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Stephen L. Scharfman
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Re: Docket No. RM2003-3 Proposed Rulemaking to Revise the Commission's Periodic Reporting Rule; Comments of the American Bankers Association and the National Association of Presort Mailers in Response to Order No. 1377, June 26, 2003.

Dear Mr. Scharfman:

The American Bankers Association ("ABA") and the National Association of Presort Mailers ("NAPM") appreciate the opportunity to comment on the Postal Rate Commission's proposed rule designed to require the Postal Service to provide additional documentation with the routine financial reports it files with the Commission. ABA brings together all categories of banking institutions to best represent the interests of this rapidly changing industry. Its membership--which includes community, regional, and money center banks and holding companies, as well as savings associations, trust companies and savings banks--makes ABA the largest banking trade association in the country. NAPM represents presort mailers, the majority of whom are presort service bureaus, on issues and policies of the United States Postal Service which affect their businesses. Presort service bureaus are unique in that they provide the means for small business mailers to participate in the Postal Service's presort programs.

ABA and NAPM strongly support the proposal of the Postal Rate Commission to amend its Rules regarding periodic reporting by the United States Postal Service as set forth in Commission Order No. 1358, issued January 8, 2003. ABA and NAPM believe that the proposed changes will have a significant positive effect upon the ability of the Commission and other parties to participate effectively in omnibus rate cases and complex classification cases.

Much of the complexity associated with omnibus rate cases for the Commission and interveners arises from the fact that they cannot even begin to prepare for such a case until it is filed. The changes to the Commission's rules as proposed in Commission Order No. 1358, which would require the USPS to periodically file much of the basic information upon which requests for new rates are based, would greatly facilitate

effective decision making by the Commission and effective participation by interveners in omnibus rate cases.

In its “Substantive Comments” the United States Postal Service argues many things. However, none of these arguments asserted provides a proper basis for rejecting the proposed rule changes.

First, the Postal Service argues that the proposed rule would enable the Commission to overstep its statutory bounds. In support of this general assertion the Postal Service argues that the Commission’s role is limited. While we disagree with many of the Postal Service’s views and arguments on the role of the Commission, the argument, we feel, is, in any event, untimely. The time to complain about the Commission overstepping its jurisdiction is when it does. In its “Substantive Comments,” the Postal Service argues only that the new rules *could* lead the Commission to overstep its role. If the proposed changes in the Commission’s rules had nothing whatsoever to do with a proper function of the Commission, this argument might have some weight. But the information that the rule changes are designed to elicit is clearly relevant to the ability of the Commission, and interveners, to meaningfully and effectively participate in proceeding before the Commission.

The second argument posed by the Postal Service is that the proposed changes would make future decisions by the Governors vulnerable to attack by creating the appearance that the Commission’s recommended decisions are the products of extra-record evidence. This “problem”, assuming, *arguendo*, that it is one, can be easily resolved. First, the periodic reports filed by the Postal Service pursuant to the proposed rule can simply be made a part of the record in future rate cases. Second, the periodic reports will have been filed with the PRC and will be a part of the public record and thus the proper subject of judicial notice to the extent they are needed.

Third, and more importantly, we fail to understand how the filing of the reports sought by the proposed rule changes could make future decisions by the Governors more vulnerable than they are now. The data that the proposed rule changes seek is data the Postal Service has and, for all we know, is the basis on which the Governors are making their decisions—i.e., the Governors may be currently basing decisions on precisely the “extra-record considerations” the Postal Service is now concerned the Commission may employ. The cure is, of course, to put this data in the record or at least on the public record so that neither the Commission nor the Governors are basing or may be alleged to have based their decisions on extra-record data. As we understand the law, both the Commission and the Governors are supposed to base their decisions on the record. In short, we don’t see how the proposed rule changes make future decisions of the Governors more vulnerable, but we do see how the filing of these reports with the Commission might make future decisions of the Governors less vulnerable.

