

Before the
POSTAL REGULATORY COMMISSION
Washington, DC 20268-0001

Regulations Establishing : Docket No. RM2007-1
System of Ratemaking :

REPLY COMMENTS OF THE GREETING CARD ASSOCIATION

On April 6, 2007, the Greeting Card Association (GCA) filed initial comments, both individually and jointly with American Business Media (ABM) and the Newspaper Association of America (NAA), pursuant to the Postal Regulatory Commission's Advance Notice of Proposed Rulemaking. In the present filing, GCA discusses several issues raised by the initial comments of other participants. GCA is also joining with ABM, NAA, and the National Newspaper Association in reply comments concerning the complaint process established by 39 U.S.C. § 3662.

I. THE TIMETABLE FOR RULEMAKING

Several participants, in their initial comments, urge the Commission to concentrate first on what they perceive as the most basic or important of the rulemaking tasks assigned by the Postal Accountability and Enhancement Act (PAEA). This task, they argue, is the implementation of the price cap structure under which the Postal Service is to make its periodic rate changes. The Postal Service, for instance, suggests¹ that

. . . the Commission should adopt those rules that are necessary to operate the CPI-U price cap structure laid out by Congress in § 3662(d), and to refrain from imposing additional requirements until it perceives a

¹ Initial Comments of the United States Postal Service, p. 4.

compelling need to do so based on how the market and public needs develop. Given the complexities involved, and the existence of the CPI-U constraint, it would be better to proceed slowly with the benefit of actual experience rather than theoretically, which presents the danger of producing unintended consequences as hypothetical issues are addressed without a specific factual basis. Indeed, we suggest that a bias towards the issuance of regulations only on an “as-needed” basis comports well with the overall intent of the PAEA and the implications of rapidly changing markets.¹

¹ The Commission can, if necessary, address in subsequent proceedings pursuant to §§ 3622(a), 3653, or 3662 any issues that may arise.

Somewhat similarly, Mail Order Association of America (MOAA) argues that

. . . at least initially, the Commission should limit its role under the “system”, to ensuring that statutory requirements are met, *i.e.*, that the overall rate increase for any class of mail not exceed the CPI, as governed by § 3622(d)(1)(A) and (2), but should not otherwise restrict the Postal Service in exercising its pricing flexibility and determining the proper application of the PAEA’s objectives and factors.^[2]

It is easy to understand the initial appeal of such fragmentation of the rulemaking task, especially if the Commission hopes to complete it before the 18-month statutory deadline.³ But if the Commission is really to comply with the requirement of § 3622(a) that it create “a modern *system* for regulating rates and classes for market-dominant products,” some threshold distinctions need to be observed.

² Comments of Mail Order Association of America (“MOAA Comments”), p. 3. The proposition, apparently implied in the last phrase, that it is the Postal Service which will “determin[e] the proper application of the PAEA’s objectives and factors” appears inconsistent with the statute; § 3622(a) makes the Commission responsible for creating the ratemaking system which the objectives and factors help to define.

³ See opening remarks of Chairman Blair, *Summit Meeting – Postal Customer Needs in a Changing Regulatory Environment* (March 13, 2007), TR. 11.

Commenters may express varying opinions as to the relative “importance” of the different components of PAEA’s contemplated system for market-dominant products, but it remains true that Congress enacted them all simultaneously and expects them all to be implemented. All are interdependent parts of the system of rates and classifications which PAEA directs the Commission to establish. That the price cap applies to every market dominant product, in every rate change cycle, does not mean that it is “more important” than a protective provision which may be invoked much less frequently. Relative breadth of applicability should not be confused with relative importance. Moreover, as Time Warner points out in its Initial Comments⁴, “the PAEA as finally adopted is a heavily brokered document that reflects the interests, objectives and views of various mutually hostile constituencies[.]” Thus the perception by one constituency that, for example, a smoothly-working price cap is important to it but the complaint jurisdiction is not, cannot be allowed to dictate the Commission’s approach to creating the system.

