

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

**POSTAL RATE AND FEE CHANGES }
PURSUANT TO PUBLIC LAW 108-18 }**

DOCKET No. R2005-1

**REPLY BRIEF
OF
MAIL ORDER ASSOCIATION OF AMERICA**

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I. INTRODUCTION

The principal issue in this proceeding is whether, as maintained by the Office of Consumer Advocate (OCA) and Valpak, the Postal Service must first exhaust its accumulated surplus before implementing a rate increase. Both the OCA and Valpak contend that the Postal Service's request would violate the "breakeven" provisions of § 3621 of the Postal Reorganization Act (PRA) because of the existence of that surplus.

That position, however, ignores the overall structure of the Act that affords the Postal Service Board of Governors extraordinary control over whether and when to seek, and implement, rate increases; the decisions of the courts interpreting that authority; and the decisions of the Commission¹.

The OCA recognizes that the breakeven requirement must be interpreted reasonably to mean that the Postal Service must breakeven over time, as has been recognized by the Commission. The OCA also supports the Postal Service's proposed across-the-board 5.4 percent rate increase, but contends that it should not be implemented prior to August 15, 2006. The Postal Service will not implement this rate increase prior to January 2006. Thus the OCA accepts the proposition that the

¹ This reply brief will hereafter reference only the Initial Brief of the OCA because Valpak's arguments are essentially the same as those of the OCA.

Postal Service would be in compliance with the breakeven requirement if the increase were implemented six months later than proposed. MOAA submits that the difference between implementing in January, or six months later, is within the boundaries of the accepted breakeven over time interpretation of § 3621.

The OCA's position also runs afoul of the court's decision in *Mail Order Ass'n of America v. U.S. Postal Service*, 2 F.3d 408, 419-20 (D.C.Cir. 1993). In that case, the Court found that the timing of the implementation of a rate increase lies solely within the discretion of the Board of Governors. The OCA has not taken the position that there should be no rate increase, but rather that the increase should not be implemented until a date later than that proposed by the Governors, a position directly contrary to the clear holding of the MOAA case.

In sum, the position of the OCA is contrary to the provisions of the Act, as those provisions have been interpreted by the courts. MOAA supports the proposition that the Governors should not implement the rate increase any sooner than necessary, but recognizes that the decision is within the discretion of the Board. The contentions of the OCA (and Valpak) that the Commission adopt a position that is directly contrary to controlling court decisions is an invitation to err which should be rejected.

II. THE POSTAL REORGANIZATION ACT AND COURT DECISIONS ESTABLISH THE PRIMACY OF THE BOARD OF GOVERNORS IN DETERMINING THE POSTAL SERVICE'S REVENUE NEEDS

The Postal Reorganization Act establishes the primacy of the Board of Governors in determining the revenue needs of the Postal Service. First, the Postal Service has the exclusive authority to request a change in rates. Section 3621 of the Act affords to the Postal Service the exclusive authority to request rate increases and the timing for such a request cannot be dictated by the PRC. Further, within broad limits, the Postal Service has the authority to determine the revenues needed to fulfill postal obligations. *Newsweek Inc. v. U.S. Postal Service*, 663 F.2d 1186, 1203 (2d Cir. 1981), *aff'd sub nom. National Ass'n of Greeting Card Publishers v. U.S. Postal Service*, 462 U.S. 810 (1983). The court found that a PRC decision "which drastically reduced the Postal Service's revenue requirements, had the effect of undermining the Board's exclusive authority in timing changes in postal rates and fees." *Id.* at 1204. The court found that by so doing the PRC "improperly encroached upon the managerial authority of the Board." *Id.* The court also found that

the “Board is free to fashion the policies of the Postal Service without interference, including from the PRC. *Id.* at 1205.

The authority of the Postal Service to determine its revenue requirements is also recognized by the provisions of § 3625 of the Act which give to the Governors the authority to modify the rates recommended by the PRC upon a unanimous finding that the PRC recommended rates fail to provide needed revenues.

The Commission should not adopt the position taken by the OCA (and Valpak) urging it to ignore the primacy of the Postal Service in determining its revenue needs and the timing of rate requests. To do so would require ignoring both the overall construct of the Act and the clear decisions of the courts.

III. APPROVAL OF THE POSTAL SERVICE’S REQUEST WOULD NOT VIOLATE THE “BREAKEVEN” PROVISIONS OF §3621 OF THE ACT

Section 3621 of the Act in pertinent part provides :

Postal rates and fees shall provide sufficient revenues so that the total estimated income and appropriations to the Postal Service will equal as nearly as practicable total estimated costs of the Postal Service.

