

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

RECEIVED
FEB 12 4 25 PM '01
POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

Complaint on Priority Mail Rates

Docket No. C2001-2

ANSWER OF THE UNITED STATES POSTAL SERVICE AND
MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO SUSPEND PROCEEDINGS
(February 12, 2001)

Introduction and Background

On January 12, 2001, the Postal Rate Commission received a complaint filed by Douglas F. Carlson (Complainant). By letter dated January 17, 2001, the Office of the Secretary, Postal Rate Commission, designated the docket number above and advised the General Counsel, United States Postal Service, of the Complaint's filing under title 39, United States Code § 3662. The complaint is the second filed in recent months by Complainant.

In this Complaint, Complainant alleges that the current rates of \$3.50 for Priority Mail weighing up to one pound, and \$3.95 for Priority Mail weighing more than one pound but not more than two pounds, violate the policies of the Postal Reorganization Act. Complainant asserts that these new rates were originally recommended by the Commission along with a classification change that would have set the rate for Priority Mail flat rate envelopes at the new one-pound rate. The Governors, in a separate decision, had rejected the Commission's recommended reclassification of the flat rate envelope, which remains tied to the higher two-pound Priority Mail rate. According to

Complainant, the recently-implemented rates for one- and two-pound Priority Mail are unfair and not sufficiently aligned with costs. He argues that, given that no change occurred in the flat rate envelope classification, these rates should be reconsidered by the Commission, and lower rates recommended to reflect the revenue effect of retaining the higher flat rate.

Complainant further contends that the Governors' rejection of the recommended change in the flat rate envelope classification violates the Act because it is unfair, is not sufficiently aligned with costs, and may have a negative effect on mailers. Such mailers, he contends, now will be confused regarding the Priority Mail options available to them. To the extent that the Governors' rejection of the flat rate envelope reclassification was based on a lack of record evidence, moreover, Complainant implies that this deficiency could be cured in the complaint docket he seeks to initiate. Thus he requests, in the alternative, that the Commission hold a hearing and again recommend the rejected classification change.

As discussed in more detail below, it is the view of the Postal Service that the Complaint should be dismissed. Alternatively, the Postal Service considers that this matter should be suspended until such time as the Governors of the Postal Service have exhausted all § 3625 Docket No. R2000-1 decision options which have the potential to affect the Priority Mail rates currently in effect. Before explaining why the Commission should either dismiss the Complaint or suspend this proceeding, however, the Postal Service provides the following Answer to the specific allegations of the complaint.

ANSWER

The Complaint consists of 21 numbered paragraphs, accompanied by one exhibit. Pursuant to Rule 84 of the Rules of Practice and Procedure of the Postal Rate Commission (title 39, Code of Federal Regulations §3001.84), the Postal Service answers each enumerated paragraph of the Complaint as follows:

1. This paragraph simply identifies Complainant by name and address; the Postal Service considers this sentence procedural and not requiring a response.
2. This paragraph consists of a paraphrase of the first sentence of one section of the Postal Reorganization Act, to which no answer is required.
3. The Postal Service admits that on December 5, 2000, the Governors of the Postal Service, with certain exceptions, allowed the Docket No. R2000-1 rate and classification recommendations issued by the Postal Rate Commission on November 13, 2000, to take effect under protest. The Postal Service further states that among the recommended classification changes rejected by the Governors was the recommendation that the rate applicable to Priority Mail flat rate envelopes be set at the rate for weight-rated Priority Mail weighing up to one pound. The Postal Service further admits that the Board of Governors of the Postal Service set an implementation date of January 7, 2001 for the rate and classification changes that were allowed to go into effect under protest.

4. The Postal Service admits that on January 7, 2001, the Postal Service implemented a rate of \$3.50 for weight-rated Priority Mail pieces weighing up to one pound ("the one-pound rate"), and a rate of \$3.95 for weight-rated Priority Mail pieces weighing more than one pound but not more than two pounds ("the two-pound rate"). The Postal Service further admits, that as a consequence of the existing Priority Mail classification schedule, which was not changed, the rate applicable to material mailed in Priority Mail flat-rate envelopes remained set at the rate applicable to weight-rated Priority Mail pieces weighing more than one pound but not more than two pounds, which, as of January 7, 2001, was a rate of \$3.95.

5. The Postal Service admits that on December 5, 2000 the Governors of the Postal Service rejected the recommendation of the Commission in Docket No. R2000-1 that Domestic Mail Classification Schedule §223.5 be changed so that the rate applicable to material mailed in Priority Mail flat-rate envelopes would be the one-pound rate, rather than the two-pound rate.

