Postal Rate Commission
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ORDER NO. 1417

UNITED STATES OF AMERICA
POSTAL RATE COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners: George Omas, Chairman;
Tony Hammond, Vice Chairman;
Dana B. Covington, Sr.; and Ruth Y. Goldway

Repositionable Notes Market Test Docket No. MC2004-5

ORDER DENYING MOTION TO DISMISS

(Issued August 30, 2004)

On August 11, 2004, the Association for Postal Commerce, the Direct Marketing Association, and the Mailing & Fulfillment Service Association filed a joint motion to dismiss the Postal Service's request in this docket. This mailer coalition contends that the Postal Service's request proposing to assess special charges for handling mailpieces bearing Repositionable Notes (RPNs) is "unlawful on its face" and should be dismissed. Joint Motion to Dismiss of the Association for Postal Commerce, Mailing & Fulfillment Service Association, and the Direct Marketing Association ("Joint Motion"), August 11, 2004, at 2.

The coalition makes several arguments. It asserts that the Postal Service's RPN proposal would impose a surcharge on mailpieces for characteristics that incur no additional cost and that such a surcharge violates section 3622(b)(3) of the Postal Reorganization Act. It argues that section 36223(b)(3) requires that rates be based on attributable as well as institutional costs. It argues that rates cannot properly reflect attributable costs unless the classification distinctions that underlie them are based on attributable cost differences. Joint Motion at 2-3. Since there are no attributable cost differences on which to base an RPN classification, there is no legal basis for such a classification.

The coalition also asserts that there is no legal basis for selecting RPN rates in the context of this Postal Service request. It asserts that the RPN proposal will alter the institutional cost relationships among the various subclasses that were recommended by the Commission in the most recent general rate case (Docket No. R2001-1), but that the Postal Service's request makes no attempt to show that the resulting relationships are reasonable. This, it argues, violates section 3622(b)(3). Id. at 3. It maintains that the Postal Service could not make the required showing, since it should be made at the subclass level, and RPN pieces do not constitute a coherent subclass. Id. at 4.

The coalition argues that value of service distinctions, standing alone, do not provide a legally sufficient basis for establishing separate classifications with separate rates. Id. at 6.

The coalition also offers several policy arguments for dismissing the Postal Service's request. One is that the Postal Service should not be allowed to charge for mail characteristics that impose no cost upon it, because to do so would ratify the Postal Service's intent to exploit its monopoly power within this market. Id. at 6. The other is that charging for mail characteristics merely because they enhance response rates sets a dangerous precedent because it could be expanded to cover a wide range of mail characteristics. Id. at 6-7.

The Postal Service argues that a motion to dismiss a request for a classification change submitted under section 3623 is procedurally improper. It contends that section 3623(c) of the Act requires the Commission to incorporate any conclusions it may have about the legal soundness of a request for a classification change into a recommended decision. It notes that the Commission's rules of practice do not specifically authorize dismissal of such requests. Response of United States Postal Service to Joint Motion to Dismiss, August 19, 2004, (Postal Service Response) at 2.

The Postal Service rejects the coalition's assertion that section 3622(b)(3) implies that "a classification is defined only where there are [distinct] attributable costs." Postal Service Response at 3, citing Joint Motion at 2-3. It attaches great weight to the fact that the costing standard articulated in section 3622(b)(3) resides in section 3622,

which explicitly applies to rate change requests, rather than in section 3623, which explicitly applies to classification change requests. It also emphasizes that in defining the term "classification" in the context of the Postal Reorganization Act, a Federal court decision mentions content as a relevant factor, but not attributable cost. Postal Service Response at 3, citing *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). The Postal Service notes that there are currently in effect rate distinctions for editorial and for advertising matter in Periodicals that are unrelated to attributable cost differences. Id. at 4.

The Postal Service rejects the coalition's argument that section 3622(b)(3) requires that impacts on relative institutional cost burdens must be evaluated comprehensively at the subclass level. It asserts that the Act provides ratemakers the flexibility to make value of service the basis of a rate element. As an example, it cites the Commission's opinion in Docket No. MC2003-1 recommending adoption of a minor classification change (Customized Market Mail) outside the context of a general rate case, even though, the Postal Service argues, it might have "potential financial consequence[s]." Id. at 5.

The Postal Service further argues that the coalition's policy arguments may go to the merits of a recommended decision, but should not be considered sufficient to support a motion for summary dismissal. Id. at 7.

