

ORDER NO. 1368

UNITED STATES OF AMERICA
POSTAL RATE COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners:

George Omas, Chairman;
Dana B. Covington, Sr., Vice Chairman;
Ruth Y. Goldway; and Tony Hammond

Customized Market Mail
Classification Changes

Docket No. MC2003-1

ORDER ON APPLICATION OF
RULES FOR MINOR CLASSIFICATION CHANGES

(Issued April 14, 2003)

This order addresses the appropriateness of considering the Postal Service's request for approval of Customized Market Mail (CMM) under the minor classification change (MCC) rules and several related procedural matters.¹ The Postal Service and a number of participants support use of the MCC rules; the Office of the Consumer Advocate opposes their application.²

¹ See Rules 69-69c.

² See Motion of the United States Postal Service for Waiver, March 14, 2003; United States Postal Service Request for Expedition and Establishment of Settlement Procedures, March 14, 2003; and Office of the Consumer Advocate 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 Hearing, April 3, 2003 (OCA Combined Pleading).

I. Application of the Rules for Minor Classification Changes (Rules 69-69c)

The threshold question in this case is whether the Service's CMM proposal qualifies for consideration as a minor classification change (MCC). In terms of initial Commission action on the Service's filing, the rules of practice set out a three-part test and require two explicit Commission findings. The test requires that the proposal must (1) not involve a change in any existing rate or fee; (2) not impose any additional restrictions on basic conditions of eligibility for a subclass or category; and (3) not significantly increase or decrease estimated institutional cost contribution. 39 CFR 3001.69(a)(1) through (a)(3). In terms of requisite findings, the Commission must find that the change is minor in nature (in terms of the established criteria) and that the effect of the change is limited in scope and overall impact. 39 CFR 3001.69b(f).

The Postal Service's position on application of the MCC status. The Service generally contends that its proposal satisfies the rule 69 criteria. It asserts that the proposal involves no change in an existing rate or fee, given that CMM pieces would pay the existing Standard Mail Regular and Nonprofit nonletter basic category mail rates, plus the residual shape surcharge. Request of the United States Postal Service for a Recommended Decision on Customized Market Mail Minor Classification Changes, March 14, 2003 (Request) at 3. It also says the proposal entails no new conditions of eligibility; instead, existing classifications would simply be made more inclusive (for pieces less than ¼-inch thick) and would provide new optional entry and handling procedures (for pieces greater than ¼-inch thick but less than or equal to ¾-inch thick). Postal Service Request at 3-4. Finally, citing to explanations in witness Hope's testimony, the Service asserts that the proposal does not entail a significant increase or decrease in estimated institutional cost contribution. *Id.* at 4 and 14.

The American Postal Workers Union, AFL-CIO (APWU), the Magazine Publishers Association (MPA), the Mail Order Association of America (MOAA), and the Parcel Shippers Association (PSA) express support for the Service's request for CMM Minor Classification Changes and, by extension, support for treatment under the MCC rules. Notice of Intervention by the APWU at 2; Notice of Intervention of the MPA as a

Full Participant at 2; MOAA Notice of Intervention at 1; and Notice of Intervention by the PSA at 1. The OCA opposes use of the MCC rules.

The OCA's position. To a large extent, the OCA's arguments on use of the MCC rules are inextricably intertwined with its arguments opposing the Service's motion for waiver of certain filing requirements. These arguments rely heavily, although not exclusively, on the filing's absence of traditional quantitative data and information on cost, revenue and volumes. Based on the absence of studies, the OCA makes numerous assertions about the possibility of internal cross-subsidy, unprofitability, and inadequate institutional cost contribution. Combined Pleading at 3-6.

To the extent the OCA focuses on the three-part test it acknowledges, in connection with the first criterion, that no numbers are changed on the DMCS rate schedules, but it asserts that the rate for CMM mail is different from that charged for any other Standard Mail piece. *Id.* at 7, fn. 7. The OCA does not contest the proposal's satisfaction of the second criterion (requiring no new conditions of eligibility). However, it contends that the Service has made essentially no showing regarding the third criterion, which requires that the proposed change not significantly increase or decrease estimated institutional cost contribution. It asserts that the Postal Service's claim that the impact is minor should not be sufficient in cases where the Service is unable to demonstrate that the proposed service will be profitable. It claims that there must be some minimum amount of information supplied to the Commission, and that the Service's admitted lack of studies quantifying the impact of the change indicates that the new offering is not ready for consideration for a permanent classification under the MCC rules. *Id.* at 5.

In essence, the OCA believes that satisfaction of the MCC test requires specific, quantitative estimates and, in the absence of such, the Commission simply has no basis to make a finding regarding the third criterion. *Id.* at 11.

Four responses to the OCA pleading were filed.³ Valpak agrees with OCA that the Postal Service has not provided sufficient evidence to allow the Commission to fulfill its statutory responsibilities under 39 U.S.C. 3622 and 3623. Both APWU and MOAA advise the Commission not to suspend or delay the case. MOAA suggests that requiring expensive data gathering might prevent implementation of minor, innovative changes.

