

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

SERVICE PERFORMANCE MEASUREMENT
SYSTEMS FOR MARKET DOMINANT PRODUCTS

Docket No. PI2015-1

**UNITED STATES POSTAL SERVICE MOTION FOR PARTIAL
RECONSIDERATION AND PARTIAL CLARIFICATION OF ORDER NO. 4002**
(August 11, 2017)

The United States Postal Service (“Postal Service”) respectfully requests that the Postal Regulatory Commission (“Commission”) reconsider and clarify Order No. 4002. As set forth more fully below, the Postal Service seeks partial reconsideration of Order No. 4002 because the Commission’s proposed application of a “clear and convincing” evidentiary standard in its evaluation of the Postal Service’s internal Service Performance Measurement (“SPM”) system is inconsistent with the Administrative Procedure Act (“APA”) and legal authority governing standards of review for agency proceedings. The law requires application of a standard no higher than the “preponderance of the evidence” standard for the Commission’s assessment of the internal SPM system.

In addition, the Postal Service seeks clarification of two important issues raised in Order No. 4002. First, the Postal Service seeks clarification of the term “free of all major issues,” as used by the Commission in connection with its standard of evaluation for the data produced by the Postal Service’s internal SPM system. Second, the Postal Service seeks reconsideration and clarification of requirements related to the number of future quarters for which data must be furnished before the Commission determines whether to approve the new internal SPM system.

PROCEDURAL HISTORY

On January 29, 2015, the Commission initiated this docket through PRC Order No. 2336, which included the Postal Service's service performance measurement plan.¹ The Postal Service revised this plan in multiple filings.² The Commission issued six Chairman's Information Requests and one Commission Information Request.³ Seven parties issued comments⁴, and four parties issued reply comments.⁵ On June 17, 2015, the Commission issued its Interim Order Concerning Service Performance Measurement Systems for Market Dominant Products.⁶ On July 14, 2017, the Commission issued its Second Interim Order

¹ Order No. 2336, Notice of Request for Comments and Scheduling of Technical Conference Concerning Service Performance Measurement Systems for Market Dominant Products, Docket No. PI2015-1 (Jan. 29, 2015).

² See USPS Service Performance Measurement Plan (Revised March 24, 2015), Docket No. PI-2015-1 (March 24, 2015); USPS-LR-PI2015-1/8 – USPS Service Performance Measurement Plan, Docket No. PI2015-1 (Feb. 23, 2017).

³ Chairman's Information Request No. 1, Docket No. PI2015-1 (March 24, 2015); Chairman's Information Request No. 2, Docket No. PI2015-1 (March 26, 2015); Chairman's Information Request No. 3, Docket No. PI2015-1 (May 1, 2015); Chairman's Information Request No. 4, Docket No. PI2015-1 (Nov. 18, 2015); Chairman's Information Request No. 5, Docket No. PI2015-1 (Nov. 18, 2015); Chairman's Information Request No. 6, Docket No. PI2015-1 (Nov. 18, 2015); Commission Information Request No. 1, Docket No. PI2015-1 (May 12, 2017).

⁴ Comments of National Newspaper Association, Docket No. PI2015-1 (March 26, 2015); Opening Comments of Douglas F. Carlson, Docket No. PI2015-1 (April 1, 2015); Supplemental Opening Comments of Douglas F. Carlson, Docket No. PI2015-1 (April 8, 2015); Initial Comments of American Postal Workers Union, AFL-CIO, Docket No. PI2015-1 (April 8, 2015); Comments of David B. Popkin, Docket No. PI2015-1 (April 8, 2015); Initial Comments of the Greeting Card Association, Docket No. PI2015-1 (April 8, 2015); Comments of the Association for Postal Commerce, Idealliance, and National Association of Presort Mailers, Docket No. PI2015-1 (April 8, 2015); Public Representative Comments Concerning Service Performance Measurement Systems for Market Dominant Products, Docket No. PI2015-1 (April 8, 2015).

⁵ Public Representative Reply Comments, Docket No. PI2015-1 (May 5, 2015); Reply Comments of the National Postal Policy Council, Docket No. PI2015-1 (May 5, 2015); Reply Comments of Douglas F. Carlson, Docket No. PI2015-1 (May 15, 2015); Reply Comments of the United States Postal Service, Docket No. PI2015-1 (May 18, 2015).

⁶ Order No. 2544, Interim Order Concerning Service Performance Measurement Systems for Market Dominant Products, Docket No. PI2015-1 (June 17, 2015).

Concerning Service Performance Measurement Systems for Market Dominant Products.⁷

This motion addresses that Second Interim Order, which is hereinafter referred to as “PRC Order No, 4002.”

