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

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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

POSTAL RATE AND FEE CHANGES, 1997

Docket No. R97–1

OPPOSITION OF THE UNITED STATES POSTAL SERVICE TO MOTION OF DAVID B. POPKIN TO DISMISS

Pursuant to section 21 of the Commission's Rules of Practice and Procedure and for the reasons stated below, the Postal Service hereby opposes David B. Popkin's Motion to Dismiss ("Motion"), filed September 10, 1997. Mr. Popkin alleges that, if implemented, the stamped card fee proposed in this docket would cause postal employees to engage in conduct violative of 18 U.S.C. § 1721. Mr. Popkin raises issues about one part of the Postal Service's Request that the Commission should consider, if at all, only in conjunction with preparation of the Recommended Decision in this docket. On this basis, the Commission denied a similar motion to dismiss in Docket No. MC96-3. Presiding Officer's Ruling No. MC96-3/11. Moreover, Mr. Popkin has not shown that the implementation of a stamped card fee would give rise to violations of section 1721. The Motion to Dismiss should accordingly be denied.

I. BACKGROUND

Mr. Popkin contends that the proposed stamped card fee contravenes 18 U.S.C. § 1721, which states that:

> Whoever, being a Postal Service officer or employee, knowingly and willfully: . . . sells or disposes of postage stamps or postal cards for any larger or less sum than the values indicated on their faces . . . or sells or disposes of *postage stamps, stamped envelopes, or postal cards, otherwise than as* provided by law or the regulations of the Postal Service; shall be fined under this title or imprisoned not more than one year, or both.

18 U.S.C. § 1721. Mr. Popkin concedes, however, that the Commission "could

possibly approve a rate to charge more for stamped cards than that which appears on their face . . . ." Motion ¶ 4. Notwithstanding, Mr. Popkin claims that if any postal employee sold a stamped card for any amount above the face value printed thereon, such transaction would give rise to a violation of section 1721. Motion at ¶ 4. Mr. Popkin further argues that "[a]n Act of Congress would be required to allow for this request of the Postal Service." Motion at ¶ 5. Mr. Popkin also argues that the legislative history of section 1721 fails to indicate any meaning for the statute other than that stamped cards must be sold at their face value. Motion at ¶¶ 6-11.

II. ARGUMENT

A. It Is, At Best, Premature to Reject the Postal Service's Stamped Card Fee Proposal.

It would generally be improper for the Commission to dismiss a portion of an omnibus rate filing prior to issuance of its Recommended Decision. The stamped card fee proposal is part of an omnibus rate and fee request that is designed to meet the Postal Service's overall revenue needs. The dismissal of the Postal Service's stamped card fee proposal would eliminate over $11 million intended to cover the Postal Service's revenue requirement, and thus would affect the other rates and fees proposed in this case. All the Postal Service's proposals should be considered together when the Commission prepares its Recommended Decision.

The Commission reached a similar conclusion when it ruled on basically the same motion to dismiss, filed by Mr. Popkin in Docket No. MC96-3. While the Presiding Officer stated that the Commission might be authorized to dismiss "a seriously flawed request for a change in fees," he concluded that:

> the merits of Mr. Popkin's legal argument are not sufficiently compelling to warrant dismissal of the Postal Service's proposed fee for stamped cards prior to a hearing and the briefing of legal issues. Mr. Popkin remains free to address both the merits of his legal argument, and the ability of the Commission to consider them under the framework of the Act, at the briefing stage of this proceeding.

Docket No. MC96-3, Presiding Officer's Ruling No. MC96-3/11, at 3.

Such a ruling is appropriate in this proceeding, too. Mr. Popkin has presented no compelling reasons why the Postal Service's proposal should be dismissed, and Mr. Popkin can present his arguments on brief for the Commission's consideration as it prepares its Recommended Decision.

In fact, the argument for dismissing the stamped card fee proposal is even weaker in this docket than in Docket No. MC96-3. In Docket No. MC96-3, Mr. Popkin raised all the arguments he presents in his Motion. Nonetheless, the Commission in Docket No. MC96-3 recommended the creation of the stamped card classification, stating:

> The Commission also agrees with the Postal Service's position that, like users of stamped envelopes, Stamped Card users should pay separately for the card as well as the postage.

PRC Op., MC96-3, at 142.[1] Mr. Popkin can try on brief to persuade the Commission to reverse its conclusions.

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[1] The only reason the Commission did not recommend a stamped card fee in Docket No. MC96-3 was the inclusion of stamped card manufacturing costs in the current postage rate for cards. *Id.* The Postal Service has rectified this circumstance in this docket by excluding stamped card manufacturing costs from the costs used by witness Fronk to determine the single-piece card rate. *See* USPS-T-15, App. D.

