

Before The
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

Postal Rate and Fee Changes, 2005)

Docket No. R2005-1

OFFICE OF THE CONSUMER ADVOCATE
COMMENTS ON NOTICE OF INQUIRY NO. 1
CONCERNING REGISTERED MAIL
(May 10, 2005)

The Office of the Consumer Advocate (“OCA”) hereby comments on the Commission’s Notice of Inquiry No. 1 Concerning Registered Mail (“Notice”) issued April 26, 2005 in these proceedings. The Notice seeks comment on three issues on the assumption that one or more component rates in an omnibus rate change request will be deferred for an undetermined period past the implementation date of other rates.

Question 1 :

In omnibus rate cases, the Commission is asked to recommend, and the Governors are asked to approve, system-wide changes in rates based in part on the relative share of the system-wide institutional cost burden that each subclass or service is estimated to bear when new rates are simultaneously implemented. In this context, is it consistent with the Postal Reorganization Act for the Governors to defer the implementation dates of recommended rates for some services with the purpose of altering the relative institutional cost burdens on which new rates were predicated?

The Commission’s inquiry raises several interesting legal and policy questions but because the Postal Service has filed for and apparently supported a particular Registered Mail rate increase, OCA believes this question and the others are largely academic in this proceeding. Pursuant to §3625(f) of the

Postal Reorganization Act, the Commission does not have final authority to determine the implementation date of rates approved by the Commission. That section states:

The Board shall determine the date on which the new rates, fees, the mail classification schedule, and changes in such schedule under this subchapter shall become effective.

That is, once the Commission issues a recommendation for a rate increase, based upon the request and the factual record developed in the case, the Commission has no further control over the implementation dates of the rates. If the Board chooses to segment the implementation dates, then the legal question will arise at that time as to whether the Board is authorized to do so under §3625.

If the parties attempt to settle the issue as to the timing of the implementation of Registered Mail rates, or any other rates for that matter, the Commission may approve the settlement that is binding on the signatories but because implementation dates are a matter for the Board to decide, that portion of the settlement would not be subject to Commission review.¹

The issue of whether Board action to defer implementation is consistent with the Postal Reorganization Act is not now ripe for decision inasmuch as the proceeding is still pending before this Commission. Thus, as a practical matter the Commission can and should proceed to a decision without reference to the future Postal Service intentions regarding the implementation date. Of course,

¹ It is possible to imagine a settlement agreed to by the Postal Service where the implementation dates substantively and significantly affected the revenue requirement and the Commission's recommendation hinged up the effective date of the rates. We assume that is not the situation here.

the Commission is free to offer its views on the matter that may be of use to a reviewing court, but the Commission views would not necessarily be dispositive of the issue on appeal.

In this proceeding, the Postal Service has formally requested a recommendation to increase Registered Mail rates. The testimony of Postal Service witness Robinson (USPS-T-27) states that the newly calculated attributable costs are so high that current rates provide only for a cost coverage of 60.6 percent in the test-year-before rates. (USPS-T-27 at 16.) The Postal Service has therefore requested an increase in Registered Mail rates of approximately 70 percent to result in a cost coverage of 102.8 percent. (*Id.* at 17.)² Postmaster General Potter's testimony further states that because the proposed fee increase is well above the 5.4 percent system-wide goal, if the Commission recommends a "fee increase of a magnitude suggested by our current proposal," (Potter, USPS-T-1 at 7) he intends to recommend that the Board "delay implementation," at least until a course of action is determined after review of the Registered Mail service. (*Id.*)

The stated intention of the Postmaster General does not necessarily indicate the Registered Mail rates will not be implemented. It is only a stated intention. Several factors could intervene between now and the time for the Board to order rate implementation. The Board may reject the Postmaster

² Current and proposed Registered Mail rates are included in the Postal Service's formal April 8, 2005 request, Attachment A, fee schedule 942, page 70.

General's recommendation. The Postal Service's review may be completed after this Commission issues a recommended decision and the Postal Service may then file an additional request regarding Registered Mail that negates the current plan stated in the testimony. At the time the Board acts upon the Commission's recommendation in this case, the proceeding will be beyond the control of the Commission; except that the Commission may be later drawn into court proceedings. In any event, the Postmaster General's current declared intention does not impact the Commission's decision here.

Also, question 1 notes that the purpose of delayed implementation would be "with the purpose of altering the relative institutional cost burdens on which new rates were predicated." We respectfully suggest that is not the purpose of delayed implementation, although it may be the impact. There may be a significant difference. The purpose of delaying implementation is, instead, to avoid rate shock, a recognized reason for recommending what may not otherwise be a desirable rate under the Postal Reorganization Act. The impact of delayed implementation may be to reduce the institutional cost burden borne by the Registered Mail users, but it will not conversely increase the institutional cost burdens of the other mailers in this round of rate increases. The rates are set assuming the institutional burden is borne in the manner recommended, not as the rates are actually implemented.

Board delay of implementation of recommended rate increases may be discriminatory and result in a Board violation of §403(c) or unreasonable and inequitable in violation of §3621 of the Postal Reorganization Act as to the other

mailers, particularly if there is no provision for make-up in a later proceeding that will remove the inequities. But again, the issues of discrimination, reasonableness and equity are potential issues for the Board and not now before this Commission. By recommending rates as proposed, the Commission would be complying with the statute's terms without discriminating against others.

