

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

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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

COMPLAINT OF THE CONTINUITY
SHIPPERS ASSOCIATION

Docket No. C99-4

INITIAL BRIEF
OF THE UNITED STATES POSTAL SERVICE

UNITED STATES POSTAL SERVICE

By its attorneys:

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March 3, 2000

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PROCEDURAL HISTORY

On June 8, 1999, a complaint was filed by the Continuity Shippers Association (hereinafter "CSA" or "the complainant") alleging that the fee for Bulk Parcel Return Service ("BPRS") "is excessive and cannot be reconciled with the cost and non-cost criteria of the Act and that the BPRS service offered by the Postal Service to Standard (A) merchandise mailers does not conform to the policies set out in Title 39." Complaint at 1. The complaint asked the Commission "to issue a Recommended Decision to the Board of Governors of the Postal Service recommending the establishment of rates for BPRS that properly reflect the costs of this Service and the value of the Service to the sender and recipient, and that otherwise accord with the policies and purposes of the Act." Complaint at 6.

The Postal Service filed an Answer on July 9, 1999, responding to the factual allegations, pointing out the misunderstandings which underlie the complaint, and asking the Commission to dismiss the complaint for failure to allege facts sufficient to justify further proceedings. The complainant filed a pleading opposing dismissal. In Order No. 1260, the Commission denied the motion to dismiss, concluding that the explanations of the complainant's mistaken premises provided by the Postal Service in its motion were not an "adequate justification for dismissal of the Complaint without hearings." The Commission noted that "the recent establishment of the BPRS rate through a settlement *agreed to by CSA*, and the expectation that an omnibus rate request will be submitted in the near future, would seem to provide a situation where it

may be possible for the parties to pursue resolution and settlement of the Complaint through informal procedures” Order No. 1260, at 5 (emphasis added).¹

In response to the Commission’s request for a statement on how long it would need to prepare its direct case, the complainant informed the Commission on September 23 that it would “stipulate” to an updated (FY 2000) cost figure for BPRS of its own calculation² and that the only remaining issue was the appropriate cost coverage for BPRS, which it characterized as “a judgmental or legal issue that does not require testimony at this time.” Letter of September 23, 1999, from counsel for CSA to the PRC.

In a response to the complainant’s statement, the Office of the Consumer Advocate, on October 1, 1999, urged the Commission to hold the complaint in abeyance “in order to defer the issues raised by the complaint until a meaningful recommendation for rates can be made at the time of the decision on the next omnibus rate case.”³ Then on October 5, the complainant filed a “brief” sua sponte, arguing that the BPRS fee should be \$1.48, calculated by applying a cost coverage of 136 percent

¹ On the latter point, the Postal Service was of the same mind as the Commission and attempts to settle this case have been pursued throughout the pendency of this proceeding, up to as recently as one month ago. However, nothing short of the complainant’s original proposal—application of the Standard Mail Regular cost coverage to the current estimated costs—has been satisfactory to the complainant.

² The complainant’s updated cost estimate was based on the Postal Service’s calculation of FY 1998 BPRS costs using the Commission’s costing methodology, multiplied by an inflation factor, the Consumer Price Index – Urban (“CPI-U”), which the complainant adopted independent of any record evidence or information provided or agreed to by the Postal Service.

³ Office of the Consumer Advocate Response to Continuity Shippers Association Statement on Proposed Schedule (October 1, 1999).

(the cost coverage used by the Commission for Standard Mail Regular in the previous omnibus rate case) to a unit attributable cost calculated by the complainant.⁴ Following responsive pleadings,⁵ the Commission, in Order No. 1265, asked the Postal Service whether it wished to file evidence before filing a response to the complainant's "brief." The Postal Service responded, that, in light of the complete lack of record evidence, it saw no need either to file evidence or to respond to the complainant's "brief," and that the only appropriate next step would be for the Commission to dismiss the complaint for lack of supporting evidence.⁶ Responsive pleadings were filed,⁷ as well as a motion by the complainant for the Commission to admit or take official notices of certain "evidence."⁸ An opposition to this motion was filed by United Parcel Service (UPS), which argued that neither the BPRS study nor the use of the CPI-U as a roll forward

⁴ As the Postal Service understands it, CSA's proposed unit costs was calculated by multiplying the Postal Service's calculation of the Commission's version of the unit costs determined in the Postal Service's BPRS costs study times an inflation factor calculated by CSA based on the CPI-U.

