

ORDER NO. 5113

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

Before Commissioners:

Robert G. Taub, Chairman;  
Nanci E. Langley, Vice Chairman;  
Mark Acton;  
Tony Hammond; and  
Michael Kubayanda

Regulation of Mail Preparation Changes

Docket No. RM2018-11

ORDER CLOSING DOCKET

(Issued June 3, 2019)

I. INTRODUCTION

On August 9, 2018, the Commission opened this docket and issued an advance notice of proposed rulemaking (ANPR) seeking proposals for a standard and process to determine when a mail preparation change is a “changes in rates” under 39 U.S.C. § 3622 in accordance with the recent decision in *United States Postal Serv. v. Postal Reg. Comm’n*, 886 F.3d 1253 (D.C. Cir. 2018) (*IMb II*).<sup>1</sup> In requesting proposals from interested parties, the ANPR explained that the Commission continues to maintain that “certain mail preparation changes are rate changes” that should be regulated under 39 U.S.C. § 3622. Order No. 4750 at 1.

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<sup>1</sup> Advance Notice of Proposed Rulemaking, August 9, 2018, at 1 (Order No. 4750).

For the reasons stated below, the Commission closes this docket and will continue to monitor issues relating to mail preparation changes.

## II. BACKGROUND

The issue of how to regulate specific mail preparation changes as “changes in rates” under 39 U.S.C. § 3622 goes back to the inception of the Postal Accountability Enhancement Act (PAEA) when the Commission initially developed the rules for calculating the percentage change in rates to determine compliance with the price cap.<sup>2</sup> Since that time, the Commission has consistently held that a change to a mail preparation requirement that “causes some mail to shift to another rate category and thereby pay different rates” will be subject to the price cap.<sup>3</sup>

In Docket No. R2013-10R, the Commission determined that a change to the Full Service Intelligent Mail barcoding (IMb) requirements was a rate change requiring compliance with the price cap under 39 U.S.C. § 3622. The Postal Service objected, claiming that only changes to the Mail Classification Schedule (MCS) required compliance with 39 C.F.R. § 3010.23(d)(2) and, accordingly, the IMb change was not subject to the price cap because it was using a Domestic Mail Manual (DMM) change to make Full Service IMb mandatory.<sup>4</sup> The Postal Service appealed the Commission’s determination to the United States Court of Appeals for the District of Columbia (the Court). In its opinion in *United States Postal Service v. Postal Regulatory Commission*, 785 F.3d 740 (D.C. Cir. 2015) (*IMb I*), the Court found that the Commission had the authority to regulate certain mail preparation changes as rate changes and remanded

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<sup>2</sup> Docket No. RM2007-1, Order Establishing Ratemaking Regulations for Market Dominant and Competitive Products, October 29, 2007, at 52-53, 124 (Order No. 43).

<sup>3</sup> Docket No. R2013-10, Order on Price Adjustments for Market Dominant Products and Related Mail Classification Changes, November 21, 2013, at 21 (Order No. 1890) (citing Order No. 43 at 52-53, 124); see, e.g., Docket No. R2011-1, Order Approving Market Dominant Classification and Price Changes, and Applying Price Cap Rules, December 10, 2010, at 28-29 (Order No. 606).

<sup>4</sup> Docket No. R2013-10, Response of the United States Postal Service to Chairman’s Information Request No. 3, Questions 1-2, and 6-7, October 24, 2013, question 1 (Response to CHIR No. 3).

that the Commission articulate an intelligible standard for determining when a mail preparation change has a rate effect. *IMb I* at 754.

In response to the Court's remand, after notice and comment, the Commission issued an order setting forth a standard to determine when a mail preparation change is a "change in rates."<sup>5</sup> In Order No. 3047, the Commission set forth a standard to evaluate when a specific change to a mail preparation requirement would have a rate effect under 39 C.F.R. § 3010.23(d)(2). Order No. 3047 at 13-20. The standard required that the Postal Service account for the rate effects of a mail preparation change when the change resulted in either the deletion or redefinition of a rate cell. *Id.* at 15-17. Applying the standard to the Full Service IMb requirement, the Commission again found that the IMb change was a rate change requiring compliance with the price cap.<sup>6</sup>

In conjunction with Order No. 3047, the Commission initiated a rulemaking to establish procedural rules to handle issues involving mail preparation changes.<sup>7</sup> The final rule as a result of the rulemaking was revised to retain only the requirement that the Postal Service provide published notice of all DMM changes in a single, publicly-available source.<sup>8</sup>

The Postal Service appealed the Commission's standard articulated in Order No. 3047 to the Court. The Court issued a decision vacating the Commission's standard, concluding that the standard impermissibly regulated changes to mailers' costs as

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<sup>5</sup> Docket No. R2013-10R, Order Resolving Issues on Remand, January 22, 2016 (Order No. 3047); Docket No. R2013-10R, Order Resolving Motion for Reconsideration of Commission Order No. 3047, July 20, 2016 (Order No. 3441).

<sup>6</sup> *Id.* at 21-27. The Postal Service requested reconsideration of Order No. 3047. Docket No. R2013-10R, Motion for Reconsideration of Order No. 3047, February 22, 2016. In response, the Commission issued Order No. 3441 resolving the Postal Service's request for reconsideration and maintaining the standard as articulated in Order No. 3047. See Order No. 3441.