Question 2:

Is indefinite deferral of implementation dates for some of the rates recommended in an omnibus rate case consistent with the Postal Reorganization Act if this procedure is only applied in exigent circumstances to minor services? Does the answer to this question depend on whether the services involved are making a positive contribution to institutional costs during the period of deferral?

As to the first sentence of the question pertaining to minor services, again this is a matter for the courts to determine once the Postal Service delays implementation of a rate increase for a specific class of mail. The Commission does not have a say in the matter, other than advisory dicta. The involvement of minor services reduces the likelihood of discrimination, unreasonableness or inequity against those customers whose rates are raised. The deferral of a rate increase for a minor service will certainly not have sufficient revenue impact to affect the Postal Service's ability to provide the overall service it has a duty to provide under the law.

On the other hand, deferring rate increases for services providing significant revenue would most likely be discriminatory, unreasonable or inequitable against the other services as it may very well impact the Postal Service's future ability to provide service to all customers. At the very least, although deferral of some rates would not immediately impact the other rate

classes because their rates are already established, the negative revenue impact of the deferral may impact the future ability to provide service. Also, unless the revenue impact of such a deferral is taken into account in the next rate case, the burden of recovering revenues to make up for the lost institutional cost coverage revenues will fall on those whose rates were implemented as provided for in the Commission's opinion. For instance, if the Board chose to defer implementing all rates except single-piece First-Class letter rates, the impact on those First-Class customers would be great and the discrimination in favor of the other classes would be obvious as it would affect a significant amount of revenues having later impact. The Postal Reorganization Act requires that rates not be unreasonably discriminatory. It is unlikely that one can even conjure up a scenario where deferring all but single-piece First-Class Mail is not discrimination in favor of non-First-Class mailers. Such an action would be clearly inappropriate and would most likely be struck down by a court as discriminatory or inequitable. Again, however, the Commission's recommendation as to timing of implementation will be advisory only and would not tie the Board's hands.

The second sentence of question 2 asks if the appropriateness of indefinite deferral depends upon whether a positive contribution to institutional costs are being provided. Once again, this is a matter for the Board to decide and not the Commission.

If the Board does defer implementing rates that do not make a positive contribution to institutional costs, and the matter makes its way to a court, then the court would be much more likely to find the Board's action untenable, at least

more likely to find the action discriminatory, unreasonable or inequitable. At some point an issue would lie in court as to how long may the Board defer putting into effect new rates if current rates are found not meeting the standard of §3621 requiring that rates “shall” be such that total estimated income shall be as nearly as practicable to total estimated costs. The court would face the question of whether the Board is doing what it can to keep that equality “as nearly as practicable” if the old rates remaining in effect do not cover attributable costs.

However, the standard the Commission must apply under §3622(b)(3) as to attributable costs is not a standard directly applicable to the Postal Service and may not be particularly significant to a court. Even though the Commission recommended rates that comply with the requirement of §3622(b)(3), the court may not look to the attributable cost language as dispositive because the Postal Service has §3625 authority to determine when rates are to be implemented. But the underlying statutory policy requiring that rates meet their attributable costs would carry great weight in any court decision.

Nevertheless, until ordered by a court, the Postal Service may as a practical matter keep old rates in effect that do not cover their attributable costs. Thus, if the Commission follows the statute in reaching its own recommendations, the Board’s actions must comply with other sections of the Postal Reorganization Act, and if the rates temporarily do not cover attributable costs, as long as the Board’s actions are consistent with §3625, and not discriminatory, unreasonable or inequitable, the Board may not be required to update rates that do not meet attributable costs.

Question 3:

Are there other effective ways to ameliorate the potential rate shock associated with the proposed Registered Mail fees in this docket that pose fewer legal and policy difficulties, such as phasing the implementation of Registered Mail fee increases according to a specific timetable, amending the Postal Service's omnibus request, or filing a new rate request restricted to Registered Mail, if the Postal Service's reevaluation of Registered Mail fees provides a basis for proposing different rates?

A recommendation for phasing implementation of Registered Mail would not avoid problems for the Commission because the increased rates in the earlier phase would still not meet attributable costs. In fact, that may exacerbate the problem for the Commission and pose more legal difficulty. The Commission could then be under fire for recommending a rate to remain in effect or a partial increase in a rate that does not meet, on the basis of record evidence, attributable costs.

Also, it is not apparent how amending the Postal Service request would avoid problems. The Commission will not have time to await the filing of a new rate request for Registered Mail based on the Postal Service's re-evaluation. Interrogatory responses indicate that reevaluation is barely underway. This case will most likely be over before a new rate proposal for Registered Mail will be filed. In any event, unless a new rate filing requests a rate increase for Registered Mail of about 5.4 percent, it would do little to improve the situation for the Commission. The Commission would still be asked to approve a rate increase well in excess of the across-the-board rate in this proceeding. As noted already, beyond that, the Board is responsible for the timing of rate implementation. Thus, we do not see another effective way for the Commission,

as opposed to the Postal Service, to ameliorate the rate shock for Registered Mail.

Respectfully submitted,

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