The Postal Service offers several arguments in support of MCC treatment of its proposal. First, it contends that the evidence that accompanies its Request is sufficient to show that CMM will not have a significant impact on institutional contribution. Postal Service Answer at 5, 6. Further, it argues that the statutory structure of postal ratemaking does not contemplate suspending or summarily rejecting a Postal Service request. It suggests that this would deprive the Governors from exercising their responsibility to act on Commission recommendations. *Id.* at 8-9. Finally, it bluntly states that the Service “seeks a recommended decision only on a permanent classification”, *id.* at 10, and that contentions hinging on the persuasiveness of evidence should “be tested by traditional means, possibly including settlement negotiations.” *Id.* at 6-7.

Analysis. As a preliminary matter, the Postal Service argument that the statute precludes the Commission from granting the relief requested by OCA requires comment. The Commission finds the Postal Service’s position unsustainable. It is certainly correct that the Governors have an important partnership role in establishing and changing postal rates and classifications. However, the Governors must act on the basis of an informed Commission recommendation. The Commission is responsible for

³ See American Postal Workers Union, AFL-CIO Comments on OCA Motions; Reply of Mail Order Association of America to Office of the Consumer Advocate 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 Hearing; 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; and Valpak Response to OCA Motions to Reject Request to Apply Minor Classification Rules, for Suspension of Proceedings, and to Defer the Time to Request Hearing. All the foregoing pleadings were filed on April 10, 2003.

developing a record that enables it to make a reasoned and sustainable recommendation. Existing rules establish what information is to be presented by the Postal Service to support requests for rate and classification changes. The rules allow the Commission to grant waivers of these filing requirements, but the Postal Service must justify the grant of such a waiver.

In this case, OCA and Valpak express some positive views on the concept of CMM, and seek to expand the available evidence to assure it will satisfy the statutory standards for a positive recommendation from the Commission. Although the Commission is responsible for insuring that there is a sufficiently complete record to provide due process, it is not responsible for assuring that the Postal Service sustains its burden of proof. The Postal Service has made it clear that it seeks a permanent classification, and that it is prepared to submit that proposal on the basis of its pre-filed testimony, the responses to discovery, and any potential settlement agreements with other participants. OCA and Valpak may oppose the Postal Service Request, but they may not transform it from a request for permanent authority into a request for an experiment. That choice is reserved to the Governors.

Since their adoption, the MCC rules have remained an untested procedural option for consideration of mail classification changes. In the spectrum of procedural alternatives, these rules have always stood in stark contrast not only to the general rules for classification changes, but also to the experimental rules. The most notable differences are not only in reduced requirements for data and greater expedition, but in other important areas as well. These include, among other things, considerations the Commission must adhere to in deciding on waiver motions, additional requirements participants must address if they seek a hearing, and — as the OCA notes — the absence of any requirement that the Service file follow-up data, should the change be approved.

With a concrete MCC request finally before the Commission, the related pleadings have raised questions that reach beyond the confines of the instant proposal to fundamental aspects of the rules. In brief, the Service's filing tests one extreme —

whether the rule allows reliance on qualitative information and waiver to the near-exclusion of traditional hard data. The OCA tests another — the possibility that waivers and qualitative information are *a priori* unacceptable substitutes for traditional data submissions, and that reviewers must be shown a certain level of detailed quantitative analysis on the question of impact on institutional costs.

This order is not the appropriate vehicle for addressing fundamental challenges to the MCC rules. Instead, the initial focus in this case is on interpreting those rules, as they now stand, in the context of this specific case and the seemingly unique characteristics of the CMM proposal.

Using this standard, one must first consider the proposal in terms of the three-part test. The proposal appears to be in technical compliance with the requirement that the proposal entail no changes in rates or fees. The OCA's assertion that rates for CMM mail are different from that charged for any other Standard Mail piece does not alter the basic dispositive facts. See OCA Combined Pleading at 7.

The second criterion is that the proposal must not impose any additional restrictions on basic conditions of eligibility for a subclass or category. The Postal Service's filing seems to unequivocally indicate that this is the case, and the OCA does not appear to challenge this aspect of the proposal. The Commission agrees with the Service's assessment.

Satisfaction of the third criterion — that the change does not significantly increase or decrease estimated institutional cost contribution — is a closer call. This is primarily because the Commission, as the OCA points out, has essentially no quantitative data to rely on, and must consider qualitative assertions and representations in the Service's request and in witness Hope's testimony.

The difficulty in assessing the third criterion comes not simply from the lack of case-specific quantitative data, but also from the fact that the available qualitative data are also somewhat limited. In the instant case, it appears that this results from the uniqueness and untried nature of the proposal, as well as from the potential expense of

gathering such data, rather than from any purposeful or negligent withholding of information.

The Postal Service presents preliminary market research that indicates some potential customer interest, but the filing shows that CMM pieces will be expensive to produce and distribute relative to other advertising pieces. This is likely to be a significant damper on volume, and thus on related postal costs and revenues, both within Standard Mail and in the mailstream as a whole. Fixed costs, while a possible factor, also appears to be a relatively minor concern. No capital equipment purchases are required. On balance, the Postal Service offers evidence that, if found probative, would support a finding that CMM, at least for the foreseeable future, will have an extremely limited impact on institutional cost contribution.

