

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

CUSTOMIZED MARKET MAIL MINOR
CLASSIFICATION CHANGES

Docket No. MC2003-1

**UNITED STATES POSTAL SERVICE ANSWER IN OPPOSITION TO OFFICE OF THE
CONSUMER ADVOCATE MOTIONS TO REJECT REQUEST TO APPLY MINOR
CLASSIFICATION RULES, SUSPENSION OF PROCEEDINGS, AND TO DEFER THE
TIME TO REQUEST HEARING
(April 10, 2003)**

The United States Postal Service hereby provides its response to the Office of the Consumer Advocate (OCA) Response to Motions for Waiver, Expedition, and Settlement Procedures and Motions to Reject Request to Apply Minor Classification Rules, Suspension of Proceedings, and to Defer the Time to Request a Hearing (hereinafter "OCA Motion"), filed on April 3, 2003.

The basic theme of the OCA Motion is that Postal Service's Request for Customized MarketMail (CMM) is deficient because, in the OCA's view, the Postal Service has not provided sufficient information to determine the impact on postal costs and revenues, or the impact on other Standard Mail users. OCA Motion at 5. The OCA fears that without such information, there can be no confidence that the proposal will make positive contribution. OCA Motion at 5. The OCA proposes various remedies, including (i) suspending the proceeding until the Postal Service files supplemental cost, volume, and revenue data, (ii) suspending the proceeding to allow the Postal Service to recast the Request as a market test, provisional, or experimental change, or (iii) summarily rejecting the Request if the Postal Service does not furnish additional

information demanded by the OCA. OCA Motion at 20-22.

As explained below, (i) the Request for CMM is properly before the Commission under the expedited minor classification rules, (ii) the OCA's concerns are misleading and prematurely raised, and (iii) the forms of relief requested in the OCA Motion lack legal foundation and are in direct conflict with statutory and judicial authority.

I. CMM IS PROPERLY BEFORE THE COMMISSION UNDER THE EXPEDITED MINOR CLASSIFICATION CHANGE RULES.

The OCA's argument that the Request does not satisfy the expedited minor classification change rules (hereinafter "expedited rules"), 39 CFR §§ 3001.69 - 3001.69c, rests on faulty and unproven allegations and on a misunderstanding of the concept of a "minor classification change." The expedited rules require that, to be eligible for consideration as a minor classification, a proposal must (i) not involve a change in any existing rate or fee; (ii) not impose any restriction in addition to pre-existing conditions of eligibility for the entry of mail in an existing subclass or category of service, or for an existing rate element or work sharing discount; and (iii) not significantly increase or decrease the estimated institutional cost contribution of the affected subclass or category of service. OCA certainly does not contest the first two criteria. Although OCA asserts the third criterion is lacking, its challenge to the Postal Service's evidence is based on unproven allegation. OCA has done nothing to contradict witness Ashe's and witness Hope's testimonies, and the Postal Service's qualitative market research in USPS LR-2/MC2003-1, all of which make manifestly clear that the proposal would be of limited effect, and thereby will have substantially no impact on costs and revenues. See, e.g., USPS-T-1 at 6; USPS-T-2 at 8-10; USPS

LR-2/MC2003-1 at 35. Thus, the Postal Service has satisfied the substantive criteria for application of the expedited rules to CMM. If CMM is not eligible for consideration under the expedited rules, then one may reasonably question whether any proposal would satisfy the OCA's criteria.

The OCA Motion also appears to misinterpret the Commission's Rules of Practice and Procedure as requiring that the expedited rules forbid consideration of any classification proposal that is alleged to be unprofitable. OCA Motion at 5.¹ Yet the Commission's rules do not demand such a showing. Rather, the rules simply state that to receive expedited treatment, a Request must not "*significantly increase or decrease* the estimated institutional cost contribution of the affected subclass or category of service." Rule 69(a)(3) (emphasis added). Thus, contrary to the OCA's assertions, the expedited rules are not off limits simply because a participant alleges that a Request might yield an insignificant negative contribution. Indeed, the expedited rules expressly contemplate that a classification proposal having a negative effect on contribution would still be eligible to receive expedited treatment under the minor classification change rules as long as the effect on contribution is insignificant. Although in the instant proceeding the Postal Service submits that expanding Regular subclass eligibility for CMM would not cause a net loss,² USPS-T-2 at 10, non-evidentiary

¹ The OCA states that the "Postal Service's claim that the impact is minor should not be sufficient to even consider a minor classification procedure where the Postal Service is unable to demonstrate the proposed service will be profitable," thereby implying that a Request must show a positive contribution in order to be considered under the expedited rules. We sincerely doubt OCA would so passionately advance this interpretation if the classification change at issue broadened a category of loss-producing Periodicals Mail category.

² It should be noted that the expedited rules contemplate that requests might not be

assertions to the contrary are insufficient grounds for the Commission to deny application of the expedited rules.

