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ORDER NO. 1132

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POSTAL RATE COMMISSION UNITED STATES OF AMERICA  
OFFICE OF THE SECRETARY  
POSTAL RATE COMMISSION  
WASHINGTON, D.C. 20268-0001

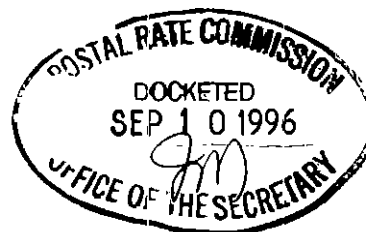
Before Commissioners: Edward J. Gleiman, Chairman  
H. Edward Quick, Jr., Vice Chairman  
George W. Haley and W.H. "Trey" LeBlanc III

Special Services Fees and Classifications                      Docket No. MC96-3

ORDER DENYING MOTION OF THE UNITED STATES POSTAL SERVICE  
FOR RECONSIDERATION OF ORDER NO. 1129

(Issued September 10, 1996)

Order No. 1129 granted the motion of Nashua Photo and Mystic Color Lab (Nashua/Mystic) to enlarge the scope of this docket to include consideration of the appropriateness of establishing a separate rate category for bulk, non-automated Business Reply Mail (BRM). The Postal Service moved for reconsideration of Order No. 1129, asking that it be reversed, or that the Nashua/Mystic proposal be considered in a separate docket. Motion of the United States Postal Service for Reconsideration of PRC Order No. 1129 or, in the Alternative, for Severance of Consideration of the Nashua/Mystic Proposal in a Separate Proceeding, filed August 16, 1996 ("Motion for Reconsideration"). The Postal Service also filed various motions for relief from its obligation to respond to discovery from Nashua/Mystic, pending



the disposition of its Motion for Reconsideration.<sup>1</sup>

Nashua/Mystic filed an opposition to the Postal Service's Motion for Reconsideration.<sup>2</sup> The Postal Service filed a supplemental response to the Nashua/Mystic opposition.<sup>3</sup>

The Postal Service's Motion for Reconsideration, for the most part, reiterates the policy arguments that it first made in its opposition to Nashua/Mystic's July 15, 1996, motion to enlarge. These included the argument that consideration of Nashua/Mystic's proposal should be deferred while the Postal Service's "comprehensive review of BRM is underway." Motion for Reconsideration at 9-10.

Order No. 1129 concluded that Nashua/Mystic had alleged facts which, if true, would make out a prima facie case that the BRM charges that it currently pays are inequitable, in violation of §§ 403(c) and 3623(c)(1). It observed that not allowing Nashua/Mystic to prove its case would frustrate the objectives of

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<sup>1</sup> Motion for Reconsideration at 1; Motion of the United States Postal Service for Relief from Obligation to Respond to Interrogatories from Nashua/Mystic (NM/USPS-8-27) Pending Resolution of Motion for Reconsideration of PRC Order 1129 and, in the Alternative, Objections to Nashua/Mystic Interrogatories, filed August, 19, 1996; Motion of the United States Postal Service for Relief from Obligation to Respond to Interrogatories from Nashua/Mystic (NM/USPS-37-65) Pending Resolution of Motion for Reconsideration of PRC Order 1129 and, in the Alternative, Objections to Nashua/Mystic Interrogatories, filed August 23, 1996.

<sup>2</sup> Nashua Photo Inc. and Mystic Color Lab Opposition to United States Postal Service Motion to Reconsider and All Pending Discovery Motions, and Nashua/Mystic Motion to Compel, filed August 29, 1996.

<sup>3</sup> Motion for Leave to File Brief Response to the Nashua/Mystic Opposition to the USPS Motion to Reconsider PRC Order No. 1129, filed September 5, 1996.

the Act, unless there are strong countervailing considerations. Order No. 1129 at 8.

Order No. 1129 concluded that the Postal Service had not shown strong countervailing considerations. The Postal Service's arguments that hearing Nashua's proposal in this docket would be inconsistent with institutional comity and management's business prerogatives were found not to be strong countervailing considerations. Id. at 9-10. Considering Nashua's proposal in this proceeding was found unlikely to jeopardize the schedule that the Commission has established for considering the Postal Service's proposals. Id. at 10-11. Order No. 1129 agreed that it would be premature to consider Nashua's proposal while the Postal Service is reexamining BRM costs and operations, if there were reasonable assurance that this reexamination would lead to a Postal Service filing addressing BRM reform in the foreseeable future. Order No. 1129 noted that the Postal Service has not given such assurance. Id. at 10.