C. Fees For Stamped Cards Would Not Cause Postal Employees To Violate Section 1721.

Even if the Commission should reach the merits of this Motion, Mr. Popkin's claim that the proposed fees for stamped cards, if implemented, would cause postal employees to engage in violations of 18 U.S.C. § 1721 is without merit. A stamped card fee would not give rise to a violation of section 1721, since, if implemented, it would be entirely consistent with the policies of the Postal Service, and therefore would not result in the unauthorized sale of postage by individual employees.[2]

It is evident that Congress did not intend the restrictions in 1721 to apply to pricing policies recommended by the Commission, approved by the Governors, and implemented by postal management, since, simultaneously with the enactment of conforming amendments to section 1721 adopted in connection with the Postal Reorganization Act, Congress contemplated that mail classifications such as postal cards would be subject to change, as it created an elaborate scheme for the implementation of changes to the Domestic Mail Classification Schedule. *See* 39 U.S.C. §§ 3623, 3625. In addition, Congress granted broad authority to the Service "to provide and sell postage stamps and other stamped paper, cards, envelopes . . . ." 39 U.S.C. § 404(a)(4).

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[2] If Congress wished to prevent the Postal Service from authorizing the sale of stamped cards for a fee in addition to postage, Congress would have enacted a law directed at the Postal Service, rather than its individual employees and officers. While Section 410(b)(2) of U.S. Code title 39 makes title 18 provisions applicable to the Postal Service, section 1721 of title 18 is still directed only at employees and officers, and not at the Postal Service.

This conclusion is consistent with the statute's legislative history. The conduct that section 1721 protects against is fraudulent salary inflation by postal employees. Compensation for postmasters was and still is determined in part by the total receipts of the office in which they are employed. *See* S. Rep. No. 2720, 84th Cong., 2nd Sess. (1956), *reprinted in* 1956 U.S.C.C.A.N. 3814, 3815; H.R. Rep. No. 555, 84th Cong., 1st Sess. (1955). Section 1721 thus serves to deter postmasters and supervisory employees from inflating their salaries through manipulating office revenues by overcharging customers for postage stamps, stamped envelopes, and postal cards. That section 1721 is intended to apply to the unauthorized acts of postal employees is manifest from the legislative history of a 1956 amendment to the statute. At that time, Congress passed legislation broadening the class of postal employees to which section 1721 applies. The House Report emphasized that Congress intended to:

> broaden the class of postal employees who are prohibited by existing law from inducing or attempting to induce any person to purchase postage stamps, stamped envelopes, or postal cards *for the purpose of increasing the emoluments or compensation* of the postmaster or any employee of any post office or any station or branch thereof . . . .

H.R. Rep. No. 555, 84th Cong., 1st Sess. (1955) (emphasis supplied). Any revenues from the proposed stamped card fees would go into general Postal Service revenues, rather than into the pocket of particular postal employees.

Finally, the interpretation of the statutory predecessor to section 1721 further demonstrates that the provision was not intended to apply to official acts of the Post Office Department. *See* 6 Op. Solicitor of the Post Office Dep't. 652 (1918). The

underlying issue there was a proposed Postmaster General order which provided that the United States postal agent at Shanghai could sell stamps to the public in exchange for foreign currency, on the basis of its value at the prevailing daily rate of exchange for U.S. currency. Since at that time exchange rates apparently could not be ascertained when banks were closed, it was questioned whether sale of stamps during such time would conflict with the predecessor to section 1721. In upholding the proposed order, the Solicitor concluded that there would be no violation of the criminal provision. In support of this conclusion, the Solicitor reasoned in part that:

> this is a criminal statute, and in order to constitute a violation a criminal intent is necessary, and while it is well established that intent may be presumed from the commission of the acts prohibited, the circumstances in this case would negative the existence of such intention, *especially should the procedure be authorized by the department* . . . . [T]he purpose of the law is not to secure an exact return, for accounting purposes or otherwise, . . . but to regulate and control postal employees in their handling of stamped papers . . . .

6 Op. Solicitor of the Post Office Dep't at 655 (emphasis supplied). In short, the Solicitor's interpretation of the predecessor to section 1721 makes clear that the legislation is aimed at the unauthorized conduct of postal employees, and establishes that the statute is inoperative against acts authorized by the institution. Thus, assuming the stamped card fee is recommended by the Commission, approved by the Governors, and implemented by postal management, postal employees would not engage in violations of section 1721 when customers paid stamped card fees.

CONCLUSION

Based on the foregoing, the Postal Service respectfully requests that Mr. Popkin's Motion to Dismiss be denied.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

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David H. Rubin

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all participants of record in this proceeding in accordance with section 12 of the Rules of Practice.

David H. Rubin

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