6. The Postal Service admits that, concurrently with announcing their decision to reject the recommended classification change for flat rate Priority Mail envelopes, the Governors expressed a number of concerns regarding that recommendation, among which was a concern regarding the lack of an examination of the merits of this recommendation on the record before the Commission in Docket No. R2000-1. The Governors' Decision speaks for itself.

7. The Postal Service admits that in Docket No. R2000-1, the Postal Service proposed a rate of \$3.45 for Priority Mail weighing up to one pound and a rate of \$3.85 for Priority Mail weighing more than one pound but not more than two pounds.

8. The Postal Service admits that in Docket No. R2000-1, the Postal Rate Commission recommended, among other rates, a rate of \$3.50 for Priority Mail weighing up to one pound and a rate of \$3.95 for Priority Mail weighing more than one pound but not more than two pounds. The Postal Service admits that, in part of its discussion of Priority Mail rates, at PRC Op. R2000-1, Vol. 1 at 325, ¶ 5355, the Commission stated:

The Commission recognizes that the "desirability of special classifications" must be considered "from the point of view of both the user and of the Postal Service[.]" 39 U.S.C. § 3623(c)(5), and that the Service's opportunity to be heard on the latter point has been limited to arguments on brief, which do not favor the recommended change. It must also be acknowledged that application of the one-pound rate to the flat rate envelope leads to the development of recommended one-pound and two-pound rates that are slightly higher than they might be if the two-pound rate were retained. Nevertheless, the Commission is sufficiently concerned about the fairness and equity of retaining the two-pound flat-envelope rate while recommending adoption of a new one-pound rate interval that it finds it must recommend a change in rate application in this proceeding.

The Postal Service further admits that the Governors of the Postal Service rejected the recommended classification change that would have set the rate for material sent in Priority Mail flat rate envelopes at the rate for weight-rated Priority Mail weighing up to one pound.

9. The Postal Service admits that no participant in Docket No. R2000-1, including

the Postal Service, proposed a one-pound rate for Priority Mail of \$3.50 or a two-pound rate for Priority Mail of \$3.95. The Postal Service further states that the Postal Service did in that Docket propose rates that were somewhat lower than the \$3.50 and \$3.95 rates listed above, and further states that at least one party advocated rates substantially higher than those proposed by the Postal Service.

10. *This statement consists of a legal conclusion and is not a statement of fact* requiring a response. To the extent that a response may be deemed to be required, the statement is denied.

11. The Postal Service admits that in Docket No. R2000-1, the Commission did not recommend a one-pound rate for Priority Mail of \$3.50 and a two-pound rate for Priority Mail of \$3.95, while at the same time recommending no change in the existing classification schedule pertaining to Priority Mail flat rate envelopes, which classification schedule applies the two-pound Priority Mail rate to material mailed in such envelopes.

12. The Postal Service admits that in its Memorandum of the United States Postal Service on Reconsideration, filed on December 20, 2000 in Docket No. R2000-1, the Postal Service did not specifically request reconsideration of the one-pound and two-pound rates for Priority Mail to take account of the fact that the recommended classification change for material mailed in Priority Mail flat rate envelopes had been rejected. The Postal Service further states that this action was consistent with the December 5, 2000, Decision of the Governors of the Postal Service to reject the

recommendation of the Commission in Docket No. R2000-1 that DMCS §223.5 be changed and the Governors' Decision on the Commission's recommendation of postal rates and fees. Neither Decision directed the Postal Service specifically to seek reconsideration of Priority Mail rates and classifications. To the extent that paragraph 12 of the Complaint asserts that the Postal Service in its Memorandum was legally authorized to specifically propose reconsideration of the Priority Mail rates in question, this assertion consists of a legal conclusion to which no response is required. To the extent that a response may be deemed to be required, the statement is denied.

13. The Postal Service admits that on December 12, 2000, the letter depicted in Complainant's Exhibit 1 was received by the Law Department of the Postal Service, and that, as of the date of the Complaint, and continuing to the present date, no communication has been directed to Complainant by the Postal Service in reply.

14. This statement consists of a legal conclusion and is not a statement of fact requiring a response. To the extent that a response may be deemed to be required, the statement is denied.

15. The Postal Service admits that in Docket No. R2000-1, the Postal Service requested a rate of \$3.85 for Priority Mail weighing more than one pound but not more than two pounds ("the two pound rate"). The Postal Service further admits that the Postal Service did not request a change in the classification schedule pertaining to material mailed in flat-rate Priority Mail envelopes, to which the two-pound rate applies.

