

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

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Docket No. R2000-1

**REPLY BRIEF OF THE ASSOCIATION
OF AMERICAN PUBLISHERS**

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5 U.S.C. § 556(d)1
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PRC Op. 94-1 at ¶ 51335
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INTRODUCTION

The Association of American Publishers (“AAP”) submits this brief to respond to arguments raised by the United States Postal Service (“Postal Service”) and the Mail Order Association of America (“MOAA”) with respect to the proposed rates and rate design for the Bound Printed Matter (“BPM”) subclass. Review of the initial briefs of AAP, MOAA and the Postal Service clearly demonstrates that there are substantial differences of opinion regarding the appropriateness of the rates and rate design proposed by the Postal Service with respect to BPM.

There are several facts, however, upon which all the parties agree. The rate increases proposed for BPM are the highest among any of the subclasses. If the rates are implemented as proposed, BPM mailers will suffer severe rate shock. AAP submits that in light of these undisputed facts, the Commission should make a recommendation for BPM that mitigates the effect of these unprecedented rate increases. AAP believes that Witness Siwek’s alternative rates and rate design for BPM achieve this goal and provide the most reasonable balance for the subclass.

ARGUMENT

I. The Postal Service Improperly Attempts to Shift the Burden of Proof to AAP

The burden of proof to justify its proposed rates and rate design for the BPM subclass remains, at all times, upon the Postal Service. By seeking higher rates and proposing a new rate design, the Postal Service is a proponent of a new rule or order, and as such, must justify the proposed rates and rate design. *See, e.g.,* 5 U.S.C. § 556(d); 39 U.S.C. § 3624(a); *see also* Initial Brief of the Office of Consumer Advocate at 12. The Postal Service bears this burden not simply because that is what the law requires, but because there is no practical alternative. No other party has the resources or ability to produce alternative data. Recognizing that that evidentiary record

in this proceeding does not support its proposals for BPM, the Postal Service seeks to obscure its failure to shoulder its burden of proof. In particular, the Postal Service criticizes AAP witness Siwek for failing to provide alternative volume forecasts for BPM and for failing to offer an alternative to the Bound Printed Matter Characteristics Study (“BPM Study” or the “Study”). *See* Initial Brief of the Postal Service (“Postal Service Brief”) at IV-3 and VII-121.

Witness Siwek’s testimony correctly pointed out that the Postal Service volume estimates for BPM were based on a flawed set of assumptions regarding the subclass. *See* Tr. 30/14564. The testimony of the primary Postal Service’s primary volume witness, Dr. George Tolley, failed to even mention that books were sent as BPM in his description of the subclass. *See* USPS-T-6 at 167-172. Instead, he referred to BPM as a catalog subclass. *Id.* Only later in the case, in response to questioning by AAP, did he produce data that showed that 63.7% of the mail sent as BPM was books. Tr. 9/35985-96. Witness Siwek also found that Dr. Tolley improperly viewed books and catalogs as belonging to the same product market in developing his volume forecasts for BPM. Tr. 30/14556-57. A close examination of the Postal Service’s initial brief on this issue is revealing. The Postal Service does not dispute the accuracy of Mr. Siwek’s statements regarding the flawed assumptions underlying Dr. Tolley’s volume estimates and composition of the subclass. Instead, the Postal Service takes the position that AAP, through Mr. Siwek, should have produced alternative volume estimates for BPM. Postal Service Brief at IV-3. But, the burden is on the Postal Service to supply credible volume estimates to support its rate requests. As Witness Siwek has shown, the Postal Service has failed to do so.

Likewise, the Postal Service attempts to discredit Witness Siwek’s thorough analysis of the flaws with the Bound Printed Matter Characteristics Study by asserting that he has failed to present any alternative data to use for purposes of introducing drop-ship discounts for the BPM

subclass. Postal Service Brief at VII-121. Again, the Postal Service improperly attempts to deflect attention from obvious defects in its case by claiming that AAP had an obligation to produce alternative data upon which to base drop-ship discounts. Apparently, the Postal Service believes that the only manner in which AAP can discredit the BPM Study is to develop a competing study which contains alternative volume estimates for various entry points of BPM into the mailstream. Even if the Postal Service were to allow AAP unprecedented access to its facilities and data in order to formulate a study (a scenario which is highly improbable), there is nothing in the Act or Commission precedent which compels AAP to conduct such a study.

