

**BEFORE THE  
POSTAL REGULATORY COMMISSION  
WASHINGTON DC 20268-0001**

RATE ADJUSTMENT DUE TO )  
EXTRAORDINARY OR EXCEPTIONAL ) Docket No. R2010-4  
CIRCUMSTANCES )

**COMMENTS OF  
THE ASSOCIATION FOR POSTAL COMMERCE  
(August 17, 2010)**

**I. INTRODUCTION**

The Association for Postal Commerce (“PostCom”) submits these comments on aspects of the Postal Service’s exigent rate increase request that specifically impact Standard Mail users. PostCom is a member of the Affordable Mail Alliance (“AMA”) and urges the Commission to dismiss the Postal Service’s filing on the grounds stated in AMA’s July 26 motion to dismiss and the further AMA comments filed separately today. PostCom writes separately here to address issues specific to Standard Mail that provide a further, independent, reason why the Commission should dismiss this case in its entirety.

PostCom members include the nation’s largest advertising mailers, printers, shippers, and mail service providers. Its membership encompasses both commercial and non-profit entities and includes the largest customers of the United States Postal Service. PostCom members rely heavily on a wide range of mail products and services but are particularly sensitive to the policies governing Standard Mail. As such,

PostCom members will be especially harmed by the Postal Service's filing, particularly by its unlawful proposed changes to Standard Mail products and rate design.

In brief, the Postal Service has impermissibly comingled changes in Standard Mail products, rate design, and rate incentives with the unrelated request for additional overall revenues because of supposedly exigent circumstances. The Postal Service has made no attempt to show that the product and rate changes, many of which have never been submitted to the Commission for review, meet the criteria of the Postal Accountability and Enhancement Act ("PAEA") or the Commission's rules. While several of these product modifications may, in fact, be desirable, this is simply not the right docket for their consideration. The Postal Service's circumvention of the rules and procedures specifically established by the Commission for these types of changes has deprived mailers of the opportunity to meaningfully review and comment on the changes, amounting to a denial of due process. The Commission should reject the Postal Service's Standard Mail rate proposals outright.

**II. THE POSTAL SERVICE HAS UNLAWFULLY COMINGLED THE CHANGES IN RATE DESIGN AND RATE INCENTIVES WITH THE EXIGENT FILING.**

The Postal Service has packed into its exigent rate request changes in products and rate relationships that have not heretofore been presented to mailers or reviewed by the Commission. Among these changes are the division of the Standard Mail Not Flat-Machinable/Parcels product into Marketing and Fulfillment Parcels, the replacement of the Not-Flat Machinables ("NFM") price category with a Regular Marketing Parcels

category; and the elimination of the half-pound rate cells for Bound Printed Matter.

Exigent Request of the United States Postal Service (“USPS Request”) at 19. The Postal Service has also altered historic rate relationships (e.g., the differential between the rate for basic ECR flats and 5-digit automation flats, the breakpoint for Standard Mail letter pieces, and the manner of computing the rate for Standard Mail Letters between 3.3 and 3.5 ounces); eliminated the procedure for allowing rigid flats to mail at automation flats rates; and heightened the Move Update Performance Based Verification requirement.

While some of these alterations may not, in formal terms, constitute changes in the definition of a “product” under the PAEA, the effects of the changes are so inextricably tied to that definition that they cannot be ignored.

While some of these changes may be desirable, considering them in this docket is nevertheless inappropriate. Congress and the Commission have set up extensive procedures, independent of exigent rate requests, to evaluate whether changes to individual products and rate relationships are appropriate. As considering the Postal Service’s requested product changes in this docket would bypass those procedures and the safeguards they provide, the Commission should order the Postal Service to initiate a separate docket for consideration of these changes. The instant docket should be focused solely on the need for an exigent rate increase for products as they currently exist.

