

**BEFORE THE UNITED STATES
POSTAL REGULATORY COMMISSION**

Transfer of Bound Printed Matter
Parcels to the Competitive Product List

Docket No. MC2021-78

**COMMENTS OF SCHOLASTIC INC. IN RESPONSE TO THE UNITED STATES POSTAL
SERVICE'S RESPONSES TO COMMISSION INFORMATION REQUEST NO. 1**

(September 13, 2021)

On March 26, 2021, the United States Postal Service ("Postal Service") filed a request pursuant to 39 U.S.C. § 3642 and 39 C.F.R. § 3040.130 *et seq.*, that Bound Printed Matter ("BPM") Parcels be transferred from the Market Dominant product list to the Competitive product list.¹ Scholastic Inc. ("Scholastic") filed comments on May 17, 2021 and June 10, 2021, supported by a careful economic analysis, demonstrating that the transfer is contrary to the governing statute, is not factually supported, and would cause significant harm to Scholastic and to its customers who are educators and their students of modest means, and rely on obtaining Scholastic's books and other educational materials at affordable prices.²

On August 19, 2021 the Commission issued an information request to help clarify the Postal Service's request to transfer BPM Parcels to the competitive product list.³ The Commission information request specifically referenced Scholastic's prior comments regarding the lack of effective competition for the educational multi-component bundles subproduct of BPM Parcels.⁴ In this context, the Commission requested the Postal Service answer several questions regarding the attributes of existing non-containerized BPM Parcels. The Postal Service's responses, which range from the obtuse to the defiant, underscore why

¹ United States Postal Service Request to Transfer Bound Printed Matter Parcels to the Competitive Product List (Mar. 26, 2021)("Request").

² Comments of Scholastic, Inc. Opposing the Transfer of Bound Printed Matter Parcels to the Competitive Product List (May 17, 2021)("Scholastic Comments"); Surreply Comments of Scholastic, Inc. (June 10, 2021)("Scholastic Surreply Comments").

³ Commission Information Request No. 1 ("CIR No. 1")(Aug. 19, 2021).

⁴ CIR No. 1 at 2 (citing Scholastic Comments at 3, 26).

the Commission should deny the requested transfer in its entirety or, alternatively, the Commission should find that the Postal Service has failed to justify the transfer of educational multi-component bundles BPM Parcels subproduct, and perhaps non-containerized BPM Parcels generally.⁵

In response to a prior Chairman’s Information Request inquiring about excluding from transfer educational multi-component bundles as a subordinate unit of BPM Parcels, the Postal Service argued that such an exclusion would be improper because the Postal Service was “not aware that any other organizations mail ‘educational multi-component bundles,’”⁶ and “there don’t appear to be very many of them in any event.”⁷ These responses are consistent with the nonpublic volume data the Postal Service filed in this case.⁸

In response to CIR No. 1, however, the Postal Service adopts an expansive view of the term “non-containerized” and now “estimates that more than half of BPM Parcels volume” is non-containerized.⁹ Doubling down on its newly adopted change of position, the Postal Service further argues that shippers can ship non-containerized and unenclosed items with UPS and FedEx Ground “subject to an additional handling charge.”¹⁰ The Postal Service cites UPS and FedEx service guides on the point, but those guides confirm that the minimum published “additional handling charge” is \$14, which, on its own, is more than *ten times* the average postage for BPM Parcels.¹¹ These responses thus abundantly confirm Scholastic’s point, and are sufficient in themselves for the Commission to deny the request in its entirety.

Contrary to the Postal Service’s suggestion, neither Scholastic nor any other party argued that private carriers would not take multi-component bundles *at any price*, and such a contention is not at all

⁵ Response of the United States Postal Service to Commission Information Request No. 1 (CIR No. 1)(Sept. 2, 2021).

⁶ Response of the United States Postal Service to Question 1 of Chairman’s Information Request No. 1 (CHIR No. 1)(Apr. 21, 2021).

⁷ Postal Service Response to CHIR No. 1, Question 10.

⁸ See Table 2 - USPS-LR-MC2021-78-NP1.

⁹ Postal Service Response to CIR No. 1, Question 1.