Depriving the Request of expedited treatment would also signal that the Commission is not serious about streamlining the ratemaking process. If the Request is not evaluated under the expedited minor classification change rules, then by default the permanent classification changes would govern the conduct of the proceeding. See Rule 69b(g). Consideration of the Request under the permanent classification rules would do nothing to alter the evidentiary basis underlying the Request, but would free the Commission and the participants from adhering to predefined milestones in the expedited rules. Specifically, the participants would not have to specify issues of material fact that require resolution in a hearing under Rule 69b(h), and the Commission would no longer be bound to its stated objective of transmitting a recommended decision to the Governors within 90 to 120 days of the filing of the Request, as required by Rule 69c. These predefined time limits are of tremendous value in establishing a swift, predictable, and streamlined method of evaluating this Request. It is therefore critical that the Commission and the participants adhere to them.

In summary, the CMM Request is properly before the Commission under the expedited rules, and the Commission would be remiss in rejecting their application in this docket.

supported with statistical evidence to substantiate that claim. See Rule 69a(b).

II. OCA'S CONCERNS ABOUT CMM COSTS ARE MISLEADING AND PREMATURELY RAISED.

The gist of the OCA Motion is essentially that the Postal Service has not supplied cost, revenue, and volume information in support of its Request. OCA fears that CMM will not be profitable. OCA claims, for example, that the cost difference between parcels and flats is 84.1 cents, and this far exceeds the unit revenue to be earned on each CMM piece. OCA Motion at 12. This observation is highly misleading and contradicted by abundant record evidence.

As the Postal Service will demonstrate in discovery responses due next week, the OCA's preliminary conclusions are seriously flawed. CMM differs from parcels in many respects. For instance, parcels tend to be heavier than letter-or flat-sized mail, and can weigh up to 16 ounces. CMM, by contrast, would be limited to 3.3 ounces. This weight disparity complicates any analysis that relies on residual shape cost data.

The physical characteristics of CMM also differ markedly from other residual shapes. CMM would be thin, as it would be subject to a maximum thickness of $\frac{3}{4}$ -inch. Given that nonrectangular Standard Mail greater than $\frac{1}{4}$ -inch thick is already mailable, it is expected that most CMM would be less than $\frac{1}{4}$ -inch in thickness. By contrast, Standard Mail parcels can be thick and bulky. Due to their shape, parcels may not be cased with other letters and flats. Distribution of CMM, however, is expected to be accomplished by sorting the CMM pieces into letter or flat cases. USPS-T-1 at 8. Again, these factors weigh in favor of lower overall costs for CMM.

CMM and other residual shapes also differ significantly in mail processing. Regular parcels do not routinely bypass mail processing operations, and are not compelled to be entered at, or dropshipped to, the destination delivery unit (DDU). By contrast, CMM pieces are required to be entered at, or dropshipped to, the DDU, thereby avoiding the mail processing costs that other residual shapes incur in mail processing. USPS-T-1 at 7. Undeliverable-as-addressed CMM also would not be subject to reentry into mail processing, USPS-T-1 at 12, which again is not the case with other residual shapes for which forwarding or return is elected. Also, typical residual shape pieces are likely to contain merchandise and are returned to the delivery office for retrieval by the customer if the piece is too large for the delivery receptacle. CMM pieces would, however, never be held for pickup.

In sum, common sense clearly dictates that CMM costs would be a fraction of the cost of other residual shapes. Thus, a more plausible argument is that application of the residual shape surcharge to CMM would lower the average unit cost in the residual shape pool,³ and thereby provide a means to ameliorate the effect of further “rate shocks” on Standard parcel mailers.⁴

The arguments above show that the OCA’s fears are based upon misimpression, not fact. The OCA’s concerns are, moreover, prematurely raised. If OCA believes that the cost and revenue relationship for CMM is out of balance, then the Commission should invite the OCA to put its concerns in writing, and allow its analysis to be tested

³ The expected volume of CMM relative to the total residual shape pool might be so small as to make the effect *de minimis*.

⁴ This does not imply, however, that the rate design for CMM should not incorporate the residual shape surcharge. The surcharge is appropriately applied to CMM, as

by traditional means, possibly including settlement negotiations.

III. THE OCA'S PROPOSED REMEDIES HAVE NO BASIS IN THE STATUTORY SCHEME OR JUDICIAL PRECEDENT, AND THE COMMISSION IS BOUND TO ISSUE A RECOMMENDED DECISION.

The OCA Motion invites the Commission to (i) suspend the proceeding until the Postal Service files supplemental cost, volume, and revenue data, (ii) suspend the proceeding to allow the Postal Service to recast the Request as a market test, provisional, or experimental change, or (iii) summarily reject the Request if the Postal Service does not furnish additional information demanded by the OCA. OCA Motion at 18, 20, 22-23. The Commission should not be tempted to believe that any of the OCA's requested forms of relief are permissible. The Commission's vehicle for concluding this proceeding, as specified by the Postal Reorganization Act, is a recommended decision. Concluding this proceeding as sought by the OCA would be fundamentally at odds with the statutory scheme for ratemaking, and the respective roles of the Commission and the Governors.