**A. The Postal Accountability and Enhancement Act Establishes Separate Review Procedures for Exigent Rate Increases and Product Modifications**

Congress plainly intended that changes in products, including changes in rate relationships that have the effect of creating a change in products, be treated differently by the Commission than requests for rate changes pursuant to the extremely narrow

exigent exception to the basic price cap. The PAEA enumerated the classes of postal products that are subject to the provisions of the statute governing market-dominant products. 39 U.S.C. § 3621(a). This list, however, is “subject to any changes the Postal Regulatory Commission may make under section 3642.” *Id.* 39 U.S.C. § 3642, in turn, establishes procedures for considering whether to add new products or transfer products between categories. Section 3624(d) requires the Postal Service to provide advance notice of any proposed change in the Federal Register, along with a statement explaining how the proposed change satisfies the criteria set out in § 3642(b). Among the factors the Commission must consider under § 3642(b) are “the views of those who use the product involved on the appropriateness of the proposed action.” *Id.*, § 3642(b)(3)(B).

Sections 3621 and 3642, both of which were added by PAEA, indicate that Congress contemplated a distinct process for requesting and evaluating changes to market dominant products and the rate relationships between these products. Congress established an initial list of products and, contemplating that these products would need to be modified and that new products would need to be created as the postal economy evolved, established a process to allow for such changes in an orderly fashion that respected the needs of mailers. In establishing these processes, Congress made no mention of changes to the rates of particular products, including exigent changes.

By contrast, Congress addressed changes in the *rates* for particular products in section 3622 of Title 39. While this section generally establishes a system for “regulating rates and classes for market dominant products,” it does not specifically address changes to the products themselves. Section 3622(d)(1)(E), which allows for the type of exigent increase at issue in this docket, refers only to rate changes, not product changes or

changes to rate relationships which effectively alter products. Since Congress specifically addressed product changes in sections 3621 and 3642, it plainly did not contemplate product changes pursuant to section 3622(d)(1)(E). In short, Congress established a method for modifying postal products, and the exigency provisions of § 3622 do not suggest Congress intended to create any exceptions to that process.

Further support for separating requests for product changes from an exigency request can be found in a comparison of the rate review provisions of § 3622(d)(1)(C) (standard rate increase) and §3622(d)(1)(E) (exigent increase). Section 3622(d)(1)(C) requires only that the Postal Service provide 45 days notice of an impending rate change, and the Commission’s review is limited to determining whether the Postal Service has complied with the price cap. While there is a requirement to provide public notice, there is no explicit requirement that the public be granted an opportunity to comment on the Postal Service’s proposal.

By contrast, § 3622(d)(1)(E) provides for a much more thorough review of an exigent rate increase. The Commission has twice as long—90 days—to make its decision and is charged with determining whether the requested increase is “reasonable and equitable and necessary to enable the Postal Service, under best practices of honest, efficient, and economical management, to maintain and continue the development of postal services of the kind and quality adapted to the needs of the United States.” This standard is far more rigorous, and requires that the Commission exercise far more judgment, than the mechanical review of periodic index-based increases under § 3622(d)(1)(C). Additionally, section 3622(d)(1)(E) explicitly provides for “notice and opportunity for a public hearing and comment.”

These heightened procedural requirements for exigent rate increases indicate that Congress intended that above-CPI rate changes proposed as exigent under § 3622(d)(1)(E) should receive heightened scrutiny. The Postal Service, however, by including significant product changes in its exigent request, has proposed to subject these product changes to *lesser* scrutiny in the exigency context than they would receive in the normal course. As discussed below, the procedures Congress and the Commission have established for review of product changes are far more extensive than can be accommodated in the 90-day review of an exigent rate increase. Allowing the Postal Service to institute its proposed product changes in this context would mean that the Commission endorses heightened review of rate changes in an exigent case but lighter review of product changes. Such a construction would be directly contrary to the structure and meaning of §§ 3622 and 3642.

**B. The Commission Has Established A Distinct Process for Review of Product Modifications That Best Respects Mailers' Due Process Rights**

1. Product Modifications should be reviewed under the procedures established by 39 C.F.R. § 3020.30 et seq.

Section 3642 of Title 39 directed the Commission to establish rules for evaluating requests to change the product lists to ensure such changes comply with the statute. In obedience to the Congressional command, the Commission, after careful and thorough study, adopted specific and detailed rules regarding the addition and subtraction of, and changes to, postal products. The rules spell out what evidence must be submitted by USPS in support of such changes and provide specific procedures allowing for mailer input.