Order No. 1129 left open the possibility that the Commission would order Nashua's proposal to be deferred for consideration in a separate phase of this proceeding if the Postal Service were to demonstrate over the course of the hearing that considering Nashua's proposal required a wide-ranging reexamination of the structure of BRM fees, and that such a reexamination must await the outcome of its current investigations. Id. at 11.

Because the Postal Service's Motion for Reconsideration of Order No. 1129 essentially repeats arguments originally made in its opposition to the Nashua/Mystic motion to enlarge, a perfunctory denial of its motion to reconsider would have been

warranted. Instead, the Commission issued Order No. 1131 offering the Postal Service a second opportunity to support its request for deferral by demonstrating that its current investigations were likely to lead to a filing addressing BRM reform in the foreseeable future. Order No. 1131 reiterated that Nashua's proposal could be deferred if deferral were shown to be more procedurally efficient. It invited the Postal Service to show what information sought by Nashua/Mystic is not currently available, but is likely to become available at the conclusion of its current investigation of BRM. To that end, Order No. 1131 invited the Postal Service to file a supplement to its motion for reconsideration stating the beginning and scheduled ending date of the Postal Service's current investigation of BRM, the resources being devoted to it, and a concrete description of its scope, including whether it extends to an examination of the relative costs of bulk and non-bulk BRM processing or the administrative tasks that a bulk BRM rate category is likely to require. Order No. 1131 at 3.

The Postal Service responded with some additional information about its current investigation. Response of the United States Postal Service to PRC Order No. 1131, filed August 23, 1996 ("Response to Order 1131"). It described the formation of a task force from within various Postal Service departments to review the BRM program.<sup>4</sup> According to the Postal

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<sup>4</sup> Response to Order No. 1131 at 2. While it also describes the formation of a "working group" of postal personnel and representatives from Nashua and Mystic to determine whether this docket should be expanded to address the Nashua/Mystic proposal, the Postal Service notes that it has already concluded that this docket should not. Id. at 3.

Service, its task force expects to study BRM costs and "explore potential opportunities for new markets, worksharing initiatives, and new products and services - including alternative methods of BRM processing and billing such as "reverse manifesting" and "weighing/piece conversion." Id. at 2.

The Postal Service states, however, that it does not have a timetable for any aspect of this inquiry [id. at 3], has not yet determined whether it will address the Nashua/Mystic proposal specifically [id. at 2] and does not know whether its inquiry will lead to a filing dealing with BRM. Id. at 3. The Postal Service also states that it is "unable to represent that [its study] will generate information specifically responsive to Nashua/Mystic interrogatories currently at issue" in this docket. Id. at 5, n.5. It has determined that less than one-sixth of Nashua's interrogatories ask for "data [that] do not currently exist, but are of a type which may emerge from the work of the task force" [id. at 7], but adds that data responsive even to these relatively few interrogatories are "of the type which ordinarily would be prepared only in anticipation of Commission litigation." Id. at 5.

As in its prior pleadings on this issue, the Postal Service's Response to Order No. 1131 is vague about the nature of its BRM inquiry, and non-committal concerning its schedule and whether it is expected to ever result in a BRM-related filing. Therefore, it has again failed to show that it would be procedurally more efficient to defer consideration of the Nashua/Mystic proposal. Accordingly, its Motion for Reconsideration will be denied.

The Postal Service's Motion for Reconsideration requests, as an alternative to deferring the Nashua/Mystic proposal indefinitely, that it be considered in a separate classification docket initiated by the Commission. As the Commission has concluded that consideration of the Nashua/Mystic proposal is unlikely to delay consideration of the Postal Service's own proposals in this docket, it is difficult to see the benefit of this alternative, other than delay. While the Postal Service may perceive additional delay as a benefit, Nashua/Mystic perceives it as a detriment, because it compounds the inequity that it claims to suffer. Under these circumstances, establishing a separate docket to consider the Nashua/Mystic proposal is not warranted if its virtue lies in the additional delay it would bring about in considering the Nashua/Mystic proposal.