⁵ AMMA Response to "OCA Response" (October 5, 1999); Continuity Shippers Association Reply to Office of Consumer Advocate on Proposed Schedule (dated October 5, filed on October 7, 1999)

⁶ Statement of United States Postal Service in Accordance with Order No. 1265 and Motion to Dismiss Complaint (October 14, 1999).

⁷ Continuity Shippers Association Opposition to Postal Service's Renewed Motion to Dismiss (dated October 18, filed October 19, 1999); AMMA Brief and Opposition to Motion to Dismiss (October 20, 1999); Statement of Association of American Publishers (October 21, 1999); Motion to File Reply and Reply of United States Postal Service to Various Pleadings (October 25, 1999).

⁸ Continuity Shippers Association Motion to Admit Evidence and Request for the Commission to Take Official Notice (dated November 3, filed on November 4, 1999).

factor could be admitted into evidence without an opportunity for cross-examination of a witness.⁹

In Order No. 1271, the Commission agreed with the Postal Service that “an appropriate evidentiary record for this proceeding is currently lacking.” Order No.1271, at 11 (November 18, 1999). The Commission determined that the results of the Postal Service’s October 1998 BPRS cost study, undertaken in accordance with the Commission’s Opinion and Recommended Decision in Docket No. MC97-4 establishing BPRS, “should be subject to evaluation by the Commission as part of its review of CSA’s complaint.” . *Id.* at 12. The Commission did not regard the study as appropriate for official notice, as the complainant had urged, and instead ordered the Postal Service to provide a witness to address the validity of the study and necessary revisions and adjustments needed to reflect Commission methodology. *Id.* at 13. In response to the complainant’s motion that the Commission take official notice of an inflation factor that the complainant contended should be applied to the results of the cost study to update the costs to the current year, the Commission stated that, while it could take official notice of the index, “its potential application to the BPRS unit attributable costs remains at issue.” *Id.* at 14. The Commission then set a schedule for the provision by the Postal Service of the cost study, for motions to move past evidence or facts appropriate for official notice into the record, and for notices of intent to conduct oral cross-examination or the filing of direct evidence. In the absence of the latter, the

⁹ Response of United Parcel Service in Opposition to Continuity Shippers Association Motion to Admit Evidence and Request for the Commission to Take Official Notice (November 15, 1999).

Commission set dates for briefs and reply briefs. *Id.* at 14. The Commission expressed its hope that settlement discussions would continue, and they did. *Id.* at 15.

The complainant moved that the Commission take official notice of the cost coverages applied by the Commission to Standard Mail Regular and to Bound Printed Matter in Docket No. R97-1.¹⁰ The same day, the Postal Service filed a response to Order No. 1271, pointing out that it was not appropriate for the burden of proof to be shifted from the complainant to the Postal Service and therefore it remained up to the complainant to move the BPRS cost study into evidence or to stipulate to it. To facilitate this possibility, the Postal Service, noting that the study was already on file with the Commission, transmitted to the Commission errata to the study as well as the changes needed to reflect the mail processing cost methodology adopted by the Commission in Docket No. R97-1.¹¹ Postal Service Response at 2. The Postal Service indicated that it would respond to written interrogatories concerning the study and provide a witness in the event oral cross-examination were requested.

That same day, the OCA moved into the record evidence from past related proceedings and gave notice of its intention to conduct written discovery.¹² Over the

¹⁰ CSA Motion to Designate Certain Findings from Docket No. R97-1 as Evidence in Docket No. C99-4, at 1 (dated December 1, filed on December 2, 1999).

¹¹ Letter of December 2, 1999, from Daniel J. Foucheaux, Jr., Chief Counsel, Ratemaking, United States Postal Service, to the Hon. Margaret P. Crenshaw, Secretary, Postal Rate Commission, re: Dockets No. MC97-4 and C99-4. Further errata were provided in a Letter from Mr. Foucheaux to Ms. Crenshaw of December 21, 1999.

¹² Office of the Consumer Advocate Motion to Move into the Record Evidence in Past Related Proceedings and Notification of Intent to Conduct Written Discovery (December (continued...))

course of the discovery period, the OCA filed, and the Postal Service responded to, 35 interrogatories. On December 8, 1999, the complainant gave notice of its intent to file direct evidence. On December 17, the complainant filed the Direct Testimony of Lawrence G. Buc on Behalf of the Continuity Shippers Association and the Direct Marketing Association. Witness Buc projected FY 2000 BPRS unit costs of 111.2 cents, and a cost coverage of 135 percent. CSA-T-1, at 4, 9. This would result in a fee of \$1.50.