The first important distinction to be drawn, then, is that between the necessary mechanisms of the “modern system” and the eventual content – in the form of substantive policies or rules of law – which that fully-developed system will generate. The distinction is necessary because unless all the elements of the system are made functional and usable by its intended beneficiaries, this eventual content simply will not exist.⁵

Consequently, GCA suggests that the Commission distinguish between (i) creating suitable procedures for all the key mechanisms of the system and (ii) defining in detail the substantive standards by which controversies arising within

⁴ Initial Comments of Time Warner Inc. in Response to Commission Order No. 2, p. 3.

⁵ Thus we have to disagree with MOAA’s suggestion (MOAA Comments, p. 4), that the October 2007 target date should be adopted even if it “preclude[s] the Commission from adopting regulations covering the full scope of its responsibilities.”

those mechanisms will be judged. The first of these tasks should be carried out as expeditiously as possible; the second may, to a considerable extent, await the “actual experience” to which the Postal Service refers.

The key mechanisms are – at a minimum –

The § 3622(d)(1)(A)-(D) price cap;

The “exigency” provision for above-the-cap rate changes [§ 3622(d)(1)(E)];

Workshare discount regulations [§§ 3622(e); 3652(b)];

Periodic reporting and annual compliance review [§§ 3652, 3653]; and

Rate and service complaints [§ 3662].

To these specific mechanisms should be added appropriate provision for the treatment – and the disclosure, under appropriate protections, to parties having a legitimate interest – of data the Postal Service considers confidential within the meaning of §§ 504(g), 3652(f), and 3654(f).

An equally pressing question, with respect to these key mechanisms of PAEA, is what is needed in the way of rulemaking to render them usable and effective. GCA suggests that two types of regulation are necessary:

Rules of procedure designed to make each of the processes efficient, expeditious, and capable of providing prompt, effective relief when legitimately invoked; and

Where the text and structure of PAEA make Congress’s intent reasonably clear, guidance as to the nature of the matters that may be brought before the Commission.

The Commission has both the experience and the expertise needed to carry out the first of these tasks. Some further discussion of how the second should be defined may be in order. GCA’s earlier text- and structure-based suggestions regarding the “exigency” provision⁶ furnish an example. If the Commission concludes, as we believe it should, that the exigency provision should not be used to deal with financial issues previously covered by the “reasonable provision for contingencies” element of former 39 U.S.C. § 3621, it can incorporate that principle in the rules of procedure for such cases. This could be done via a statement of general policy⁷ clarifying the appropriate circumstances for their initiation by the Postal Service, and – in terms general enough to provide the requisite flexibility – what the Service must show *in limine* in order to justify proceeding with the proposal. Such guidance need not, and doubtless should not, attempt to list all the specific circumstances in which the Service may (or may not) seek an above-the-cap increase. The appropriate balance, in this situation, is between appropriate leeway for Postal Service management decisions and avoidance of proceedings that would misapply PAEA if pursued, and would in any case waste the Service’s, the Commission’s, and the parties’ time and resources.

II. THE ROLE OF § 3622(b)(8)

Introduction. Subsection (b)(8) of § 3622 requires that the ratemaking system the Commission creates “establish and maintain a just and reasonable

⁶ Comments of the Greeting Card Association in Response to Advance Notice of Proposed Rulemaking (“GCA Comments”), pp. 7-15.

⁷ Section 3001.82 of Title 39, CFR, provides a current example, relating to complaints under § 3662, of such a policy statement.

schedule for rates and classifications,” with the specific caveat that it not be read to prohibit “changes of unequal magnitude within, between, or among classes of mail.” GCA has suggested some principles for interpretation of paragraph (b)(8)⁸, and will not reiterate them here. What follows is in response to suggestions in the initial comments of other participants.

The phrase “just and reasonable” is new to postal legislation, though not to ratemaking statutes in general. The history of PAEA’s development, however, provides no compelling reason to assume that “just and reasonable” means the same thing in § 3622(b)(8) as in, for example, Part II of the Federal Power Act.⁹ Indeed, since most earlier statutory schemes using the phrase have embodied cost-of-service ratemaking in one form or another¹⁰, there is good reason to assume the opposite: that “just and reasonable,” as the 109th Congress used it, calls not for a particular ratemaking theory or technique historically associated with those words in the regulation of private-sector enterprises, but rather for a more independent interpretation guided by the general postal policies of PAEA – both those newly defined and those carried over from the Postal Reorganization Act of 1970.