Based on the foregoing assessment, the Commission concludes that the proposed change is minor in nature, and its effects are likely to be appropriately limited in scope and overall impact. 39 CFR § 3001.69b(f)(1) and (2). Therefore, the Commission decides that the proposed change may be evaluated under the provisions of rule 69, as a minor classification change. In line with that finding, the Postal Service motion for waiver of certain rules applicable to classification requests is granted.

II. Suspension of Proceedings/Extension of Deadline for Requesting a Hearing/Other Alternative Procedures

Given its position on the inappropriateness of MCC treatment, the OCA moves for suspension of the proceedings until the Service files sufficient cost, volume and revenue data to enable a determination that the new service will contribute to institutional costs, or until the Service recasts its request under the Commission's market test, provisional service, or experimental change rules. *Id.* at 5. This motion is denied in light of the foregoing conclusion regarding use of the MCC rules.

In the alternative, the OCA says that if the Commission accepts the case under the MCC rules, it should be permitted to contend (pursuant to rule 69a(b)) that the

request should be rejected on the grounds that necessary data has not been provided by the Postal Service. This request is granted.

The OCA maintains that it has demonstrated that the Service has been unreasonable in failing to develop and submit sufficient cost, volume, and revenue estimate information. *Id.* at 18. On the basis of its pleadings to date, this issue is not yet ripe. This is an issue that must be addressed by the Commission after reviewing the full evidence and argument that all participants may wish to offer on this subject.

III. Clarification on Expedition and Settlement Proceedings

When the Service filed its CMM request, it also filed a concurrent request that the Commission authorize, in addition to the expedition inherent in the MCC rules, several additional steps to facilitate consideration of this case on an expedited basis. These include authorizing settlement proceedings coincident with the deadline for intervention; appointing a settlement coordinator; issuing a decision on MCC status prior to the established deadline; and allowing certain adjustments in discovery deadlines. APWU, MPA, MOAA and PSA support the Service's request for expedition; the OCA opposes it. APWU Notice of Intervention at 2; MPA Notice of Intervention at 2; MOAA Notice of Intervention at 1; Notice of Intervention by the PSA at 1, and OCA Combined Pleadings at 2.

The OCA considers the request for expedition "beside the point given the lack of data to support the minor classification request." *Id.* at 2. It says expedition may be useful where there is a demonstrated need to reach a ready market or to meet other exigencies that will benefit from an expedited decision, but asserts that the Postal Service has not made that showing. *Ibid.* In fact, other than recounting the current factual situation, the OCA says the request for expedition merely states that because there are only two pieces of testimony and one substantive library reference, discovery should not be an issue. OCA asserts that it is not the volume of testimony but the

deficiency in the application that precludes the ability to continue with the Request as an MCC case. *Id.* at 21.

The Service's request for expedition entails several discrete elements. In Order No. 1365, the Commission authorized settlement proceedings, appointed a settlement coordinator, and encouraged intervention by April 3, 2003. To this extent, the OCA's comments are moot.

In establishing discovery timetables or making other scheduling rulings, recognition will be given to the arguments set out in the OCA's Combined Pleading. As OCA notes, the Postal service offers no specific reasons supporting any particular need for expedition in this case. Therefore, the Commission will be guided by the generally applicable statutory standard that it conduct its proceedings with the maximum expedition consistent with providing appropriate due process. 39 U.S.C. 3624.

IV. OCA Motion to Defer Time to Request a Hearing

The OCA requests deferral of the deadline for requesting a hearing pending a ruling on the Service's motion for waiver and on its own motion to deny the request for minor classification treatment and to suspend proceedings. The OCA does not provide a date certain. *Id.* at 21.

At the prehearing conference a bench ruling set April 18, 2003, as the deadline for participants to request a hearing. That ruling is reaffirmed. Further, in conformance with that ruling and rule 69b(h), participants requesting a hearing also shall state with specificity the issues of material fact that require a hearing for resolution. The statement shall also identify any disputed facts and, when possible, state the participant's belief as to the facts and identify evidence supporting the participant's position. 39 CFR 3001.69(b)(i).

It is ordered:

1. The Postal Service request that this docket be conducted under the Commission's rules for minor classification changes (39 CFR 3001.69 through 69c) is granted.
2. The OCA's motion, as set forth in the OCA Combined Pleading, for suspension of the proceedings until the Service files sufficient cost, volume and revenue data to enable a determination that the new service will contribute to institutional costs, or until the Service recasts its request under the Commission's market test, provisional, or experimental change rules is denied.
3. The Motion of the United States Postal Service for Waiver, filed March 14, 2003, is granted.
4. The OCA's motion, as set forth in the OCA Combined Pleading, that notwithstanding the use of procedures applicable to requests for minor classification cases, it be allowed to contend that the request should be rejected on the grounds that required data has not been provided by the Postal Service is granted.
5. Hearing requests shall address the matters identified in the body of this order.

By the Commission; Commissioner Goldway not participating.
(SEAL)

Garry J. Sikora
Acting Secretary