

BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

REPOSITIONABLE NOTES PROVISIONAL SERVICE

Docket No. MC2004-5

**RESPONSE OF UNITED STATES POSTAL SERVICE
TO JOINT MOTION TO DISMISS**
(August 19, 2004)

PostCom, MFSA, and DMA have asked the Commission to dismiss this proceeding.¹ Their motion claims that the proposal to establish a provisional classification and rates to allow for the attachment of repositionable notes to the exterior of several categories of mailpieces is “unlawful on its face” and should be dismissed without further hearing by the Commission. Joint Motion to Dismiss (“JMD”) at 2. The motion speaks direly of the “threat that the rate and classification embodied in this product poses to the fundamental legislative and regulatory principles and policies that underlie our current rate and classification system.” JMD at 2-3.

The motion is procedurally improper and substantively unsound. It therefore should be denied, as explained below.

¹ Joint Motion to Dismiss of the Association for Postal Commerce, Mailing & Fulfillment Service Association, and the Direct Marketing Association (August 11, 2004).

I. The Motion is Procedurally Improper and Inconsistent with the PRA

As a threshold matter, the motion itself is improper and inconsistent with the Postal Reorganization Act. Section 3623(b) authorizes the Postal Service to request classification changes “from time to time.” Once it does so, the Act requires the Commission, following an opportunity for hearing, to transmit a recommended decision to the Governors. 39 U.S.C. § 3623(c) (“The Commission *shall* make a recommended decision ...”); 39 U.S.C. § 3624. There is no statutory provision for summary dismissal of a Postal Service request. Not surprisingly, the Commission’s rules make no provision for substantive summary dismissal of a Postal Service request.

As a procedural matter, the Commission has already determined that the request can properly be considered under its rules. Order Nos. 1413, 1415. The Commission is now in the process of determining what further proceedings are required to provide due process.² In the appropriate course of those proceedings, the joint movants may certainly express their views on the substantive merits of the Postal Service’s request. If the Commission were ultimately to conclude that the joint movants are correct on one or more of their arguments, it would have the option not to recommend the classifications and rates as proposed. But, as discussed above, the statute requires that conclusion to be incorporated into a recommended decision based on the record developed after an opportunity for hearing. Therefore, because there is no legal basis for the Commission to act as the joint movants request, the motion should be denied.

² In Order No. 1415, issued on August 16, the Commission extended the deadline for motions for evidentiary hearings on the Postal Service’s direct case to seven days after all answers to discovery requests are received.

II. The Proposed Rates and Classifications Are Not Unlawful on Their Face.

If the Commission finds it necessary to consider the joint movants' substantive arguments, it should find they lack merit. First, the joint movants argue that creating the requested classification would be inconsistent with section 3622(b)(3). JMD at 2-3. But that section does not govern the creation of classifications; section 3622 presents the criteria to be applied for the evaluation of proposed rates. The criteria for evaluating a proposed new classification are set forth in section 3623.

Nowhere in section 3623 is there anything remotely resembling the principle postulated that "a classification is defined only where there are attributable costs." JMD at 2-3. Instead, as factors to be considered in the evaluation of proposed classifications, 3623(c)(2) refers to "the relative value to the people of the kinds of mail matter entered into the postal system and the desirability and justification for special classifications and services of mail," while 3623(c)(5) refers to "the desirability of special classifications from the point of view of both the user and the Postal Service." Section 3623 in its entirety makes no mention of costs, either generically or as "attributable costs."

The most salient summary of what constitutes "classification is a 'grouping' of mailing matter for the purpose of assigning it a specific rate or method of handling." *National Retired Teachers Association v. U.S. Postal Service*, 430 F.Supp 141, 146 (D.D.C. 1977), affirmed, 539 F.2d 1360 (D.C. Cir. 1979). That court further noted that "[r]elevant factors include size, weight, content, ease of handling, and identity of both posting party and recipient." *Id.* at 146-47. Conspicuous in its absence is "attributable cost" as a factor. Moreover, one factor specifically identified is content, a criterion which

allows, for example, distinctions in classification between printed matter that is purely advertising and printed matter that is primarily editorial, even though the costs of handling such printed matter may be utterly unaffected by its content. Thus, the conclusion proffered by the joint movants that "[t]here are no attributable costs in this case; thus there is no legal basis for a new or revised classification" is sheer bluster. See JMD at 3. The instant proposal would create "groups" of mailing matter (items with RPNs attached) for the purpose of assigning them a specific rate, precisely in accord with the *Retired Teachers* opinion.