16. The Postal Service admits that the testimony of Postal Service witness Robinson in Docket No. R2000-1 (Tr. 7/2754) estimated that for FY 1998, most flat-rate Priority Mail envelopes (approximately 77 percent) weighed one pound or less.

17. The Postal Service admits that, as with any rate change, it is possible that some customers initially may be confused by the relation of the new one-pound rate to the existing Priority Mail flat-rate classification.

18. This statement consists of a legal conclusion and is not a statement of fact requiring a response. To the extent that a response may be deemed to be required, the statement is denied.

19. The Postal Service admits that the table depicted at paragraph 19 of the Complaint summarizes the proposed, recommended and implemented Priority Mail rates at issue in the Complaint, with the exception that material mailed in a Priority Mail flat-rate envelope does not bear a specific rate, *per se*, but has applied to it whatever two-pound Priority Mail rate currently is in effect.

20. This statement consists of a legal conclusion and is not a statement of fact requiring a response. To the extent that a response may be deemed to be required, the statement is denied.

21. This paragraph consists of a request for relief, to which no answer is required. To the extent that an answer is deemed to be required, the Postal Service denies that the requested relief is either warranted or appropriate.

The Postal Service denies all other allegations of material fact which have not been answered specifically herein.

**MOTION TO DISMISS OR, IN THE ALTERNATIVE,
TO SUSPEND PROCEEDINGS**

In accordance with Rule 84(b) and (c) of the Rules of Practice and Procedure of the Postal Rate Commission, the Postal Service further moves that the Complaint be dismissed or, alternatively, that proceedings be suspended in this matter for the reasons stated below.

The subject matter of this Complaint is two-fold. First, it alleges the illegality of the existing one-pound and two-pound Priority Mail rates, in the absence of the rejected classification change pertaining to Priority Mail flat-rate envelopes. Second, the Complaint alleges the illegality of the existing classification pertaining to Priority Mail flat-rate envelopes, in light of the existence of a distinct one-pound Priority Mail rate.

**The Commission Lacks Jurisdiction To Review A Decision By The Governors To
Reject A Classification Recommendation**

By operation of § 3628, three of the four decision options of the Governors under § 3625 are subject to judicial review. Importantly, Congress excluded the Commission from any role in review of decisions by the Governors. Of the Governors' four § 3625 decision options, the rejection option is specifically not subject to judicial review.

In requesting that the Commission review the Governors' rejection of the Commission's Priority Mail classification recommendation, Complainant asks the Commission to assert review jurisdiction that Congress explicitly determined should not even be given to the courts. For this reason, to the extent that Complainant seeks review of the Governors' determination to reject the recommended Priority Mail classification change, the Complaint must be summarily dismissed.

Section 3662 Is Limited To Rate Or Service Complaints

Insofar as the Complaint raises classification issues, it also must be dismissed, because the Commission's jurisdiction under § 3662 is limited to rate or service complaints. In part, the Complaint appears to seek the initiation of a classification proceeding, but under the terms of § 3662. The Postal Service does not dispute that parties may make pertinent classification proposals in properly initiated rate or classification proceedings. However, parties should not be permitted to expand the very limited scope of § 3662 rate and service complaint jurisdiction to include the initiation of proceedings to consider modification of the classification schedule. The Governors' primary basis for rejecting the recommended Priority Mail classification change was the absence of an adequate record basis for the recommendation. Section 3662 was not conceived as a vehicle for re-litigation of classification proposals which did not survive administrative review by the Governors.

A Section 3662 Complaint Proceeding Is Not The Proper Vehicle For Review Of The Rates Allowed Under Protest

To the extent that Complainant seeks to challenge the Docket No. R2000-1 Priority Mail rates allowed into effect under protest by the Governors on December 4,

2000, his reliance on § 3662 is misplaced. As an intervenor in Docket No. R2000-1, Complainant was permitted by § 3628 to petition the court for review of the Governors' allowance under protest within 15 days of the publication of the Governors' decision. The Postal Service is unaware of any timely petition having been filed by Complainant in any court of competent jurisdiction seeking review of any decision of the Governors arising out of Docket No. R2000-1. Presuming a failure on Complainant's part to file such a petition in court, the Postal Service considers that the § 3362 complaint petition presently before the Commission is nothing more than an attempt to substitute the Commission in place of the court, where petitioner has either neglected to or elected not to seek judicial review. Accordingly, the Complaint should be summarily dismissed.