In Order No. 1275, issued on December 22, 1999, the Commission admitted the following material into evidence: the Postal Service BPRS cost study filed October 30, 1998, the study errata and cost changes reflecting Commission methodology, the cost coverages for Standard Mail Regular and Bound Printed Matter from Docket No. R97-1, and certain testimony and exhibits from Docket Nos. MC97-4 and MC99-4, in which BPRS was established and enhanced. That same day the complainant filed a Motion for Order on Further Proceedings and on December 28, 1999, the Commission issued Order No. 1276, setting dates for the end of discovery on witness Buc's testimony; a hearing date for witness Buc, if requested; and dates for briefs and reply briefs. During the course of discovery, witness Buc responded to discovery propounded by the Office of the Consumer Advocate and the Postal Service.

On January 12, 2000, the Postal Service filed an omnibus rate case (Docket No. R2000-1). Included in the proposals were a BPRS fee of \$1.65, an annual permit fee of \$125, and a new BPRS annual advance deposit accounting fee of \$375. On the same

¹² (...continued)
2, 1999).

day, the Postal Service moved that the Commission either suspend the complaint docket pending litigation of Docket No. R2000-1, filed that day, or consolidate the complaint docket with the omnibus rate case.¹³ The Postal Service argued that the Commission had taken these actions in the past when omnibus rate cases had overtaken rate complaints. The Postal Service pointed out that the reasons the Commission had done so in previous cases applied in this case as well: the inefficiencies of having two separate proceedings to develop the same factual record and “the potential for duplication of effort, the existence of rate case testimony addressing the [relevant issues], the Postal Service’s production of new cost and volume data and the lack of prejudice to interested parties.” Motion at 1. The complainant filed an opposition to the motion,¹⁴ the OCA filed a response in support¹⁵ and the Postal Service filed a reply to the complainant’s opposition.¹⁶

In Order No. 1281, issued on January 24, 2000, the Commission denied the Postal Service’s motion. That same day, the Postal Service gave notice of its intention to file rebuttal testimony and asked the Commission to set a date for its filing. In Order No.

¹³ Motion of United States Postal Service for Suspension of Proceedings Or Consolidation of this Docket with Docket No. R2000-1 and Motion for Expedited Consideration of this Motion (January 12, 2000).

¹⁴ Continuity Shippers Association Opposition to Postal Service’s Motion to Suspend or Consolidate Proceedings with R2000-1 (dated January 18, filed January 19, 2000).

¹⁵ Office of the Consumer Advocate Response to United States Postal Service Motion for Suspension or Consolidation of this Docket with Docket No. R2000-1 (January 19, 2000.)

¹⁶ Motion of United States Postal Service for Leave to File Response to and Response to Continuity Shippers Association Opposition to Postal Service’s Motion to Suspend or Consolidate (January 21, 2000).

1282, the Commission rescheduled the date for cross-examination of witness Buc, set dates for filing of rebuttal testimony and for hearings on that testimony, if requested, and also set new dates for briefs and reply briefs.

Witness Buc appeared for cross-examination on February 2, 2000. He was cross-examined by the OCA and the Postal Service.

The Postal Service filed the rebuttal testimony of witness Susan W. Mayo on February 16. No cross-examination of witness Mayo was requested; consequently, in Order No. 1286, the Commission canceled the scheduled hearing.

I. THE COMPLAINANT HAS FAILED TO MEET ITS BURDEN OF PROOF AND NO RELIEF IS JUSTIFIED

This complaint was brought under 39 U.S.C. § 3662, which provides: "Interested parties who believe the Postal Service is charging rates which do not conform to the policies set out in this title ... may lodge a complaint with the Postal Rate Commission" The statute continues: "If the Commission ... determines the complaint to be justified, it shall, after proceedings in conformity with section 3624 of this title, issue a recommended decision which shall be acted upon in accordance with the provisions of section 3625 of this title and subject to review in accordance with the provisions of section 3628 of this title." 39 U.S.C. § 3662

The statute clearly requires that, for a rate complaint to be justified and a recommended decision to be issued, the complainant must show that the rate at issue does not conform to the policies set out in the Postal Reorganization Act. No such showing has been made in this case.

A. The Fee Was Lawful When Established and No Changed Circumstances or Intervening Events Have Occurred to Support a Lower Cost Coverage

The Commission determined that the current BPRS fee was lawful when recommended in Docket No. MC97-4. The Commission stated: "[T]he Commission has reviewed the evidentiary record pursuant to its statutory obligation under chapter 36 of title 39 of the U.S. Code. This includes an independent review of the costing and pricing testimony of Postal Service witnesses Pham and Adra. This review leads to the conclusion that the proposed classification and fee changes meet the criteria of 39 U.S.C. §§ 3622 and 3623, and conform to policies of the Postal Reorganization Act."