¹⁰ *Id.*

¹¹ See 2021 UPS Rate and Service Guide, July 11, 2021, at 124; FedEx Service Guide, January 4, 2021, at 100.

necessary in a market definition exercise, where only 5 to 10% price differentials can be sufficient to establish separate markets.¹² Scholastic's comments stated:

Given the substantial volume of bundled flat-shaped mail that it processes, the Postal Service is uniquely suited to handling the educational multi-component bundle BPM Parcels shipped by Scholastic. In fact, private carriers have communicated to Scholastic their unwillingness to process and deliver comparable educational multi-component bundles. Private carriers have stated they would only accept containerized shipments. The cost to Scholastic to retool its operations and to ship these materials in cardboard boxes would be prohibitive.¹³

Rather, Scholastic and others have demonstrated that the direct evidence in this case, including the Postal Service's own pricing and competitive market analysis, establishes that the Postal Service has failed to prove there is effective competition for BPM Parcels such that Scholastic and other mailers have reasonable economically viable alternatives. The new evidence provided in the response to CIR No. 1 confirms that the Postal Service itself estimates that more than half of all BPM Parcels would be subject to massive surcharges. These massive surcharges would be in addition to the substantial pricing differential between BPM Parcels as compared to UPS and FedEx Ground prices

Scholastic previously illustrated a price comparison for a 4-pound, Zone 1&2 Parcel, representing the typical weight and entry profile for a Scholastic Book Club Kit sent as an educational, multi-component bundle BPM Parcel as compared to published rates for UPS and FedEx Ground products. That example showed that the list price for UPS and FedEx Ground products is wildly higher (455 percent) than the BPM DNDC Parcel price, even excluding UPS and FedEx residential and delivery area surcharges.¹⁴ Based on the new information provided by the Postal Service in response to CIR No. 1, the actual price comparison for a non-containerized multi-component bundle BPM Parcel including the minimum \$14 additional handling surcharge reveals that the list price for UPS and FedEx Ground is a shocking *1,218 percent more* than the BPM Parcel price.

¹² See Scholastic Surreply Comments at 3 & n.9.

¹³ Scholastic Comments at 3, 25-26.

¹⁴ See Scholastic Comments, at 17-19 & Figs D & E.

This analysis provides further proof that the UPS and FedEx Ground products cannot be considered effective substitutes for BPM Parcels, and that the Postal Service could thus dramatically increase prices on BPM Parcels without risk of losing business to other firms offering similar products. The Commission and the courts have consistently held that failing the SSNIP test, typically 5-10 percent price increase, is strong evidence of market power.¹⁵ Setting aside the debate of whether 5, 10, or 15 percent is the appropriate outer bound, there can be no doubt that the Postal Service's ability to raise prices here – whether it be by 455 percent or 1,218 percent -- conclusively establishes market power under section 3642(b)(1). This again is alone sufficient for the Commission to deny the Postal Service's request in the entirety.

The Postal Service's arguments opposing the exclusion of educational multi-component bundle BPM Parcels from a partial transfer are also meritless. The Postal Service's response to CIR No. 1, Question 3, misreads 39 U.S.C. § 3642(c). The Postal Service erroneously suggests that the statute only allows segmentation of individual products within a class. In fact, section 3642(c) permits the transfer of only part of a product and expressly contemplates distinctions that "involve only some (but not all) of the subclasses or other subordinate units of a class of mail or type of postal service involved (without regard to satisfaction of minimum quantity requirements standing alone)."¹⁶ The Commission has repeatedly recognized that the product definition is flexible, so that "almost any category of mail would qualify."¹⁷

As Scholastic previously pointed out, the Commission's precedent here is supported by analogous antitrust case law which recognize distinct submarkets based on consideration of "such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price

¹⁵ See Docket No. MC2012-14, Order No. 1448 (Aug. 23, 2012) at 24-25 (quoting Department of Justice/Federal Trade Commission *Horizontal Merger Guidelines* establishing that the ability to impose a small but significant non-transitory increase in price ("SSNIP") of 5-10% establishes market power); *CF Industries, Inc. v. Surface Transportation Board*, 255 F.3d 816, 821-24 (D.C. Cir. 2001)(holding that a 20% increase is "well above the standard usually employed to signal a substantial degree of market power," citing the *Merger Guidelines*' use of a "5% or 10% differential").