The Commission's Decision In Docket No. C96-2 Is Controlling

In directing his complaint against the classification change rejected by the Governors, Complainant is seeking to revisit an issue that he raised belatedly in Docket No. R2000-1. Complainant's attempt to substitute review before the Commission of a matter withheld from the courts is plainly contrary to the statutory framework of the Act.

To revisit the issue in a complaint docket would be to encourage and abet the waste of administrative resources. As a full participant in Docket No. R2000-1, Complainant had every opportunity to present record testimony in support of the classification change he seeks in the instant proceeding. See, Complaint at ¶21. However, Complainant filed no testimony in Docket No. R2000-1 concerning any Priority Mail classification. Instead, Complainant raised the issue on brief, after the

close of the evidentiary record.¹ Thus, Complainant's alternative prayer for relief consists of a belated attempt to reopen the Docket No. R2000-1 record for the purpose of litigating a proposal that was never a matter of record in that proceeding.

In dismissing a § 3662 complaint petition in 1996, the Commission rebuffed a similar attempt of litigants to get a "second bite of the apple." It should be recalled that several parties who were silent on an issue raised in Docket No. MC95-1, after the conclusion of that proceeding, attempted to use the § 3662 complaint process as a conduit for addressing that same issue. The Commission dismissed their complaint, emphasizing that petitioners had been afforded a full and fair opportunity to address the subject matter of their complaint in the recently concluded Docket No. MC95-1. See, Docket No. MC96-2, PRC Order No. 1121 (June 24, 1996). In the instant proceeding, Complainant seeks to use the § 3662 complaint process to advance a classification proposal that he had every opportunity to raise on the record before the Commission in Docket No. R2000-1. In this regard, he stands in the same shoes as the Docket No. C96-2 petitioners. Complainant had the opportunity to propose a Priority Mail flat rate envelope classification change on the record in Docket No. R2000-1. He did not pursue it until after the evidentiary record was closed.¹ Accordingly, the Complaint

¹ The Postal Service considers that the Governors' Docket No. R2000-1 rejection of the recommendation to substitute the new one-pound Priority Mail rate for two-pound rate as the basis for the flat envelope rate is consistent with the Governors Docket No. R80-1 rejection of "rates . . . contingent upon a change in classification which had neither been discussed nor proposed in any record proceeding." *Newsweek v. U.S. Postal Service*, 633 F. 2d 1186, 1206 (2d Cir. 1981).

¹ The fact that the Commission recommended a Priority Mail classification change in its Docket No. R2000-1 opinion (in response to Complainant's Brief, but without benefit of an evidentiary record basis) does nothing to elevate the status of his

should be dismissed.

There is nothing to prevent any party from reviving Complainant's preferred Priority Mail flat rate classification change during the evidentiary phase of the next omnibus proceeding and having it subjected to adversarial scrutiny. In the proper context of a review of all other related rate, volume and revenue consequences, such a development would provide the Commission with an opportunity to consider whether substantial record evidence exists in support of such a proposal and to reach a determination on the merits in a manner which satisfies due process.

Complainant Reads Too Much Into The Recommended Decision

At paragraph 8, the Complaint cites the Commission's allusion to unspecified lower Priority Mail rates that it might have recommended, had it also recommended continued application of the two-pound rate for flat rate envelope pieces.² Complainant seizes upon this discussion as a basis for apparently arguing that the rates allowed into effect by the Governors are not desirable, fair or equitable, because the Commission might have recommended lower one- and two-pound Priority Mail rates, had it also not recommended a classification change affecting flat rate envelope pieces.

The Commission's discussion makes clear that it strongly preferred the classification change it recommended. However, unlike the Complainant, the Postal

complaint in relation to the Docket No. C96-2 petition. The Commission may consider its Docket No. R2000-1 recommended substitution of the new one-pound Priority Mail as the basis for the flat envelope rate as fair and equitable. However, the court has made clear that those considerations do not override the Commission's obligation to subject its preferred classification changes to adversarial scrutiny on the record in accordance with applicable due process standards. *See, Mail Order Association of America v. United States Postal Service*, 2 Fd 408, 423-25 (DC Cir. 1993).

² PRC Op. R2000-1, Vol. 1 at ¶5355.