Under the Commission’s rules, the Postal Service may propose a modification to the market dominant product list or the competitive product list in the Mail Classification Schedule. The definition of “modification” is “adding a product to a list, removing a product from a list, or moving a product from one list to the other list.” 39 C.F.R. § 3020.30. The Commission’s rules require the Postal Service to: (a) demonstrate why the change is in accordance with the policies and the applicable criteria of chapter 36 of title 39 of the U.S. Code; (b) explain why, as to market dominant products, the change is consistent with each requirement of 39 U.S.C. § 3622(d), and advances the objectives of 39 U.S.C. § 3622(b), taking into account the factors of 39 U.S.C. § 3622(c); . . . (e) explain whether each product that is the subject of the request is covered by the postal monopoly as reserved to the Postal Service under 18 U.S.C. § 1696 subject to the exceptions set forth in 39 U.S.C. § 601; (f) provide a description of the availability and nature of enterprises in the private sector engaged in the delivery of the product; (g) provide any information available on the views of those who use the product on the appropriateness of the proposed modification; (h) provide a description of the likely impact of the proposed modification on small business concerns; and (i) include such information and data, and such statements of reasons and bases, as are necessary and appropriate to fully inform the Commission of the nature, scope, significance, and impact of the proposed modification. 39 C.F.R. § 3020.32.

In response to a request by the Postal Service to modify the product lists, the Commission, upon reviewing the request and responsive comments, must: (a) approve the request; (b) institute further proceedings to consider all or part of the request if it finds that there is substantial likelihood that the modification is inconsistent with statutory

policies or Commission rules, and explain its reasons for not approving the request to modify the market dominant and competitive product lists; (c) provide an opportunity for the Postal Service to modify its request; or (d) direct other action as the Commission may consider appropriate. 39 C.F.R. § 3020.34. If the Commission determines that further proceedings are necessary, a conference must be scheduled to consider the concerns expressed by the Commission. Written statements commenting on the Commission's concerns must be requested, to be filed 7 days prior to the conference. After the conference, the Commission must promptly issue a ruling to: (a) provide for a period of discovery to obtain further information; (b) schedule a hearing on the record for further consideration of the request; (c) explain the reasons for not going forward with additional proceedings and approve the request to modify the market dominant and competitive product lists; or (d) direct other action as the Commission may consider appropriate. 39 C.F.R. § 3020.35.

The exigent request review process, by contrast, allows for none of these procedures. The Commission, unless it dismisses the case outright, has no opportunity to “determine further proceedings are necessary,” schedule a conference to discuss the Commission’s concerns, or schedule a hearing for further consideration of the request. Instead, the Commission must simply accept or reject the Postal Service’s request within 90 days. This quick binary choice is incompatible with Congress’s intent in establishing a thorough review process for product modifications and the Commission’s implementation of that intent through its extensive regulations governing requests to modify products. In other words, the significant product modifications and major

alterations of rate relationships proposed by the Postal Service have no place in an exigent request.

2. Section 3010.65(a)(3) of the Commission’s rules does not apply to the changes proposed by the Postal Service

The Postal Service points to section 3010.65(a)(3) of the Commission’s rules as authority for including these product changes in its exigent rate increase request. USPS Request at 19. The language used in that section, however, refers to “changes in . . . the Mail Classification Schedule.” This language is identical to that used in the title to Subpart E of Part 3020 of the Commission’s rules governing Product Lists—“Requests Initiated by the Postal Service to Change the Mail Classification Schedule.” The rules under that subpart, 39 C.F.R. § 3020.90 *et seq.*, are designed to ensure “that product descriptions in the Mail Classification Schedule accurately represent the current offerings of Postal Service products and services.” 39 C.F.R. § 3020.90. These rules do not govern substantive changes to postal products. Apparently recognizing this distinction, the Postal Service has not included its plans to move small parcels into the competitive category in this exigent case, but has established a separate docket for this change. *See* Docket No. MC2010-36, Request of the United States Postal Service to Transfer Commercial Standard Mail Parcels to the Competitive Products List (August 16, 2010). But the Postal Service has ignored this distinction in proposing its other product changes.