The inherent unfairness and weaknesses of the Postal Service position must be stressed. The Postal Service seeks to have the Commission ignore the flaws in the Postal Service's volume forecasts and BPM Study by attempting to shift the burden of proof to AAP. Taken to its logical conclusion, the Postal Service appears to be arguing that even though its BPM data may be unreliable, it must be relied upon because AAP has failed to produce alternative BPM volume data or an alternative BPM Study. In fact, AAP is not required to produce such data in order to discredit the Postal Service's case. The Postal Service is the party proposing unprecedented rate increases for BPM and a radical restructuring of the subclass. Accordingly, the burden of supporting those changes falls squarely upon the Postal Service. AAP has shown that the Postal Service has failed to meet this burden and that its proposals for BPM should be rejected by the Commission.

II. The Postal Service Has Failed to Provide a Rational Explanation for Its Proposed Cost Coverage for BPM

The core of AAP's concern regarding cost coverage accorded to BPM centers on the Postal Service's unwillingness to depart from the historical ECSI treatment of BPM notwithstanding that evidence developed in this proceeding clearly shows that that the majority

of the subclass consists of books and that BPM should be accorded significantly greater ECSI consideration. AAP Initial Brief at 3-10. Instead of taking a fresh look at its approach, the Postal Service has chosen to circle the wagons and to defend its arbitrary application of the rate-making criteria to BPM. In doing so, the Postal Service is forced to rely upon an invidious distinction it has created between BPM as compared to other subclasses of mail.

The Postal Service misleadingly chooses to frame the issue as a dispute over whether *any* criterion 8 consideration was given to BPM in establishing rates for the subclass and asserts that AAP Witness Siwek has “manufactured a claim that criterion 8 was disregarded.” *See* Postal Service Brief at VI-34. In fact, as outlined in AAP’s initial brief, the actual issue is whether *appropriate and full* ECSI consideration was accorded to BPM. AAP Initial Brief at 3-9. Apparently, the Postal Service has chosen to mischaracterize the issue in order to avoid confronting the fact that books now constitute a majority of the mail matter sent as BPM and, accordingly, that BPM is entitled to substantially more than the partial level of ECSI consideration accorded by Witness Mayes. *See* USPS-T-32 at 45 (BPM accorded “some ECSI consideration.”).

Most telling is the Postal Service’s failure to address (or even mention) the testimony of AAP’s primary witnesses regarding the application of criterion 8 – Witnesses Schroeder and Wells. Tr. 28/13368-75; Tr. 28/13379-81. Witness Schroeder, a former member of Congress, spoke to the Congressional intent underlying criterion 8 and the need to accord full ECSI consideration to the BPM subclass in light of recent revelations that the subclass is predominantly composed of books. Tr. 28/13368-69. Witness Wells, a well-known children’s author, spoke to the cultural and education value of books sent as BPM, and noted that the staggering increases in BPM rates could have unintended consequences on childhood literacy

efforts. Tr. 28/13381. The failure of the Postal Service to cross-examine or rebut these witnesses, combined with the failure even to mention the existence of such testimony in its initial brief, must be taken as a tacit admission that their testimony is unimpeachable and accurate.

The weakness of the Postal Service's position with respect to the cost coverage accorded to BPM is nowhere more evident than in its failed effort to distinguish the application of ECSI to BPM as compared to Periodicals. Postal Service Brief at VI-32-33. Without any support for its position, the Postal Service attempts to differentiate its treatment of the two subclasses by stating the editorial content found in Periodicals cannot be disassociated with the advertising content. Each Periodicals mail piece, states the Postal Service, contains editorial content that deserves ECSI value. In contrast, the Postal Service contends that BPM contains mailpieces that do not have any editorial content (*i.e.*, catalogs), and that BPM is not entitled to the same ECSI consideration as Periodicals. *Id.* at VI-33.

The Postal Service position on this matter constitutes a radical departure from past practice and directly contradicts statements made by its own costing witness during the course of this proceeding. Historically, ECSI consideration is accorded to a subclass not on a piece-by-piece basis, but based on the characteristics of the subclass as a whole, a fact that Witness Mayes explicitly agreed with during her cross-examination on this issue. Tr. 11/4471. Further, as noted by the Commission in R94-1, "[n]ot all periodicals contain both advertising and nonadvertising material. Yet, the presence of editorial content in the class, gives each and every piece of second class publications their ECSI value." PRC Op. 94-1 at ¶ 5133. Thus, the Postal Service position is at odds with the Commission's interpretation of how ECSI consideration is applied to a subclass.

Furthermore, the import of the distinction posed by the Postal Service scarcely supports the conclusion it advocates. That is, it is hardly evident why a magazine with non-ECSI advertising content is more valuable from a ratemaking perspective than a book without advertising that is mailed in a subclass that includes catalogs. If the total percentage of unsegregated editorial content in the Periodicals subclass is roughly equal to that in BPM, BPM must be accorded the same level of ECSI consideration as Periodicals. Only by applying criterion 8 in such a manner can the Postal Service legitimately avoid the appearance that a magazine such as Popular Mechanics is accorded greater ECSI value than a Bible. *See* Tr. 11/4636 (comments of Commissioner LeBlanc).