PRC Op., MC97-4, at 9. Indeed, the complainant was a party to the agreement that led to the Commission's recommendation, which included a finding that the fee conformed to the applicable statutory policies. Postal Service witness Pham had estimated a unit attributable cost for BPRS of 111.90 cents.¹⁷

Not only has the complainant failed to allege any circumstances that have changed since that time that would render the fee not in conformity with those policies, its own witness has estimated BPRS unit attributable costs to be 111.2 cents.¹⁸ Tr. 1/12. This is virtually identical to witness Pham's estimate. If one accepts that the costs have remained the same and the fee has remained the same, and the fee conformed to the policies of the Act when it was recommended, to support the complaint there must be some intervening event or events that arguably rendered the fee not in conformity with the Act. The complainant has neither alleged nor proven that such circumstances exist. To the contrary, the only intervening event which must be considered is Docket No. MC99-4, in which the Commission recommended, and the Postal Service implemented, an "improvement in BPRS." PRC Op., MC99-4, at 1.

B. The "Goldilocks" Argument Does Not Support a Rate Complaint

The complainant's case for a change in the fee is based entirely on the testimony of its witness that the cost coverage is a "little too high." Tr. 1/114. Witness Buc

¹⁷ Testimony of Hien D. Pham, USPS-T-1, Table 3, at 16. This testimony was admitted into evidence in this proceeding by Order No. 1275.

¹⁸ While the Postal Service does not concede that witness Buc's estimation methodology is necessarily valid, it has not challenged the use of his estimated cost for purposes of this proceeding.

explains in his testimony why he believes that a different fee might conform better, in his view, with the judgmental rate design criteria of section 3622(b). We will show below why witness Buc's analysis is unreliable. But even if one were to accept witness Buc's argument that his cost coverage seems *just right*, that still does not establish as a matter of law that the current fee is unlawful. Even if one believed that the witness's cost coverage was "better" than either the one that the Commission implicitly recommended in Docket No. MC97-4 or the calculated current cost coverage¹⁹, it does not establish the unlawfulness of the current fee. As anyone who has engaged in this exercise knows, setting cost coverages is a matter involving judgment and balances; there is more than one "right" answer. A range of cost coverages and rates could conform to the policies of the Act in any given set of circumstances.

C. Witness Buc's Reliance on the Cost Coverage for Standard Mail Regular is Misplaced

Witness Buc proposes that the appropriate cost coverage for BPRS is the cost coverage used for Standard Mail Regular in the last rate case. Tr. 1/ 13. His reliance on Standard Mail Regular is misplaced, as demonstrated by the rebuttal testimony of witness Susan W. Mayo on behalf of the Postal Service, USPS-RT-1.

Witness Mayo explains that BPRS is a special service which provides "a value of service above and beyond the basic mail class or mail delivery," in this case, Standard Mail Regular. USPS-RT-1, at 5. Witness Mayo shows that BPRS pieces have different

¹⁹ These two numbers, in any event, are virtually identical. When the fee was set, the cost coverage was $1.75/1.119 = 156$ percent. Using witness Buc's estimate of current costs, the cost coverage is $1.75/1.112 = 157$ percent.

characteristics from Standard Mail Regular. *Id.* at 5-6. It is "shaped differently, its contents are different, its costs are much higher, it is more welcomed by the recipient, and [on its outgoing leg] it fails to make a contribution to covering the institutional costs of the Postal Service." *Id.* at 6.²⁰ Furthermore, unlike a typical Standard Mail Regular advertising piece, which is generally unsolicited, in the case of BPRS, the "original mailer has asked to receive, and has a great interest in receiving, returned merchandise and whatever else may have been included in the case of opened and resealed parcels, such as customer information and payment." *Id.* Finally, the recent enhancements to BPRS adopted as a result of Docket No. MC99-4, "allowing the use of return labels at no additional fee and authorizing return of opened and resealed parcels without return labels in certain circumstances, add considerably to the value" of BPRS. *Id.* at 10.