The OCA cites absolutely no authority in support of its attempt to derail consideration of the Request and conclude this proceeding with anything other than a recommended decision. Indeed, the OCA's remedies are in direct conflict with the statutory language. Section 3623 of Title 39, United States Code, unequivocally commands that when the Postal Service requests a change in the DMCS, the Commission "shall make" a recommended decision on changing the DMCS. 39 USC §

explained in the Postal Service's direct case. See USPS-T-2 at 7.

3623(c). In short, the plain language of the Act provides unambiguous and clear direction that the Commission must resolve this proceeding with a recommended decision, and not with any type of order indefinitely suspending or summarily rejecting the Request.

The OCA Motion's mere suggestion that the Request be summarily rejected suffers from additional legal deficiencies. In particular, it would inappropriately deprive the Governors the opportunity for timely and effective review, contrary to the statutory scheme envisioned by the Postal Reorganization Act. As such, the Commission's disposition of the Request must be in a form that facilitates subsequent review by the Governors. Summarily rejecting this proceeding would undermine the delicate balance that Congress crafted in the Act. It hardly bears repeating that the Commission and the Governors are "partners" in the ratemaking process. *Mail Order Ass'n v. United States Postal Service*, 986 F.2d 509, 524 (D.C. Cir. 1993);⁵ *Governors of United States Postal Service v. United States Postal Rate Commission*, 654 F.2d 108, 114-15 (D.C. Cir. 1981). For the Commission to order the proceeding's termination would deprive the Governors of the exercise of their statutory options under 39 U.S.C. § 3625, as well as their authority under 39 U.S.C. § 202 to exercise the powers of the Postal Service.

The Commission would also be wise to steer clear of the OCA's suggestion to suspend the proceeding to coerce the Postal Service into converting the proposal into an experiment, provisional service, or market test. The DC Circuit's opinion in *Governors of*

⁵ *remanded, in part, review denied, in part, Mail Order Ass'n v. United States Postal Service*, 2 F.3d 408 (D.C. Cir. 1993), *amended, reh'g denied, Mail Order Ass'n v. United States Postal Service*, 1993 U.S. App. LEXIS 24994 (D.C. Cir. Sept. 22, 1993).

the United States Postal Service v. Postal Rate Commission is especially instructive here.

The underlying controversy in *Governors* involved the proposed E-COM service, which began with a Postal Service Request in Docket No. MC78-3 for a permanent classification. At the urging of the Officer of the Commission (the OCA's predecessor title), the Commission unilaterally converted the case into an "experimental" service, with a sunset provision establishing a termination date for the service. The Governors concurred with the basic structure of the decision but, primarily because of the "experimental" designation, rejected the recommendation and referred the matter back to the Commission for reconsideration. The Commission, in its reconsidered opinion, adhered to the "experimental" designation. The Governors allowed the reconsidered decision to take effect under protest and petitioned for judicial review. The DC Circuit held that the Commission's designation of E-COM as "experimental," and imposition of a termination date for the "experiment," was an infringement of the Governors' statutory managerial powers. The court explained that the decision to propose E-COM on a permanent basis was:

peculiarly one for management to make, yet by its recommended decision the Postal Rate Commission attempted to overrule it. We hold that by so doing the Rate Commission exceeded its authority and strayed from its ratemaking and classification powers to intrude upon the management functions of the Board of Governors.

Id. at 115. Moreover, the court concluded that the Commission erred in attempting to set an expiration date for E-COM service. On this point, the court concluded that "trench[e]d on the authority of the Governors by usurping their exclusive statutory right to determine the date on which a change in the mail

classification schedule will occur.” In the court’s view, the Commission had:

arrogated to itself the power to set a specific termination date for E-COM absent action by the Governors. The recommendation of the Commission violates section 3625(f) because under this provision the Governors alone decide when the mail classification schedule will change. The Commission cannot impose upon the Governors the affirmative responsibility to prevent change in the schedule.

Id. at 116.

In this case, the Postal Service opposes conversion of the proposal into a market test, experiment, or provisional service. The Postal Service seeks a recommended decision only on a permanent classification, and the statutory scheme in § 3623 compels the Commission to do nothing less than to conclude the proceeding with a recommended decision on a permanent classification for CMM.

While the OCA Motion does not request that the Postal Service be ordered to convert its request into an experiment-type filing, it is manifestly clear that suspending the proceeding for that purpose would effectively deprive the Postal Service of securing a recommended decision on its Request. Thus, the Postal Service submits that suspension for any purpose would, in substance, be tantamount to unilateral conversion. Such an option was squarely rejected by the *Governors* court, and would similarly be precluded here.

In sum, the Commission should not be tempted to conclude this proceeding in an order suspending or summarily rejecting the Request. Instead, all of the OCA’s requests should be denied, and the docket should continue as provided by the expedited rules.

CONCLUSION

WHEREFORE, the Postal Service respectfully requests that the Commission reject the OCA Motion.

Respectfully submitted,

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