Equally flawed is the joint movants' argument that the proposed rates are *per se* unlawful. This argument essentially boils down to a claim that any proposal between rate cases with potential financial consequences violates section 3622(b), because it could disrupt the cost coverage relationships established in the last omnibus rate proceeding. JMD at 3-5. There is, however, nothing within the language of section 3622(b) or within prior Commission practice that supports this view. Section 3622(b) presents the factors the Commission examines in evaluating a rate proposal. As the motion correctly suggests, one such factor, subsection 3622(b)(3), addresses attributable costs and institutional costs. Even if a proposal might alter the contribution to institutional costs of one or more subclasses, however, such a possibility would not preclude the Commission from reaching a determination that the resulting contributions would be reasonable in accord with subsection 3622(b)(3) and the other factors of the Act. The terms of section 3622(b) neither state nor imply that the factors can only be

evaluated if all subclasses are examined simultaneously.³ There is nothing even remotely “unlawful” about a Postal Service proposal that requires Commission consideration of the factors of the Act outside the context of a general rate case, even if the proposal may involve potential financial consequences for one or more subclasses. One need look back no further than last year, to the Customized Market Mail case, for an example of a proposal with potential financial consequence that was recommended by the Commission outside the context of an omnibus rate case. Opinion and Recommended Decision, Docket No. MC2003-1 (June 6, 2003). Thus, an argument that the “existing legal framework” cannot accommodate consideration of limited proposals like the instant one borders on the frivolous.

III. Value of Service is a Policy of the Act that Can Be Considered by the Commission

The joint movants make two basic arguments regarding value of service. JMD at 5-8. The first argument is a legal one, in which they suggest that value-of-service principles can, as a matter of law, only be applied at the subclass level, when relative

³ The JMD’s statement at page 4 that the instant proposal “writ[es] out of existence all of the other non-cost factors of the Act” is bizarre, given witness Kaneer’s in-depth analysis of these factors’ applicability to the proposal. USPS-T-2, at 7-11. It should be noted that these factors are traditionally applied to determine cost coverages at the subclass level. Nevertheless, they embody “policies of the Act” that can guide the Commission in determining the appropriateness of the prices proposed for the provisional service. Another strange argument made in the Motion is that the Postal Service is unlawfully “ignoring established methods of adjusting markups which have been accepted as ‘fair and equitable.’” JMD at 4. This argument completely ignores the fact that at this point the RPN program is only a test, and that, to the extent the RPN program generates revenue and becomes an established rate element, its revenue will be included in the pool of revenue generated by the host subclasses – as is the case with Ride Along – and will figure into the target coverage established for the subclasses.

cost coverages are being assessed. The language of the statute, however, does not compel any such conclusion. It would be ironic in the extreme if section 3623 allowed the creation of “special classifications” that were desirable and justifiable based on the “relative value” of different kinds of mail matter, but section 3622(b) precluded consideration of that value when determining appropriate rates for such a special classification. Once again, the Customized Market Mail case is instructive. The relatively high price of CMM is consistent with its expected value as an innovative advertising medium. The statutory scheme certainly provides ratemakers the flexibility to include consideration of value-of-service factors as the foundation for particular rate elements such as the RPN rates proposed in this proceeding.

The joint movants’ second basic argument involves policy issues. Policy issues, of course, provide no basis for the Commission to refuse to consider the proposal and to dismiss the case, as the joint movants urge. But the movants are wrong regarding the important policies as well. The proposal is quite sound on policy grounds. No mailers are required to use RPNs. Mailers who do not expect to derive value from RPNs will not apply them. Thus, based on the fact the motion to dismiss has been filed, it is fair to surmise that RPNs are expected (by at least some mailers) to add value to the subclasses of mail for which the service is proposed to be available. Even under the ratemaking approach advocated within the motion, such enhanced value of service would need to be taken into account when considering costs coverages and rates for the affected subclasses. The policy issue then becomes, should that enhanced value be a factor to raise subclass rates for all subclass mailers, regardless of whether they use RPNs, or should the enhanced value be charged directly to the mailers who benefit

when they choose to apply RPNs to their mailings? It is a perfectly permissible policy choice to charge directly the mailers who perceive that they will obtain benefits in excess of the applicable proposed price (as evidenced by their decision to enter their mailings with RPNs applied), and leave undisturbed the rates of mailers who choose not to participate in the RPN program. But ultimately, that is a matter the Commission may consider in formulating its recommended decision in this docket. And in so doing, the Commission can address, if it sees fit, the joint movants' policy arguments on interpreting and applying the "value of service" criterion, analyzing the effect of this proposal on the marketplace, and distinguishing this product from other means that may increase advertising mail return rates or other "mailer innovations." JMD at 5-7. The fact that there may be differences of opinion on such policy questions provides no basis for summary dismissal of the request.

For these reasons, the Joint motion to dismiss should be denied.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all participants of record in this proceeding in accordance with section 12 of the Rules of Practice.

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