¹⁶ 39 U.S.C. § 3642(c).

¹⁷ Docket No. RM2009-3, Order No. 536, Order Adopting Analytical Principles Regarding Workshare Discount Methodology (Sept. 14, 2010), at 22.

changes, and specialized vendors.”¹⁸ Educational multi-component bundle BPM Parcels are a distinct subordinate unit of BPM Parcels for a variety of reasons, including their unique customer base and educational mission targeting educators, students and parents to promote affordable children’s literacy and empowerment consistent with the unique status afforded educational, cultural, scientific, and informational content in title 39 and because of their unique preparation and handling characteristics as dropshipped bundles that only are disassembled for distribution at a single destination address at a school.

The Postal Service’s arguments opposing the recognition of educational multi-component bundle BPM Parcels as a subordinate unit of BPM Parcels are internally inconsistent. The Postal Service concedes, as it must, that Scholastic’s educational multi-component bundle BPM Parcels are distinct, “the Postal Service is not aware of any other organizations that mail ‘educational multi-component bundles.’”¹⁹ The Postal Service thus falls back to the position that Scholastic’s educational multi-component bundles are *too* distinct - that there are “hardly enough to constitute a separate product.”²⁰ Or, alternatively, that the Postal Service’s failure to undertake any of the relevant studies or analysis constituting supporting justification for a product transfer request under 39 C.F.R. 3040.132(f),(g), (h), or (i) and its refusal to even entertain a Commission decision approving a partial transfer, is reason alone to deny the request to exclude educational multi-component bundle BPM Parcels from the transfer request.²¹ Neither explanation is persuasive.

Finally, the Postal Service gains nothing by repeating the erroneous argument that the producers, not the consumers, of the product in question, define the relevant market.²² Scholastic previously explained that the Postal Service’s position is based on a misreading of *Brown Shoe* and, thus, is simply wrong as a

¹⁸ *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

¹⁹ See Response of the United States Postal Service to Question 1 of Chairman’s Information Request No. 1 (CHIR No. 1)(Apr. 21, 2021); see Postal Service Response to CHIR No. 1, Question 8 (Scholastic’s “educational multi-component bundles” are sent and delivered as bundles and are only disassembled for distribution to students and families after delivery to a single address for an educational institution (much like a box of books would be). By contrast, all, or nearly all, other bundles are drop-shipped to Postal Service plants as bundles but are disassembled and delivered as individual flats to individual addressees (e.g. home delivery of magazines); see Postal Service Response to CIR No. 1, Question 3 (“Scholastic Inc. May (or may not) be the only entity that sends shrink-wrapped “educational multi-component bundles” as BPM Parcels.”).

²⁰ See Postal Service Response to CIR No. 1, Question 3.

²¹ See Postal Service Response to CIR No. 1, Question 5.

²² See Postal Service Response to CIR No. 1, Question 3.

matter of antitrust law.²³ As with much of the rest of its submission, the Postal Service simply repeats its prior erroneous assertions without making any attempt to deal with Scholastic's demonstration that those assertions are simply wrong.²⁴

For the reasons stated above and in Scholastic's previous comments, the Postal Service's Request to transfer BPM Parcels should be denied in its entirety. Even if the Commission determines to approve the BPM Parcels transfer, in part, it should exclude educational multi-component bundles.

Respectfully submitted:

/s/ Michael F. Scanlon
Michael Scanlon
John Longstreth
K&L GATES LLP
1601 K Street, NW
Washington, DC 20006
Telephone: (202) 661-3764
E-Mail: michael.scanlon@klgates.com
john.longstreth@klgates.com

Counsel to SCHOLASTIC INC.

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²³ See Scholastic Surreply Comments at 7-9.

²⁴ In particular, Scholastic cited the rule from the *Cellophane* case that products must be "reasonably interchangeable by consumers for the same purposes," *Id.*, at 8-9 & n.30 (quoting *Cellophane*, 351 U.S. at 394-95, 76 S. Ct. at 1007 (emphasis added)). Scholastic also pointed out that the Postal Service's use of the case reflected the well-known "*Cellophane* fallacy." Scholastic Surreply Comments at 9-10. The Postal Service ignores both points in simply repeating its prior error.