On August 25, 2004, the mailer's coalition filed its Reply to Response of United States Postal Service to Mailer Coalition's Joint Motion to Dismiss (Coalition Reply), together with a Joint Motion for Leave to File Reply. In its reply to the Postal Service, the coalition concedes that there are classification distinctions currently in effect that are not based on cost, but it argues that these classifications are based on message content and are intended to reflect distinctions in social value. It argues that basing a classification distinction on value of service alone is an unprecedented exception to the rule that classification distinctions must be cost based. Coalition Reply at 2-3. The coalition's reply reiterates its argument that RPN charges are unlawful because they

would have a cross-class impact on cost coverages whose reasonableness could not be analyzed. Id. at 4-5. It distinguishes Customized Market Mail from the Postal Service's RPN proposal as one that had a cost-based rationale, and only an intra-class effect on cost coverages. Id. at 6.

According to the coalition, the "intrinsic value" of mail to the customer, and the economic concept of the elasticity of demand are the only legally cognizable meanings of "value of service" in section 3622(b)(2). It argues that characteristics such as RPNs that enhance response rates to mail fall outside these meanings. Id. at 7-9.

The Postal Service is correct that the mailer coalition has an overly narrow view of the legally allowable bases for making classification distinctions. Under the Postal Reorganization Act, such distinctions may be based on multiple grounds, including differences in cost, differences in value of service, or other statutory policy considerations or commands. See, 39 U.S.C. 3622, 3623, and PRC Op. MC76-5, at 15. The Postal Service must show that the RPN categories that it requests are consistent with the statutory factors for evaluating classifications in section 3623(c). It must also show the RPN rates that it proposes are consistent with the statutory factors for evaluating rates articulated in section 3622(b), including the cost factor articulated in section 3622(b)(3).

Section 3622(b)(3) requires that rates cover the attributable costs of the mail to which they apply and make a reasonable contribution to the institutional costs of the system. It applies to each "class or type" of mail, but it does not explicitly define "class or type" as corresponding to a particular level of disaggregation. Therefore, it does not dictate the level at which attributable costs must be separately estimated, and at what level relative institutional cost burdens must be analyzed. These are matters that the Act leaves to the discretion of the Commission. In deciding at what level to perform these analyses, the Commission relies on both theory and practical considerations. It considers both precedent, and the factual context of a particular case. The Commission's policy has generally been to analyze attributable cost and cost coverages at the subclass level. Below the subclass level, it has generally estimated costs without

analyzing cost coverages, where the rationale for separate rate elements is cost. Worksharing discounts and shape-based surcharges illustrate this approach.

The Act, however, does not forbid rate elements to be based primarily on characteristics other than cost. As the Postal Service points out, the Act does not forbid distinct rates for editorial and for advertising matter in Periodical mail, even though there are no cost distinctions. Nor does the Act forbid distinct rates that are based to an important degree on value of service distinctions, such as whether mail is sealed against inspection. Whether a particular rate distinction may be based entirely on value of service differences requires consideration of all the classification and the ratemaking factors articulated in the Act. But this process requires factual and policy determinations beyond threshold determination of what the Act allows.

The mailer coalition's arguments that things that the mailer does to enhance the response rates to its mail should not be viewed as affecting "value of service" are particularly strained. Clearly, things that drive response rates also drive the mailer's demand for mail service. The coalition's unusual interpretation of "value of service" is an oblique way of arguing that it is unfair for the Postal Service to exploit enhanced demand that results only from the efforts of mailers. Its essential argument is that this proposal should be dismissed on public policy grounds. Joint Motion at 2, 6-7.

Such relevant public policy as can be ascertained is embodied in the statutory classification and ratemaking factors articulated in Chapter 36 of the Act, as well as its more general policy provisions. The Act cites fairness and equity as something that should be considered in evaluating rate and classification proposals. It also cites the "value" and "desirability" of mail as something to be considered, rather than ignored, in this process. Accordingly, whether RPN mail has "value" or "desirability" that should be reflected in classifications and rates is something that should be examined in a proceeding where there is an opportunity to make a record, rather than be determined in summary fashion at the outset. For this reason, the motion for summary dismissal filed by the mailer's coalition is denied.

The Postal Service's reply to the motion to dismiss was filed one day late. It does not appear to prejudice the interests of any participant to accept its reply. Therefore, the Motion of the United State Postal Service for Late Acceptance of Its Response to Joint Motion to Dismiss, August 19, 2004, will be granted.

The Joint Motion for Leave to File Reply, August 25, 2004, will be granted as well.

It is ordered:

1. The Joint Motion of the Association for Postal Commerce, Mailing & Fulfillment Service Association, and the Direct Marketing Association, August 11, 2004, is denied for the reasons stated in the body of this Order.

2. The Motion of the United States Postal Service for Late Acceptance of Its Response to Joint Motion to Dismiss, August 19, 2004, is granted.

3. The Joint Motion for Leave to File Reply, filed August 25, 2004, is granted.

By the Commission
(SEAL)

Steven W. Williams
Secretary