Witness Buc himself testified to the value of BPRS. He testified that it has improved the timeliness of returns. Tr. 1/124-25. In addition to timeliness, the certainty of returns has increased. He testified that it is a "big factor" that "you are more certain that you are going to get it back." Tr. 1/126. Moreover, "the customer is probably happier." Regarding the value to the mailer and the customer of the customer information and payment often received, witness Buc testified:

Some of the people have terminated their relationship with Cosmetique when they send it back, but some of them haven't. And it is a good thing to know

²⁰ On cross-examination, witness Buc agreed that the lack of contribution of parcels mailed out as Standard Mail Regular had some relevance to the issue of the appropriate BPRS cost coverage. Tr. 1/135. He also testified that if a competitor of the Postal Service offered delivery of parcels under a pound at a lower price, Cosmetique would be using that service. Tr. 1/133.

that they haven't, because those people can get the next shipment. It is a good thing for those that have terminated, to know that, so that their account gets credited or so that they don't get a dunning letter. *So BPRS is very good for Cosmetique and other continuity shippers.*

Tr. 1/126-27 (emphasis added). Witness Buc testified that no BPRS customers have been lost due to its price. Tr. 1/120.

II. EVEN IF THE COMPLAINT WERE JUSTIFIED, ONLY A LIMITED REMEDY WOULD BE CONSISTENT WITH THE STATUTE AND CASE LAW

Even if the Commission were to find that the current fee is unlawful and must be changed, the Commission may not, consistent with the statute as it has been interpreted by the Courts, recommend a new fee at this time. In *Dow Jones, Inc. v. United States Postal Service*, 656 F.2d 786, the Court held that "Congress made the deliberate decision to confer rate origination authority solely upon the Postal Service." *Id.* at 790. The Court affirmed the finding of the district court "any rate order issuing from the proceeding would be 'an illegal order' because 'there has to be a rate proceeding initiated by the Postal Service.'" *Id.* at 789.

A. The Complainant Would Only Be Entitled to Limited Relief in this Docket

It is not clear whether the relief, as specifically requested by the complainant, would violate this standard. In the original Complaint document, the complainant stated that "the Commission should issue a Recommended Decision to the Board of Governors of the Postal Service recommending the establishment of rates for BPRS that properly reflect the costs of this Service and the value of the Service to the sender and recipient, and that otherwise accord with the policies and purposes of the Act."

Complaint at 6. The complaint did not specifically ask for the recommendation of a new fee, or ask for any particular fee to be recommended.

In its "Brief" filed on October 5, 1999, at page 5, the complainant stated: "The Continuity Shippers Association requests that the Postal Rate Commission issue a Recommended Decision to the Board of Governors finding that the rate for the Bulk Parcel Return Service should be \$1.48, consisting of \$1.09 in year 2000 costs and a cost coverage of 136%." Although this prayer for relief contains a specific fee, which has since been contradicted by the complainant's filed testimony, it asks only for a transmission of a finding of what the fee "should be," and does not explicitly ask the Commission to recommend that fee; it is not clear if that was its unstated intention.

Accordingly, if the Commission believes that a complaint is justified, it may recommend to the Governors that the Postal Service request the Commission to issue a recommended decision to change the fee and the Commission may recommend whatever fee it deems appropriate in light of the applicable criteria and the evidence on the record. While, in the normal course of events, there would be utility to this approach, in that it would alert the Governors to the need to consider a request for a change in the fee, given that the Postal Service has already requested that Commission recommend a new fee as part of the pending omnibus rate case, Docket No. R2000-1, there would be no point to any recommended decision in the instant docket.

B. More Comprehensive Consideration Is Available in the Rate Case

The better course in this circumstances is for the Commission to decline to issue an affirmative recommendation in this case and simply issue an order dismissing the

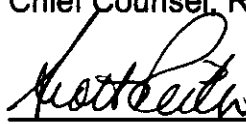
complaint with prejudice for failure to meet the applicable statutory standard of section 3662, noting that the pending rate case will provide a better opportunity for resolution of issues regarding cost coverages for BPRS and other related services. Even the complainant's witness agrees that resolving the complaint in the context of the rate case would be "optimal." Tr. 1/141. In light of the lack of any credible showing that the current fee is inconsistent with the policies of the Act, the Commission should choose this optimal course and allow the future costs, cost coverage, and fees²¹ for BPRS to be determined in the context of the current omnibus rate case.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

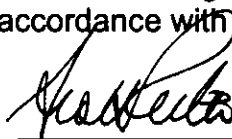
Daniel J. Foucheaux, Jr.
Chief Counsel, Ratemaking



Scott L. Reiter

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all participants of record in this proceeding in accordance with section 12 of the Rules of Practice.



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²¹ In particular, the omnibus case will allow the per-piece fee to be determined in conjunction with the appropriate annual fees for BPRS.