Ultimately, the problem in which the Postal Service now finds itself with respect to its inability to differentiate between ECSI consideration provided to Periodicals compared to BPM is entirely of its own making. The comparison to the ECSI treatment accorded to Periodicals was suggested by Postal Service Witness Mayes herself in a response to an interrogatory posed by AAP. Tr. 11/4189. Ms. Mayes stated if books were assumed to dominate the subclass “[E]xamination of the Commission’s treatment of such subclasses as First-Class Letters or Periodicals where the mail consists of both material which would warrant ECSI value consideration (personal correspondence or editorial content, for example) as well as advertising or other matter which would not warrant ECSI value consideration *could be instructive.*” *Id.* (emphasis added).¹

¹ The Postal Service goes to great lengths in its attempt to discredit AAP Witness Siwek by claiming that he ignored the “option” available to book mailers to use the Special Standard subclass. The “option” referred to by the Postal Service is illusory as Special Standard rates are higher than BPM rates. The Commission, as a matter of policy, has endorsed the sending of books through the BPM subclass. *See* PRC Op. 90-1 at ¶ 6508 (“[I]ntent of Act is to encourage widespread dissemination of books.”). The implication of the Postal Service argument is that
(continued...)

Finally, the Postal Service repeatedly contends that substantial mitigation of rates, through a reduction of the cost coverage, was accorded to BPM pursuant to the requirement of criterion 4 that consideration be given to the effect of the increase upon the general public and business mail users. Postal Service Brief at VI-30. The Postal Service states, however, that it has no obligation to ensure that mailers are not adversely affected by its rate proposals. *Id.* It also states that Mr. Siwek's concerns in this area are "obscure." *Id.* In fact, there is nothing obscure about the 25.9% increase that will be faced by some mailers of BPM. Further, although the Postal Service contends that it engaged in significant rate mitigation by lowering the cost coverage for BPM to 117.6%, the extent of that mitigation is questionable, particularly in light of the inability of the Postal Service to provide any explanation for the BPM cost increases and the far greater mitigation provided to the Periodicals subclass in the face of similar unprecedented cost increases.²

(..continued)

there could be a reverse migration of books to the Special Standard subclass. Clearly that would only happen if the rates for Special Standard were less than BPM. To suggest that book mailers would return to Special Standard and pay higher postage rates than BPM defies logic and thwarts the policy the Commission has endorsed. With respect to the Postal Service argument that Special Standard is entitled to full ECSI value, and that the cost coverage proposed for the subclass is 112.5%, AAP submits that the cost coverage for Special Standard is too high and should remain at its historical levels (i.e., 105-106%).

² Accepting the level of rate mitigation requires that the Commission accept, in the first instance, that the level of cost increases for BPM is accurate. However, the true attributable costs for BPM have been overstated because they improperly assume 100% volume variability for mail processing costs. Interestingly, although the Postal Service brief provides an extensive discussion as to why mail processing variabilities of less than 100% are statistically valid, the Postal Service fails to recognize that this equally applies to mail processing costs at non-MODS offices and at BMCs. Witness Siwek's testimony specifically addresses this issue and shows that if the mail processing costs at non-MODS offices and at BMCs are *not* treated as 100% volume variable, the claimed 40% cost increase for BPM is simply not true. Tr. 30/14575. The Postal Service fails to address this point.

III. Witness Siwek's Proposal Provides the Most Reasonable Alternative for BPM

The Commission is faced with three proposals pertaining to the rate design for BPM. In assessing each proposal, AAP submits that the Commission should take into account (1) the extensive flaws in the Postal Service Study underlying its proposal for instituting BPM drop-ship discounts; (2) the inherent unfairness and inequity in the MOAA proposal as applied to mail dropped at the DBMC; and (3) the balance provided by Witness Siwek's proposal.

A. The Postal Service Cannot Defend the Flaws in the BPM Study

AAP's criticisms of the Bound Printed Matter Characteristics Study ("BPM Study" or the "Study") have been fully set forth in the testimony of Witness Siwek, Tr. 30/14575-82, and in AAP's Initial Brief. AAP Initial Brief at 14-24. Although the Postal Service goes to great lengths to defend the Study in its initial brief, the Study is flawed, and these flaws bring into question whether it can be relied upon for purposes of supporting the proposed implementation of drop-ship discounts to the BPM subclass.