There are additional legal arguments made by the Postal Service in its Motion for Reconsideration that warrant comment. In its motion, the Postal Service seeks to bolster its initial argument that it should be allowed to determine the scope of this docket by citing the following passage from the *Mail Order Association of America v. United States Postal Service*, 2 F.3d 408, at 423

a ratemaking . . . is inevitably circumscribed to some extent by the parameters of the Postal Service's request; it is not an open invitation for the Commission to propose wide-ranging and unrelated changes in classifications. To open up these proceedings to extraneous initiatives would undermine the timeliness concerns that govern ratemaking.

The Postal Service's attempt to apply this passage in *MOAA* to the Nashua/Mystic proposal in this docket is misplaced. Read in

context, it merely recognizes that practical considerations, such as time and data constraints, and the Postal Service's budgetary needs, "inevitably" limit the scope of the issues that the Commission can consider in a general rate case. See the judicial commentary and legislative history cited immediately before and after the quoted passage. 2 F.3d at 423.

The MOAA court did not "hold" that the Commission lacked authority to enlarge the scope of Docket No. R90-1 to consider establishing a Public Automation Rate (PAR) category. The Commission's recommendation to establish PAR was held infirm, according to the Court, because the proposal was developed after the conclusion of the hearing phase of that docket, and the support for it was not developed on the record. Id. at 422. The Court specifically held that the Commission need not tailor its recommended decisions to the precise contours of the Postal Service's proposals, but may recommend modifications, if it determines that they are needed to serve statutory objectives.<sup>5</sup>

The MOAA court grounded its decision to invalidate the Commission's PAR recommendation in Docket No. R90-1 on the lack of opportunity given the Postal Service to demonstrate during the hearing that PAR was not administratively feasible or was in conflict with other management objectives, as the Postal Service asserted on appeal. Id. at 423-24. There is no indication in MOAA that the Court would have found any procedural error if PAR

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<sup>5</sup> These, the Court acknowledged, include fairness and equity [ §§ 3622(b)(1) & 3623(c)(1) ], the desirability of special classifications from the point of view *both of the user and the Postal Service* [ § 3623(c)(5) ], or "such other factors as the Commission deems appropriate" [ §§ 3622(b)(9) & 3623(c)(6) ]. 2 F.3d at 422. (Emphasis added).

had been proposed in the direct case of a party in Docket No. R90-1, and the Postal Service had been afforded a full opportunity to file rebuttal evidence. The procedural defects identified by the MOAA court, therefore, have little relevance to the Order that the Postal Service contests here. Order No. 1129 allows Nashua/Mystic to submit its proposal in its direct case, and affords the Postal Service a full opportunity to file rebuttal evidence.<sup>6</sup>

Order No. 1129 neither departs from precedent, nor abandons principle, as the Postal Service's Motion for Reconsideration suggests. The passage that its motion cites from MOAA acknowledges the practical necessity of limiting the scope of general rate proceedings in order to issue a timely recommended decision. In all of the instances cited by the Postal Service in which the Commission deferred a party's classification proposal to a later docket, it did so because of the practical necessity of limiting the issues in an already crowded docket, coupled with a Postal Service representation that it intended to file a case more relevant to the party's proposal in the near future. See Motion for Reconsideration at 6-7. In contrast, the issues in this docket, so far, are narrow and manageable, and the Postal Service remains ambivalent about whether it will ever file a case that is more relevant to the Nashua/Mystic proposal than the current docket.

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<sup>6</sup> It is worth noting the inconsistency in the Postal Service's argument that MOAA held that the classification proposals of other parties generally should not be considered in rate cases, and its apparent concession in its motion to reconsider that Nashua/Mystic would, at a minimum, be entitled to have its proposal considered in the next omnibus rate case. Motion for Reconsideration at 10.



The governing principles in determining whether to consider classification proposals initiated by intervening parties remains a balancing of procedural efficiency concerns against the various statutory directives articulated in §§ 3622 and 3623. In this instance, it has not been demonstrated that deferral would be more procedurally efficient, while it has been demonstrated that deferral is likely to frustrate the statutory objectives of ensuring that rates are equitably structured, and serve both the interests of the Postal Service and its customers.

It is ordered:

1. The Motion of the United States Postal Service for Reconsideration of PRC Order No. 1129 or, in the Alternative, for severance of consideration of the Nashua/Mystic Proposal in a Separate Proceeding, filed August 16, 1996, is denied.

2. The Motion for Leave to File Brief Response to the Nashua/Mystic Opposition to the USPS Motion to Reconsider PRC Order No. 1129, filed by the Postal Service on September 5, 1996, is granted.

By the Commission  
(S E A L)



Margaret P. Crenshaw  
Secretary