The changes proposed by the Postal Service are modifications, not simply “changes in . . . the Mail Classification Schedule.” The Postal Service has eliminated the Standard Mail Not Flat-Machinable/Parcels product, as evidenced by the elimination of the Not-Flat Machinables price category, and added the Marketing Parcels, Fulfillment Parcels, and Regular Marketing Parcels products; has changed the breakpoint for certain

letters, effectively blurring the distinction between letter-shaped and flat-shaped products; has altered the rate relationship between basic ECR and 5-digit automation, presumably to induce migrations of flats between two heretofore distinct subclasses; has eliminated the procedure for allowing rigid flats to mail at automation flats rates; and has heightened the Move Update Performance Based Verification requirement. These changes are far more extensive than the clerical or ministerial changes to the Mail Classification Schedule contemplated by section 3020.90. *See also* 39 C.F.R. § 3020.91.

A contrary example will help illustrate the difference between the types of changes permitted by section 3010.65(a)(3) and 3020.90, on the one hand, and those subject to the more rigorous standard of section 3020.30, on the other. The Postal Service relied on section 3020.90 in Docket No. MC2008-2 in changing the description of the Repositionable Notes (“RPN”) product. In that docket, the Postal Service proposed no substantive changes to the RPN product, but simply sought to make permanent a product that had initially been created on an experimental basis. To accomplish this change, the Postal Service simply struck the qualifier “experimental” from the description of the RPN product in the MCS. This is the sort of clerical, descriptive change that section 3010.65(a)(3) contemplates. By contrast, the total reconfiguration of several Standard Mail products proposed by the Postal Service in its exigent filing would amount to change of another kind entirely. The Commission should not permit the Postal Service to make such significant changes outside of the procedures the Commission specifically established to handle them.

**C. Considering The Postal Service’s Proposed Changes Would Violate Due Process**

Considering the Postal Service's proposed changes to market dominant products and the rate relationships between these products not only would violate Congressional intent and the Commission's own rules, but it also would contravene the fundamental notions of due process embodied in the Constitution and the Administrative Procedure Act. *See, e.g.*, 5 U.S.C. § 553(c) ("After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments.") Agency actions may be invalidated when participants in a proceeding are not afforded an opportunity to present relevant comments. *See United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240, 251 (2d Cir. 1977) (explaining that when inadequate notice "actually prevent[s] the presentation of relevant comment, the agency may be held not to have considered all "the relevant factors.") Mailers would be deprived of these rights if the Commission allowed the Postal Service to implement its proposed product changes without the more thorough review process called for by the PAEA and the Commission's regulations. Allowing the Postal Service to commingle product changes with an exigent rate increase proposal would prevent mailers from presenting relevant comments directed at the product changes themselves.

One might argue that the Postal Service has provided adequate notice by filing its exigent case months before these changes will take effect. Congress and the Commission, however, have already examined this issue and determined that such notice is inadequate. In promulgating Rule 3020.30, the Commission considered what level of notice and opportunity for comment was appropriate to protect mailers' due process

rights. It required the extensive review process embodied in those rules. Any lesser degree of notice and comment would be inadequate as a matter of law.

**D. The Commission Should Dismiss The Exigent Case With Leave to Refile**

PostCom does not claim that all of the proposed changes lack merit as a matter of economics and ratemaking policy. At least one proposal—the change in the ECR pound rate—has been considered and approved by the Commission in prior cases and ought to be noncontroversial. Thus, PostCom does not categorically oppose the proposed product changes on their merits. Nonetheless, the attempt to pack into an exigent case matters that are not properly part of that proceeding is procedurally unlawful because it bypasses the Commission’s Rules, subverts the purpose of the review provisions of the PAEA, and essentially amounts to a collateral attack on the both the rules and the statute. Since the proposed product changes are inextricably linked to the revenue demand, the Commission must dismiss the case without prejudice, allowing the Postal Service to re-file in a separate docket such changes in products and rate relationships as it wishes to file.

**III. CONCLUSION**

Following the dictates of the PAEA, the Commission established a thorough review process for the Postal Service’s requests to modify market dominant products and the rate relationships between those products. Further, in establishing procedures for evaluating a request for an exigent rate increase, both Congress and the Commission sought to provide an opportunity for greater scrutiny and mailer participation than in the standard case. Allowing the Postal Service to enact substantial product changes through

an exigent rate increase would subvert these goals. Whether or not the proposed changes are desirable, they should not be considered in this docket. Since the proposed product changes are inseparable from the Postal Service's overall exigent request, the Commission should dismiss the Postal Service's request in its entirety.

Respectfully submitted,

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