<sup>7</sup> See Docket No. RM2016-6, Notice of Proposed Rulemaking on Motions Concerning Mail Preparation Changes, January 22, 2016 (Order No. 3048); Docket No. RM2016-6, Order Adopting Final Procedural Rule for Mail Preparation Changes, January 25, 2018 (Order No. 4393).

<sup>8</sup> Docket No. RM2016-6, Order Adopting Final Rule for Mail Preparation Changes, October 11, 2018 (Order No. 4850).

opposed to the price mailers pay in order to determine whether a mail preparation change was a change in rates under the statute. *IMb II* at 1260. The Court suggested that the Commission could have tried to integrate mail preparation requirements into its authority over “changes in rates” with the following argument: “Where an increase in mail preparation requirements for one cell will *drive* mailers to use a *higher-priced cell*, the resulting increase in volume in the latter should count against the rate cap.” *IMb II* at 1256 (emphasis in original). To accomplish this task, the Court suggested that any standard under this theory would have to compare mailers’ compliance costs with the offsetting rate benefit in order to determine whether mailers would be driven to a higher rate cell and pay a higher rate. *Id.* at 1260.

Despite vacating the standard, the Court reiterated its position that the Commission retained the authority to regulate mail preparation changes as “changes in rates” under the price cap. *Id.* at 1254-1255.

In response to the Court’s decision in *IMb II*, the Commission opened this docket and issued the ANPR seeking proposals from commenters for a standard that would both comport with the Court’s decision and be workable in the context of the Commission’s proceedings. Order No. 4750 at 6. The Commission requested proposals for a standard “that could be used to predict ‘possible mailer migration to higher-priced products’ to determine when a mail preparation change results in a ‘change in rates’ under 39 U.S.C. 3622.” *Id.* In addition to proposing a standard in line with the *IMb II* decision, the Commission sought proposals for a process that could be used “to determine and resolve disputes over whether a mail preparation change is a rate change.” *Id.*

### III. RESPONSES TO THE ANPR

The Commission received responses to the ANPR from the Association for Postal Commerce, Joint Commenters the National Association of Presort Mailers and Idealliance, National Postal Policy Council, the Postal Service, the Public Representative, and Valpak Direct Marketing Systems, Inc. and the Valpak Franchise

Association, Inc. (collectively Valpak).<sup>9</sup> The Commission reviewed the wide variety of proposals from the participating parties that ranged from an argument to abdicate regulation of mail preparation changes as changes in rates, modification of the *de minimis* rules, and adopting the Court's dicta in *IMb II* as the standard to regulate mail preparation changes. The Commission appreciates the participation in this docket and the variety of proposals presented by the parties. The Commission, however, declines to propose rules at this time.

Over the past decade, the issue of whether a specific mail preparation change is a change in rates under the price cap has been infrequent. Since the Full Service IMb requirement was raised in 2013, there have been no major issues related to mail preparation requirement changes. As a result, the Commission is not convinced that issuing a notice of proposed rulemaking would be the best use of the Commission and the interested parties' resources and determines that the likelihood of harm to any party from considering a standard at a later date is low.

In closing this docket, the Commission does not abdicate its authority to regulate mail preparation changes as "changes in rates" under the price cap but will continue to monitor such changes and take appropriate action consistent with the court's guidance articulated in *IMb II*, should the need arise. As previously mentioned in other dockets related to this issue, interested persons may utilize the Commission's existing motion rules under 39 C.F.R. § 3001.21 to identify potential issues concerning specific mail preparation changes. The Commission encourages the Postal Service to continue to work with mailers and stakeholders prior to implementing any large-scale mail

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<sup>9</sup> See Comments of the Association for Postal Commerce, October 15, 2018; Joint Comments of National Association of Presort Mailers and Idealliance, October 15, 2018; Comments of the National Postal Policy Council, October 15, 2018; United States Postal Service Comments on Advance Notice of Proposed Rulemaking, October 15, 2018; Public Representative Comments, October 15, 2018; Valpak Direct Marketing Systems, Inc. and the Valpak Franchise Association, Inc. Comments in Response to Order No. 4750, October 17, 2018. Valpak filed a motion for late acceptance of its comments. Valpak Direct Marketing Systems, Inc. and the Valpak Franchise Association, Inc. Motion for Late Acceptance of Comments, October 17, 2018. The Motion is granted.

preparation requirement changes in order to avoid making changes that may cause mailers to pay a higher rate.<sup>10</sup>

#### IV. CONCLUSION

In consideration of the discussion above, the Commission concludes the most appropriate action is to close this docket.

*It is ordered:*

Docket No. RM2018-11 is closed.

By the Commission.

Stacy L. Ruble  
Secretary

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<sup>10</sup> See, e.g., the Postal Service's determination to maintain its existing regulations in response to comments from interested stakeholders and its work with the mailing industry after initially proposing to implement restrictions based on the content of the mailpiece for Marketing Mail Letters and Flats. 83 FR 42624 (August 23, 2018); United States Postal Service Industry Alert, *Postal Service Maintains Existing Marketing Mail Letter and Flats Requirements* (April 4, 2019), available at <https://postalpro.usps.com/node/6691>.