LEGAL POSITION

I. THE “PREPONDERANCE OF THE EVIDENCE” STANDARD IS THE APPROPRIATE STANDARD FOR THE COMMISSION’S EVALUATION OF THE POSTAL SERVICE’S INTERNAL SPM SYSTEM.

The Postal Service respectfully requests that the Commission reconsider PRC Order No. 4002’s application of the “clear and convincing” evidentiary standard to the Commission’s review of whether the Postal Service has demonstrated that “differences [in service performance results developed by the proposed internal SPM system and the legacy SPM system] are not the result of the proposed system being less representative than the legacy system.” Order at 4. The ordinary evidentiary standard under the APA is “preponderance of the evidence,” and the Order cites no authority for the proposition that the higher evidentiary standard of “clear and convincing evidence” may justifiably be applied in the Commission’s evaluation of the Postal Service’s internal SPM system. In the Postal Service’s assessment, this higher evidentiary standard is inconsistent with the APA and relevant case law.

As background, like other federal agencies, the Commission is subject to the APA.⁸ 39 U.S.C. § 503 (“The Postal Regulatory Commission shall promulgate rules and regulations and establish procedures, subject to chapters 5 and 7 of title 5 ...”). The APA imposes standards of decision-making for most federal agencies, including evidentiary standards

⁷ Order No. 4002, Second Interim Order Concerning Service Performance Measurement Systems for Market Dominant Products, Docket No. PI2015-1 (July 14, 2017).

⁸ The APA appears in Title I, Part 5, Chapter 5 of the United States Code.

when agencies consider administrative claims brought by parties or issue rulings in other proceedings.⁹ Section 556(d) of Title 5 provides that:

Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.

The “preponderance of the evidence” standard is the appropriate standard for decisions and proceedings of the Commission and other federal agencies subject to the APA. The Supreme Court long ago interpreted the APA to require a preponderance of evidence standard:

In [the Administrative Procedure Act (APA)], Congress ... expressed its intent that adjudicatory proceedings subject to the APA satisfy the statute when determinations are made according to the preponderance of the evidence. Congress was free to make that choice ... and ... the courts are not free to disturb it.

Steadman v. SEC, 450 U.S. 91, 104 (1981); accord *Maher Terminals, Inc. v. OWCP*, 992 F.2d 1277, 1281-82 (3d Cir. 1993); *Bender v. Clark*, 744 F.2d 1424, 1429 (10th Cir. 1984) (“The traditional standard required in a civil or administrative proceeding is proof by a preponderance of the evidence”) (internal citations omitted); *Scott-Sheppard v. HHS*, 2000 WL 1772472 at 9 (Ct. Fed. Cl. 2000) (preponderance is the “traditional standard of proof in civil and administrative proceedings”). The legislative history of the APA includes a clear statement of Congressional intent regarding the appropriate standard of review. *Sea Island Broadcasting Corp. v. FCC*, 627 F.2d 240, 243 (D.C. Cir. 1980) (preponderance is “the traditional standard in civil and administrative proceedings

⁹ The Postal Service is not subject to the APA. 39 U.S.C. § 410(a) (“[N]o federal law dealing with public or federal contracts, property, works, officers, employees, budgets, or funds, including the

... [and] is the one contemplated by the APA, 5 U.S.C. s 556(d)” (citing H.R. Rep. No. 1980, 79th Cong., 2d Sess. 37 (1946), reprinted in S. Doc. No. 248, 79th Cong., 2d Sess., Administrative Procedure Act Legislative History 271 (1946))).

In other situations where a federal agency has attempted to apply a standard higher than the “preponderance of the evidence” standard in its evaluation of a regulated entity’s request for action by the regulator, courts and other reviewing bodies have remanded the regulator’s decision and directed the regulator to apply the “preponderance of the evidence” standard. *See, e.g., Bender*, 744 F.2d at 1424 (remanding a determination by the Interior Board of Land Appeals that relied on the Board’s application of a “clear and definite” standard in its evaluation of an oil and gas lease offeror’s request for a determination regarding the status of land subject to a potential lease); *Fairfax Hospital Association, Inc. v. Califano*, 585 F.2d 602 (4th Cir. 1978) (remanding a decision by the Medicare Provider Reimbursement Review Board (U.S. Department of Health Education and Welfare) that relied on the Board’s application of a “compelling or conclusive evidence” standard in its evaluation of a medical provider’s appeal of a reimbursement disallowance).