In its zeal to defend the Study at all costs, the Postal Service implicitly concedes several of Mr. Siwek's key criticisms. For instance, the Postal Service concedes that the Study assumed entry points for certain plant load volume and that Witness Siwek's analysis of the Study on this issue is "technically correct." Postal Service Brief at VII-123. The Postal Service admission on this issue echoes Witness Degen's earlier admission that many of the faults with the Study identified by Witness Siwek also were "technically correct." Tr. 38/17340. The Postal Service is thus left to argue that the errors were not significant and that it is naïve for AAP to even suggest that a study be conducted without errors. AAP submits that the errors are significant and that it is not unreasonable to expect statistical soundness and accuracy of a study upon which the Postal Service intends to restructure the rate design of an entire subclass.

The Postal Service also attempts to downplay its lack of direct oversight of the BPM Study. Yet, this lack of oversight directly led to the improper tabulation of volume figures for various drop-ship locations. Tr. 30/14579-81.³ The Postal Service attempts to brush aside this mistake by noting that Witness Kiefer showed that the revised volume figures had no material effect upon his proposed rates. Yet, as shown by Witness Siwek, the changes made by Mr. Kiefer to account for these adjustments were manipulated to offset the volume changes. Tr. 30/14581-82. Thus, no matter how large the volume changes may have been, under the procedure used by Witness Kiefer, the rates would remain unchanged. This is not, as the Postal Service characterizes it, an issue over the form of the spreadsheet used by Witness Kiefer, but an issue regarding the arbitrariness of the procedure he utilized to conclude that the volume changes made to the Study (long after the filing of the Postal Service case) would have no effect on BPM drop-ship rates.

There are numerous other flaws with the Study outlined in Witness Siwek's testimony which do not bear repeating here. See Tr. 30/14575-82. While the Postal Service disputes the significance of these flaws, AAP submits that the cumulative nature of these problems is significant and renders Study neither reliable nor sound.

B. The MOAA Proposal Is Grossly Unfair to DBMC Mailers

AAP agrees with the Postal Service position that MOAA's proposed drop-ship discount structure for BPM would adversely affect DBMC mailers and that it would have a severe impact upon those mailers who do not drop-ship at the DDU. Postal Service Brief at VII-133. As noted

³ The Postal Service states that the record reflects no "confusion" on this issue. Yet, Witness Crum explicitly stated that "confusion" and miscommunication between the Postal Service and Christensen Associates caused these mistakes. Tr. 8/3455-56

by the Postal Service, MOAA's proposal also would raise rates even higher than those proposed by the Postal Service for mail currently entered at the local rate. Postal Service Brief at VII-133. Overall, AAP believes that MOAA's proposal is even less equitable than that put forth by the Postal Service and would exacerbate the rate shock faced by the vast majority of BPM mailers who cannot drop-ship at the DDU. Further, although MOAA's proposals would create greater incentives for drop-shipping at the DDU level, those incentives would necessitate that other BPM mailers – particularly those who use the DBMC – pay higher rates than those proposed by the Postal Service in this case.

In assessing MOAA's proposal, it is noteworthy that MOAA agrees with AAP that the majority of mail matter sent as BPM is books and that book mailers will not be able to use the full range of drop-ship discounts. Initial Brief of MOAA at 27. Although these facts cause MOAA some degree of consternation, MOAA does acknowledge that the changing composition of the subclass justifies a low cost coverage for BPM.⁴ *Id.* at 26-27. Thus, even though AAP and MOAA are in obvious disagreement regarding the how the drop-ship discounts should be structured, both parties agree that the fundamental qualities of the subclass are considerably different than assumed by the Postal Service at the start of this rate case.

C. The Siwek Proposal Provides the Best Balance for the Subclass

Both the Postal Service and MOAA directly challenge the fairness of Witness Siwek's rate proposal, citing the disparity in passthroughs among DBMC, DDU and DSCF mail and the

⁴ MOAA also speculates that the increase in costs for BPM is directly due to the introduction of books into the subclass. Initial Brief of MOAA at 27. The record in this case provides absolutely no support for this assertion. MOAA's misplaced speculation on this issue does, however, highlight that the Postal Service has never provided BPM mailers with an explanation for the purported increase in costs.

apparent preference that his proposal accords to mail drop-shipped at the DBMC. However, the proposed rate structure set forth by Witness Siwek provides the best and most reasonable balance between the three drop-ship levels. More importantly, his proposal produces the greatest degree of rate mitigation to the greatest number of BPM mailers. While AAP admittedly recognizes that this proposal may not provide DDU mailers with the extent of discounts that they desire, Witness Siwek's proposal is fair and equitable to all mailers who use the subclass. Introducing a full range of discounts at this time simply to appease a relatively small (and shrinking) group of mailers provides inordinate benefits to the minority users of the subclass (catalogs mailers) at the expense of the majority users of the subclass (book mailers).⁵