The OCA recognizes that this provision must be given a reasonable interpretation. Obviously, the Postal Service is not required to be on a breakeven status daily, weekly, monthly or even yearly. The OCA has conceded the obvious reality that because “costs and revenues fluctuate from year to year between rate cases, year to year breakeven is not expected to be maintained.... OCA Initial Brief at 10. As stated by the OCA :

Rate cases could be filed every year and, then, each year the rates would be adjusted to meet that year’s expenses. But rate cases are not filed every year; instead they are filed about every three years. Profits or losses between test years are allowed to float up and down in the interim years between rate cases. If a large profit arises in the first year after a rate case, the first interim year, it may be eliminated in subsequent interim years. The same is true with losses. Losses in interim years accumulate between rate cases and measures are taken to recover those losses from prior years in the next rate case. Thus, the principle that losses may be recovered in the subsequent rate case

is a long-established principle. That principle is based upon the statute and legislative history.

OCA Brief at 11.

The OCA asserts, however, that when the Postal Service “does file for a rate increase, the books should be evened-up unless there is a very good policy reason consistent with the Postal Reorganization Act for not doing so.” *Id.* The OCA does not even attempt to support that bald assertion or answer the question of why the “books should be evened-up” at any particular time. Once it has been conceded that breakeven cannot possibly be interpreted to mean a constant stasis, the issue of the appropriate period of measuring “breakeven” is necessarily left to the reasonable judgment of the Board of Governors. It represents a management function that is beyond the authority of the Commission.

The OCA offers no reason why a surplus, or using the OCA’s word “profits”, in the period prior to a proposed rate increase should be treated differently than a surplus or “profits” subsequent to the implementation of new rates. Once the inescapable acknowledgment is made that the financial condition of the Postal Service will necessarily fluctuate from one period to another, and that “breakeven” cannot possibly be interpreted to mean that the Service must be in a breakeven status at all times, the particular periods in which the Service experiences a surplus or a loss become immaterial. If the Postal Service were to carry a consistent and growing surplus over an extended period of time, a sound and probably conclusive argument could be made that it would be a violation of the breakeven requirements of § 3621. The Service, however, is not even close to that situation.

The OCA contends that § 3621 does not grant to the Postal Service “the power to retain earnings.” OCA Initial Brief at 16. The proposition, as stated, is correct, but the issue remains whether the absence of such authority means that the Postal Service may never be in a surplus situation. All concede that § 3621 cannot reasonably be so interpreted, and thus, the timing of the surplus is immaterial. It is notable that the OCA has not even attempted to explain why a surplus preceding a rate filing should be treated in any way differently than a surplus that occurs subsequent to a rate filing or the implementation of rates pursuant to that filing.

In sum, the OCA's assertion that the books should be "evened-up" at such time as the Service files for a rate increase lacks both authority and logic. The assertion cannot be supported under the statutory scheme, or decisions of the courts and is facially illogical. It should be rejected by the Commission.

IV. THE OCA'S POSITION THAT THE BOARD SHOULD BE PRECLUDED FROM IMPLEMENTING RATES PRIOR TO AUGUST 15, 2006 IS CONTRARY TO ESTABLISHED LAW

The OCA also states that its "preference" is to approve of the rate increase but to delay its implementation until August 15, 2006. OCA Initial Brief at 5, n.1. In other words, the OCA's entire position is that the Service's request would be lawful and not in violation of the breakeven requirement of § 3621 if the implementation date were delayed for six months.

MOAA, and presumably all other mailers, would prefer that rates not be implemented any earlier than necessary. We have made that position clear to the Postal Service. Obviously, no rate increase is welcome and a later implementation date would make it easier for mailers to absorb the increase than an earlier implementation date. That truism, however, cannot, as the OCA seeks to do, be raised to the level of concluding that implementing a rate increase six months after the Service anticipates doing so, would not violate the breakeven requirement, whereas doing so six months earlier would.

Additionally, the OCA's position that no rate increase should be implemented prior to August 15, 2006 runs afoul of the clear authority of the Governors to determine the implementation date of rate increases. *Mail Order Ass'n of America v. U.S. Postal Service*, 2 F.3d 408, 419-20 (D.C. Cir. 1993).

In sum, the OCA's contention that approval of the Postal Service's request would violate the breakeven provisions of §3621, and its further contention that a delayed implementation would cure any violation, are contrary to the Act as interpreted by this Commission and the courts.

V. THE OVERWHELMING ACCEPTANCE OF THE STIPULATION AND AGREEMENT BY THE INTERVERNOR MAILERS IS PERSUASIVE EVIDENCE THAT ITS ACCEPTANCE BY THE COMMISSION WOULD BE IN THE PUBLIC INTEREST

MOAA is aware of and respects the role of the OCA to represent the interests of the public. At the same time, in assessing the public interest, MOAA urges the Commission to give due consideration to the fact that thirty five parties representing all classes of mail, and collectively representing the great majority of all mail, have entered into the Stipulation and Agreement. This large number of parties, represented by counsel, presumably have done so after weighing their own interests. Further, given the breadth of support for the Agreement, the MOAA submits there is no real distinction between the mailers self-interest and the interests of the public.

VI. CONCLUSION

For the reasons discussed above, and in MOAA's Initial Brief, the Commission should accept the Stipulation and Agreement that has been submitted by the Postal Service and parties to this proceeding.

Respectfully submitted,

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