligations are appropriate. The issue then becomes whether a requirement to periodically file supporting costing information may properly be deemed by the Commission to be “necessary and proper to carry out [its] functions and obligations.” 39 U.S.C. § 3603.

There is no doubt that it is “necessary and proper” for the Commission to keep abreast of the costing information that underlies the postal rates being charged to the

American public. If nothing else, doing so adds to the Commission's ratemaking expertise and puts it in the best position possible to promptly recommend the best possible rates when the Postal Service requests it to do so. There is nothing in Section 3603 or in any other portion of the statute which limits the development and maintenance of the Commission's expertise to the ten month period within which the Commission must recommend a decision on a Postal Service rate request. As the Office of the Consumer Advocate suggests, the purpose of the ten month deadline for rate cases is to ensure that the Commission has an adequate opportunity to develop the facts and to arrive at an appropriate recommended decision, not to see whether the Commission and the parties can meet some arbitrary time limit for uncovering errors or fashioning improvements. See Office of the Consumer Advocate Reply Comments (July 11, 2003) at 4 n.9.

The Postal Service complains of the burden of complying with the proposed rule. Postal Service Comments at 21-24. However, the Postal Service already compiles and files with the Commission on an annual basis the PRC Version of the CRA report. It is difficult to believe that requiring the Postal Service to file the information it inevitably uses to fashion that report can possibly add any substantial additional burden on the Postal Service. Nevertheless, in an effort to reduce the burden which the Postal Service claims the proposed rule would impose on it, the Commission may consider eliminating the requirement that the Postal Service supply all of the backup documentation for the "USPS Version" of the CRA report. After all, it is the PRC Version which the Commission relies upon in determining appropriate rates.

The Postal Service also suggests that the proposed rule would jeopardize its litigating position in a subsequent rate case and thereby runs afoul of Section 410(c)(4)

of the statute, 39 U.S.C. § 410(c)(4) (providing that the application of the Freedom of Information Act to the Postal Service “shall not require the disclosure” of “information prepared for use in connection with proceedings under chapter 36” of the statute). This claim applies only to that aspect of the proposed rule which requires the Postal Service to highlight costing method changes in the PRC Version of the CRA.

It is unclear from the text of Proposed Rule 102(a) whether the Postal Service may unilaterally implement a “change in attribution principles or methods” in the PRC Version of the CRA between proceedings; Proposed Rule 102(a)(1) would require the filing of both the PRC Version and the USPS Version of the CRA and requires “Each change in attribution principles or methods” to be identified without distinguishing between the PRC Version and the USPS Version. Order No. 1358, Notice of Proposed Rulemaking to Revise the Commission’s Periodic Reporting Rule (January 8, 2003), Attachment at 1. It would be remarkable were the proposed rule to give the Postal Service the leeway to make such unilateral changes in the PRC Version of the CRA. One would think that the PRC Version would be required to remain unchanged and use exactly the same “attribution principles or methods” approved by the Commission in the most recently completed rate case, unless and until the Commission gives prior approval to any change in it. However, if the Commission is intending to give the Postal Service this added discretion, it does not make sense to say that the Postal Service may change a report required to be filed by the Commission but need not inform the Commission and the public of the changes. Section 410(c)(4) is intended to prohibit the public from obtaining, through a Freedom of Information Act request, information concerning what the Postal Service intends to propose and how it intends to support those proposals before a rate case is filed; it is not meant to permit the Postal Service to

change Commission-mandated costing methods without telling the Commission and the public about the changes.

We come finally to the issue of confidentiality. When the very same information which the proposed rule would require to be filed between rate cases is filed at the inception of a rate case, it is made available to the general public; none of it is filed under protective conditions. That fact by itself demonstrates that there is nothing inherently confidential about it.² Moreover, the Postal Service has never pointed to any concrete example of harm it has suffered by virtue of providing, in a rate case or otherwise, the basic cost support for its rates that the Commission's rules require.³

The Postal Service may prefer not to make available to the public on a periodic basis the costing support for its rates, but public scrutiny of the basis for the rates paid by the American public is the price the Postal Service pays for the considerable

2. The proposed rule would, like the current rule, provide for certain billing determinant information to be filed on a delayed basis. UPS has previously addressed in this proceeding the validity of that distinction. See Comments of United Parcel Service in Response to Notice of Proposed Rulemaking on Periodic Reporting Rule (February 10, 2003) at 2-5. UPS continues to urge the Commission to modify the proposed rule as there suggested.

3. When the Postal Service has made a claim of possible competitive harm with respect to requested information other than that required to be filed by the proposed rule, the parties have generally been willing to accommodate the Postal Service's concern, *e.g.*, with respect to customer specific and facility specific data. Where the parties have differed with the Postal Service, the Commission has always been sympathetic to the Postal Service's concerns.

advantages it has by virtue of its status as a government enterprise with a statutory monopoly over its largest service.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this date I have caused the foregoing document to be served in accordance with Section 12 of the Rules of Practice.

John E. McKeever

Dated: July 16, 2003.

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