The Postal Service's proposal would provide DDU and DSCF mailers with the largest passthroughs of 45.3% and 46.5%, respectively, leaving DBMC mailers with a significantly lower pass-through of 16.3%. *See* Tr. 30/14584. This results in a DDU passthrough that is 2.8 times greater, and a DSCF passthrough that is 2.9 times greater, than the passthrough proposed for DBMC mail. In contrast, witness Siwek's proposal would dramatically reduce the disparity among passthroughs. His proposal would result in a 51.3% pass through for DBMC mail, a 36.9% passthrough for DSCF mail and a 29.7% passthrough for DDU mail. This results in a DBMC passthrough that is only 1.7 times that accorded to DDU mail, and 1.4 times that for

⁵ The Postal Service asserts that “[c]ustomers are asking for a full range of drop-ship options in this case for Bound Printed Matter.” In support of this statement, the Postal Service cites to the testimony of witnesses for the Parcel Shipper's Association (“PSA”) and MOAA. Admittedly, MOAA seeks a full range of drop-ship discounts in this case. PSA has stated, however, that while it supports the introduction of DSCF and DDU rates for BPM it is concerned that “many BPM users will not have sufficient volumes and therefore will be left to pay an extremely high 18.15% increase.” Thus, the Postal Service's claims of support for its proposals are overstated. It is puzzling that the Postal Service did not seek mailer input on the feasibility of drop-ship discounts for BPM prior to the filing of this case. Other than its conclusory assertions, no such input is evident in the record of this case.

DSCF mail. Thus, when examined objectively, it is clear that Witness Siwek's proposal results in the least amount of passthrough disparity among the three drop-ship levels and focuses the largest passthrough on the greatest number of mailers who can drop-ship.

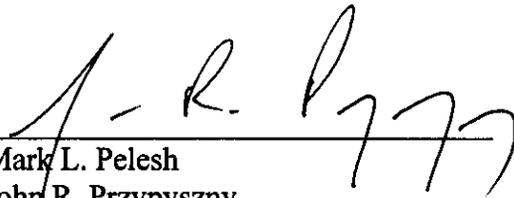
The foundation of Witness Siwek's proposal rests on the view that the full-range of drop-ship discounts be implemented over time, similar to the manner in which drop-ship discounts for Parcel Post were instituted. The Postal Service contends that there is no "compelling reason as a matter of logic, business or ratemaking that BPM should follow the evolution of Parcel Post's rate structure in lock-step." Postal Service Brief at VII-127. Yet, as set forth in AAP's Initial Brief, there are numerous compelling reasons to phase-in implementation of the discounts. Delayed implementation of the DSCF and DDU discounts will help to mitigate the rate shock that will be experienced by those mailers who do not have the volume to make use of the discounts. Witness Siwek also has identified numerous problems with the underlying BPM Study upon which Postal Service justifies the feasibility of the discounts. Tr. 30/14575-82. Instead of relying upon a flawed study to force such discounts upon mailers, the Postal Service might take the novel step of seeking additional mailer input into whether such discounts are suitable to the composition of the mail matter being sent as BPM and closely examining the issue of whether such discounts are feasible given the limited mailing volume of many BPM mailers. AAP submits that all of these considerations are logical, relate to real-world business considerations of BPM mailers and make for sounder decision-making in the rate-making process.

CONCLUSION

The composition of the BPM subclass is substantially different than presumed by the Postal Service at the time it made its rate proposals. Books now predominate the subclass. These facts should guide the Commission as it determines the appropriate rates and rate structure

for BPM. Recognizing that there is no easy way to reconcile the respective positions of the Postal Service, MOAA and AAP with respect to the rate design for the subclass, AAP submits that Witness Siwek's proposal provides the most reasonable approach to drop-ship discounts.

Respectfully submitted,



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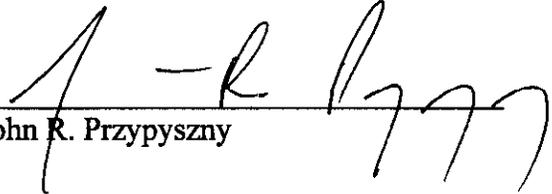
Counsel for Association of
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Date: September 22, 2000

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing document, by First-Class Mail,
upon the participants in this proceeding.

Date: September 22, 2000



John R. Przepyszny