Service does not presume that the Commission was unaware that the final decision regarding adoption of its preferred classification change rested with the Governors. Moreover, the Postal Service also presumes the Commission to respect that fact that one of the Governors' options included the rejection of its recommended classification change, separately from any decision regarding the recommended rates. Thus, the Postal Service presumes that the Commission made its recommendations fully aware of the holdings in *Newsweek* and *MOAA* and the possibility that its preferred rate and classification recommendations might not all be approved. Notwithstanding the Commission's explicit preference for the Priority Mail rate and classification combination that it recommended, the Postal Service does not consider it reasonable to interpret the Commission's opinion as concluding that its preferred combination is the only combination consistent with the policies of the Act. Nor does the Postal Service consider it a fair reading of the Commission's opinion to infer that the only alternative desirable, fair and equitable one-and two-pound Priority Mail rates the Commission could have recommended are whatever unspecified rates it might have recommended had it left the flat rate envelope classification untouched.

The mere fact that one of the Commission's classification preferences was rejected by the Governors does not compel the conclusion that the rates allowed under protest by the Governors are undesirable, unfair or inequitable. The assertion that the Commission might have recommended different rates if it had recommended different classifications, by itself, is insufficient to sustain a complaint that the rates allowed by the Governors are contrary to the policies of the Act. The purpose of the § 3662 complaint proceedings surely cannot be to "re-do" every aspect of the rate case, each

time the Governors' exercise of their authority under § 3625 disappoints a rate case intervenor.

Moreover, Complainant has not proffered any evidence or testimony that he would present at a hearing to prove his unsupported allegations of customer confusion, unspecified "negative effects" on users of the mail, unfairness and inequity, and the like. For the foregoing reasons, Complainant's attempt to re-litigate the flat-rate classification change should be denied, and the Complaint dismissed.

Motion For Time To Supplement This Pleading

On February 9, 2001, the Commission issued its Opinion and Further Recommended Decision. The Postal Service has only begun to analyze the implications of the Further Recommended Decision issued three days ago. That Decision may have a bearing on the issues raised in the Complaint, as well as those discussed above. Accordingly, the Postal Service requests five additional working days (until January 20, 2001) to analyze the Further Recommended Decision and either amend its Answer or supplement its Motion.

If The Complaint Is Not Dismissed, Proceedings Should Be Suspended

For the most part, the preceding discussion ignores any potential future action by Governors or the Commission arising from Docket No. R2000-1. The Postal Service will not speculate here regarding what the Governors may do or where their decision may lead. Nevertheless, it cannot be overlooked that the statutory scheme for administrative review of the Further Recommended Decision contemplates the ultimate possibility of changes to the Docket No. R2000-1 revenue requirement, rates and fees beyond those identified in the Further Recommended Decision. Any such changes

could have an impact on the Priority Mail rates which are the subject of the instant Complaint. Such possible changes could substantially alter or moot the basis for the Complaint, insofar as it pertains to specific rates allowed under protest.

Should the Commission not dismiss the Complaint on the basis of the grounds asserted above, it would seem imprudent for the Commission to consider initiating a separate § 3662 docket for review of Priority Mail rates which potentially could change at the conclusion of the currently ongoing administrative reconsideration process. That process should be allowed to run its course.

Again, should the Commission not dismiss this Complaint before administrative reconsideration has fully run its course, the Postal Service requests that it then be afforded a reasonable opportunity to determine the exact nature of any additional grounds for dismissal which may become apparent at the conclusion of administrative review of Docket No. R2000-1. Accordingly, because the Postal Service is not in a position to know what additional grounds for dismissal may evolve and become available to it and what grounds would not be prudent to assert in light of rate changes that may occur, the Postal Service moves that the Commission suspend proceedings in this matter until the reconsideration process has run its course, and the parties are more certain what issues remain.

WHEREFORE, the United States Postal Service respectfully requests that this proceeding be dismissed or suspended, and that it be given additional time to supplement this pleading in response to the February 9, 2001, Opinion Upon Further Reconsideration.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

Daniel J. Foucheaux
Chief Counsel
Ratemaking



Richard T. Cooper
Attorney

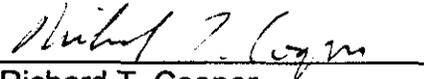
475 L'Enfant Plaza West, S.W.
Washington, D.C. 20260-1137
(202) 268-2993/ FAX: -5402
February 12, 2001

CERTIFICATE OF SERVICE

I hereby certify that, in accordance with section 12 of the Rules of Practice, I have this day served the foregoing document upon:

Douglas F. Carlson
P.O. Box 7868
Santa Cruz CA 95061-7868

David B. Popkin
P.O. Box 528
Englewood NJ 07631-0528


Richard T. Cooper

475 L'Enfant Plaza West, S.W.
Washington, D.C. 20260-1137
(202) 268-2993/ FAX: -5402
February 12, 2001