For example, in *Bender*, the New Mexico office of the Bureau of Land Management (“BLM”) rejected a noncompetitive bid for an oil and gas lease on certain public lands in New Mexico based on a determination by the United States Geological Survey (“USGS”) that the bid involved land with a known geological structure.¹⁰ 744 F.2d at 1425. The bid applicant appealed the BLM’s decision to the Interior Board of Land Appeals (“IBLA”), challenging the USGS determination that the land subject to the

provisions of chapters 5 and 7 of title 5, shall apply to the exercise of the powers of the Postal Service.”)

¹⁰ Federal law prohibits use of the noncompetitive bid process for land within a known geological structure. 30 U.S.C. § 226.

lease was included within a known geological structure. *Id.* The IBLA reviewed the evidence presented on appeal and upheld the BLM's decision based on the bid applicant's failure to show by "clear and definite" evidence that USGS erred in its assessment of the known geological structure. *Id.* at 1426. The bid applicant sought judicial review of the IBLA decision in federal district court, and after concluding that the IBLA erred in applying the "clear and definite" evidentiary standard, the federal district court remanded the case for a determination under the "preponderance of the evidence" standard. *Id.* On appeal, the Tenth Circuit affirmed the federal district court decision. *Id.* at 1430.

Application of a heightened evidentiary standard, such as the "clear and convincing" standard proposed by the Commission, is justified only "where particularly important individual interests or rights are at stake, such as the potential deprivation of individual liberty, citizenship, or parental rights." *Id.* at 1429 (citing *Herman & MacLean v. Huddleston*, 459 U.S. 375, 389-390 (1983)). This docket, which concerns the Commission's evaluation of the effectiveness and accuracy of the Postal Service's measurement of service performance, involves no "potential deprivation of individual liberty, citizenship, or parental rights." Accordingly, there is no justification for a heightened standard of review in this Docket.

Finally, even if the Commission's authority in this docket fell outside the scope of the APA, which it does not, the "preponderance of the evidence" standard would still be the appropriate standard of review for the Commission's evaluation of the internal SPM system. Where agency hearings, formal or informal, are conducted pursuant to an authority other than the APA, "[t]he traditional preponderance standard must be applied unless the type of case and the sanctions or hardship imposed require a higher standard

[because particularly important individual interests or rights (the potential deprivation of individual liberty, citizenship, or parental rights) are at stake].” *Id.*

For the reasons described above, the “preponderance of the evidence” standard is the appropriate standard for the Commission’s review of the internal SPM system. The Postal Service accordingly requests that the Commission revise the Order to establish that a standard no higher than the “preponderance of the evidence” standard will apply to the Commission’s review of whether the Postal Service has demonstrated that “differences [in service performance results developed by the proposed internal SPM system and the legacy SPM system] are not the result of the proposed system being less representative than the legacy system.”

II. ADDITIONAL RECONSIDERATION AND CLARIFICATION OF THE COMMISSION’S ORDER IN OTHER KEY AREAS WOULD FURTHER ADVANCE THIS DOCKET.

A. “Free of All Major Issues” Standard

Order No. 4002 notes that the Postal Service “appears to have been making steady progress in the development of the new measurement systems” since the establishment of this docket over two and half years ago. Order No. 4002 at 1. The Order also acknowledges that “limitations, concerns, and unresolved issues” with data in the new internal SPM system were “to be expected”. *Id.* at 4. However, the Commission’s Order then emphasizes, at this relatively late stage in the proceedings, a newly-worded and ill-defined requirement that four consecutive quarters of data should be “free of all major issues.” *Id.*

The Postal Service questions the Commission’s addition of this and other new requirements for the SPM system (discussed below), after it has expended considerable time

and effort attempting to meet the Commission's earlier stated requirements and recommendations. For example, in Order No. 2544, dated June 17, 2015, the Commission discussed the need for additional details on the proposed SPM system, an auditing plan, and technical conferences with Postal Service staff. The Commission also stated that an acceptable internal SPM system would consist of:

test results demonstrating that the EXFC and the new system generate objective and reliable performance measurements for all affected products over a period of four consecutive fiscal quarters...

Id. at 4. The Postal Service had satisfied this initial requirement and expected that it would be reasonable to sunset its external measurement system once it had provided four consecutive quarters of SPM data. The Postal Service has also participated in four technical conferences with Commission staff, as directed by Order No. 2385 (March 18, 2015), Order No. 2733 (September 28, 2015), Order No. 3459 (August 11, 2016), and Order No. 3813 (March 2, 2017), providing specific details about the SPM system and audit plan, and answering multiple questions from Commission staff and other interested parties. In short, the Postal Service has met, by any reasonable measure, the Commission's previously expressed concerns for the new SPM system. The introduction of these additional requirements by the Commission, after two and half years of proceedings, appears to create something of a moving target for the Postal Service to reach.