⁸ GCA Comments, pp. 4-7.

⁹ 16 U.S.C. § 824d.

¹⁰ Thus, for example, the Commission should not accept the argument that because the Federal Communications Act, the Federal Power Act, and the Natural Gas Act (i) all use the phrase “just and reasonable” and (ii) all “protect against the abuses of entities possessed of monopoly power,” the same phrase in PAEA refers – and refers *only* – to avoiding monopoly abuse by the Postal Service. See Initial Comments of PostCom in Response to Advance Notice of Proposed Rulemaking on Regulations Establishing a System of Ratemaking, p. 5. The argument itself is fallacious: that a complex regulatory statute uses a particular phrase and serves a particular function does not entail that the phrase has no meaning apart from that function. And, as noted, the fact that “just and reasonable” in other statutes has been taken to require cost-of-service ratemaking, which PAEA clearly excludes, suggests that practice under those other statutes is not a suitable guide for this rulemaking.

Supersession of “fair and equitable.” Some commenters lay particular emphasis on the disappearance of “fair and equitable” from the text of § 3662. It may well be that Congress wanted the Commission’s evaluation of rates from the general standpoint of “non-market” considerations to start with a clean slate. Certainly “fair and equitable,” in the context of the 1970 Postal Reorganization Act, acquired a close association with the analysis and appropriate allocation of costs; and, in a price-cap statute necessarily according cost allocation less prominence, its retention might have led to needless difficulties of interpretation. But it is equally important that when striking “fair and equitable” Congress simultaneously added – in a structurally homologous location – “just and reasonable.” What “non-market” considerations Congress wanted the Commission to embody in the new ratemaking system cannot, therefore, be deduced merely from the elimination of “fair and equitable.” The initial comments filed by PostCom, however, attempt to draw precisely such an inference:

One of the objectives the Commission must consider in the rulemaking process is to establish and maintain a “just and reasonable” rate and classification system which allows increases of “unequal magnitude” within, between or among classes of mail. . . . Thus – in sharp contrast to the old law – the matter of revenue apportionment within and among classes is principally a matter for the Postal Service to determine, as a business matter. The Commission’s rules and evaluation of the Postal Service’s business decisions is not to be judged by a “fairness” test. Rather, the only absolute statutory limitation on the Postal Service’s ability to apportion the revenue requirement between or among the market dominant classes of mail is the annual CPI limit on rate increases that applies at the class level. . . .^[11]

* * *

The Commission is also given clear direction as to the substantive standard it is to apply in the exercise of these duties [i.e., deciding complaints under § 3662]. The subjective “fairness and equity” test has been eliminated from the criteria by which the rules for market dominant rates are to be shaped. Section 403(c) of Title 39, which prohibits “undue or unreasonable discrimination” and “undue or unreasonable

¹¹ PostCom Comments, p. 8 (underlining in original).

preferences”, is preserved. Section 403(c) is therefore the measure of monopoly abuse, and the standard the Commission must apply.^[12]

The first of these passages argues, in effect, that while Congress called for a *just and reasonable* rate schedule which (also) *does not prohibit unequal increases*, nevertheless the Service’s rate-setting judgments are not to be evaluated on a “fairness” standard, but only by whether they conform to the price cap. But this construction simply, and impermissibly, reads “just and reasonable” out of the statute.¹³

The second quoted passage appears to go still farther out on the same limb. The addition of “just and reasonable” to the statute is simply ignored, and the removal of “fair and equitable” is said to make § 403(c) the *only* surviving standard for judging complaints. This argument is refuted not only by the text of § 3622(b)(8) but by the complaint provision itself: any interested person may file a complaint alleging violation of “sections 101(d), 401(2), *403(c)*, 404a, or 601, or this chapter [i.e., chapter 36]” (italics added). Section 403(c) cannot be both (i) one coordinate member of a class of provisions grounding complaints and (ii) the sole standard for judging a complaint.¹⁴

¹² Id., p. 9.

¹³ PostCom does characterize the price cap as the only “absolute” statutory limitation on the Service’s discretion; but this qualification does not save the argument. That “just and reasonable” may be (by comparison with the relatively calculable outcomes of the price cap) a somewhat flexible standard does not make it vacuous. Indeed, the price cap itself is not quite an “absolute” standard, as § 3622(d)(1)(E) makes clear.