Nothing in the proposed rules would alter the power or authority of the Governors to decide when, and if, to initiate rate or classification proceedings. While the public may know much more than it does now about an ongoing case, the Governors would retain unfettered authority to initiate rate cases. This is not a “mere formality.” The Postal Service alone controls the timing and agenda of rate and classification cases. The fact that PRC staff and others could analyze the data on which rate cases are presumably predicated does not change the statutory prerogative of the Governors. What the Postal Service seems to really be arguing is that it could lose an important tactical advantage if it had to begin rate cases with the PRC and other interested parties already in possession of much of the data on which the case was based. The Postal Service seems to think and to argue that it is entitled as a matter of law to this tactical advantage, but cites no law in support of this incredible assertion.

The argument that the Commission might, in the future, seek to adopt rules that would allow for the ongoing questioning of Postal Service experts between rate cases should be advanced if and when such a rule is proposed. The present proposal simply does not provide for the ongoing questioning of Postal Service experts by the Commission staff.

The argument that the proposed rule is an untimely distraction from business transformation and other critical goals of the Postal Service and would preempt the legislative reform process is simply incredible. It is important to note that the Postal Service cites no law supporting its claim that a regulated entity has the right to be free of whatever it deems to be “untimely distractions” or that regulatory proposals may not preempt the legislative reform process. On the latter point, we think it is sufficient to note that the legislature is not only free to, but did not, enact any law that preempts regulatory proposals that deal with topics that may also be the subject to legislation. The current legislative reform initiative has been ongoing for more than six years now and shows no sign of coming to any conclusion. Indeed, rather than oppose regulatory preemption, the legislature may prefer that regulatory authorities resolve as many issues and problems as possible without legislative intervention. In short, this whole argument seems to be predicated on nothing more than some nightmare envisioned by the Postal Service based upon its deliberately obtuse “understanding” of the “expectations” of some of the Commission’s staff. What is untimely here is the argument, not the proposed rule changes.

The Postal Service argument that the proposed rule would impose significant, unnecessary and recurring burdens on the Postal Service suffers from the same defects as the preceding argument that the proposed rule would be an “untimely distraction.” First, the Postal Service cites no law in support of its assumption that it has some right to be free of any burden it deems unnecessary. To the contrary, the law requires, among other things, that rates implemented by the Governors need to be

fair and equitable. If the Commission and other parties need more regular access to data to be able to determine if rates are fair and equitable, then the burden involved is one imposed by law. The Commission must have the information it needs to do its job and other interested and affected parties need that information to effectively participate in rate proceedings. Compared to the amount of money at issue, the costs of providing data to the regulator and to interested and affected parties is quite small.

Finally, the Postal Service argues that the rule would impair its ability to protect sensitive commercial and other information against unwarranted public disclosure. This argument is simply nonsense. The Postal Service is once again attempting to hide an elephant behind a beanpole. The area in which the Postal Service faces direct price competition is quite small. It appears to ABA and NAPM that only about five percent of the Postal Service's activities are subject to the sort of direct price competition that might warrant protection in some instances. However, virtually no other enterprise, including those that compete with the Postal Service in the limited areas where there is direct competition, has a cost structure that even remotely resembles the cost structure of the USPS. Thus, the sort of data the proposed rule changes would require the Postal Service to produce does not seem to be the sort of data that would give competitors in the small area where there is competition information of value. In any event, the Postal Service should identify with much more precision the information that it believes is commercially sensitive and should not be disclosed and allow the Commission the opportunity to tailor protective measures suited to the particular circumstances. It cannot and should not be allowed to hide ninety-five percent of its data behind the possible need to protect five percent of it data. It can and should identify sensitive data when it is to be disclosed and provide a sufficient description of the data and the reasons for the need for protection so that reasoned and informed judgments can be made and appropriate protective measure employed.

The Postal Service gets much of its revenue and most of its profits from monopoly classes. This claim of commercially sensitive information is of limited validity coming from such a dedicated monopolist.

In summary, the proposed rule changes are good ones that are badly needed to provide the Commission and interested and affected parties with the information they need to prepare for and to participate in rate cases. The objections posed by the Postal Service are without merit at this point and should not delay further the promulgation of the proposed rule changes.

Sincerely,

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