The Postal Service seeks clarification from the Commission as to the meaning of the terms, "free of all major issues." The meaning of this standard is unclear, as the Commission has not indicated how this standard will be applied and measured. For example, will data produced by the internal SPM system be considered "free of all major

issues” when a certain statistical confidence interval is achieved? If so, what is that interval? Alternatively, can the Commission provide guidance as to specific SPM-related major issues that should be resolved? Also, if the Postal Service has already successfully resolved any major issues the Commission had with the SPM data thus far, it would be helpful to learn what those were. As the Postal Service has emphasized throughout this process, the internal SPM system will continue to be subject to continuous improvement.

In addition to its creation of significant uncertainty, the “free of all major issues” standard is vague and open-ended. “A fundamental principle in [the U.S.] legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.” *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (citing *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926) (“A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law”)). An agency cannot enforce a regulation or standard against a party if the regulation or standard is “unduly vague,” for example, when it fails to define “what fact must be proved” in order to satisfy the regulation or standard. *Id.* (citing *United States v. Williams*, 553 U.S. 285, 304 (2008)); *TNA Merchant Projects, Inc. v. Federal Energy Regulatory Commission*, 857 F.3d 354, 360 (D.C. Cir. 2017) (citing *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012)).

In this docket, the Commission proposes the adoption of a “free of all major issues” standard for its evaluation of the internal SPM system, despite providing no prior indication that this was the standard the Postal Service needed to meet and with

absolutely no description of the standard or the factors to be considered in its application. The Commission provides the Postal Service and other interested parties with no notice of how the standard will be applied and fails to explain how it will ensure that its evaluation will reflect reasoned decision-making. Due to its vague and open-ended nature, the “free of all major issues” standard is difficult to apply in practice, and raises due process concerns. *See Fox, supra* (agency violates due process when it “fails to provide a person of ordinary intelligence fair notice of what is prohibited [or permitted]”). Accordingly, the Postal Service requests guidance from the Commission that will establish a reasonable understanding of acceptable SPM data requirements and the boundaries of the “free of all major issues” standard.

B. At Least Two Quarters of Audited Data

The Postal Service would also benefit from reconsideration of the Commission’s new request that “at least two quarters of data undergo auditing and be deemed acceptable by the Postal Service’s external auditor (ideally with one quarter being from quarter 1).” Order No. 4002 at 4. As an initial matter, the Postal Service did not understand from prior Commission orders that it would be required to incur the costs of auditing the proposed internal measurement system before it was approved by the Commission, and while the Postal Service was continuing to incur the costs of the legacy external measurement system. Given its precarious financial condition, the imposition of any additional cost burdens is difficult for the Postal Service to absorb.

Nevertheless, given PRC Order No. 4002, the Postal Service can have an external auditor perform audits of Fiscal Year 2017, Quarter 3 data, and beyond if necessary.¹¹ Although this was not previously required by the Commission, the Postal

¹¹ The Postal Service may make arrangements with an existing supplier for this purpose.

Service acknowledges that despite the additional cost burden it will impose, having audit data for this quarter in hand will provide the Commission with additional information to evaluate and approve the new SPM system. The Postal Service submits, however, that one quarter of such data should be more than adequate for this purpose. Accordingly, the Postal Service requests that the Commission reconsider Order No. 4002's requirement for four quarters of data "free of all major issues" and simply require one quarter of such data, which would include audited data for Quarter 3 of FY 2017. The Commission could thereafter promptly consider whether the new system may serve as the official source for service performance measurement reporting.

In addition, the Postal Service requests that the Commission reconsider its preference for audited data for Quarter 1 of FY 2018. This additional requirement appears unnecessary, since a Q3 audit will be made available, as noted above; in addition, requiring an FY 2018 Q1 audit, before the Commission makes its final determination on the new SPM system, will needlessly prolong this docket, reduce the flexibility of the Postal Service to pursue costs savings and eliminate redundancy in its service performance measurement systems, and create uncertainty for the Postal Service's Performance Plan and Performance Report for FY 2018. Because the Quarter 3 audit will provide the information necessary for the Commission to complete an effective evaluation of the internal SPM system, the Postal Service respectfully requests that the Commission clarify its Order so that Quarter 1 audited data (as well as FY 2017 Quarter 4 audited data) are not expected to be furnished before the Commission determines whether the internal system can be used as a replacement for the legacy external measurement system. The Postal Service instead urges the Commission to make its decision upon review of the audited data for Quarter 3 of FY 2017.

CONCLUSION

For the reasons stated above, the Postal Service respectfully requests that the Commission reconsider Order No. 4002 and clarify the outstanding issues identified in this motion.

Respectfully submitted,

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