¹⁴ Reading § 3662 as PostCom suggests it be read would produce the strange result that, while the Commission would be required to set for proceedings a complaint raising material legal or factual issues of violation of, e.g., the workshare discount provisions [39 U.S.C. § 3622(e)] of PAEA, it could decide for the complainant only if it found that the violation was (also) an undue or unreasonable discrimination or preference.

All this suggests strongly that the proper way to interpret § 3622(b)(8) is neither by imitating practices under other statutes that use the terms “just and reasonable,” nor by extrapolating from a supposedly “basic” purpose of PAEA, but by seeking to give effect to all the provisions of the new legislation.

These provisions include not only § 3622(b)(8) itself, but § 101(d), carried over unaltered from the 1970 Act: “Postal rates shall be established to apportion the costs of all postal operations to all users of the mail on a fair and equitable basis.”

This presumably does *not* mean that the Commission must – or even meaningfully can, in most contexts – carry out the detailed cost attribution and allocation exercises required by former § 3622(b)(2) and (3).¹⁵ Where rates are determined in the first instance by a price cap, such proceedings would be academic at best. But the language is still present, even though “apportion the costs . . . to all users of the mail on a fair and equitable basis” cannot mean today what it would mean if it were identified with all the ratemaking directives of the 1970 Act. Instead, it should be taken to mean that even though ratemaking is no longer to be essentially cost-based, the costs of various products must be known¹⁶ and the rates charged must bear a relation to them that comports with recognized concepts of fairness and equity.

¹⁵ In this connection, it is worth noting that § 101(d) does not use the by now technical terms “attribute” or “assign” [cf. former § 3622(b)(3)], but the more general word “apportion.” So it does not follow that if § 101(d) is taken seriously as a statutory command [as it must be; see § 3662(a)] the Commission will be driven back to the time-consuming methods of cost and rate analysis needed under the 1970 Act.

¹⁶ Successful implementation of 39 U.S.C. § 3652 should insure that in fact they are known. Section 3622(c), of course, requires the Commission to take recovery of attributable costs into account in creating the ratemaking system.

PAEA also preserves former § 403(c), clearly an important statutory policy (though not the exclusive standard PostCom takes it to be). Like “just and reasonable,” the prohibition of undue or unreasonable discrimination or preferences has a substantial history in other statutory schemes. As the Commission noted in its Docket R87-1 Opinion,

Price discrimination can be thought of as objectionable simply when it does not promote economic efficiency, or, more broadly, because it does not treat similarly-situated purchasers in a substantially similar way. The latter judgment may be embodied in statute without any particular concern over what cases of price discrimination are efficient or the reverse. It is fair to say that the usual meaning of “undue discrimination” as used in ratemaking statutes [such as § 403(c)] is more oriented to the equitable than to the economic meaning. See *Transcontinental Bus System, Inc. v. CAB*, 383 F.2d 466, 482-486 (5th Cir. 1967), certiorari denied, 390 U.S. 920 (1968); *Wight v. United States*, 107 U.S. 512, 516-518 (1897). . . .^[17]

These two provisions are perhaps the most prominent, though not the only¹⁸, sections of PAEA that require a reading of § 3622(b)(8) that makes it fully effective. GCA’s earlier suggestions¹⁹ would help establish such a reading. That “just and reasonable” cannot be exhaustively defined in advance does not mean that it can be marginalized.²⁰

¹⁷ PRC Op. R87-1, ¶ 3012, fn. 3.

¹⁸ Section 404(b), providing the Governors’ power to establish classifications and rates and fees, requires “reasonable and equitable” rates and classes.

¹⁹ GCA Comments, pp. 4-7.

²⁰ It is true that the requisite broad treatment of this standard will at times require the Commission to “act like a judge.” That, however, seems – in some contexts other than the initial setting of price-capped rates – to be what PAEA contemplates. The clearest case is the complaint jurisdiction. Formerly, a complaint as to rate issues resulted in a recommended decision subject to the usual supervening powers of the Governors (including, particularly, the non-appealable power of rejection); a service complaint led only to a “public report.” The Commission’s § 3662 decisions are now final, subject only to judicial review. In addition, the Commission’s former quasi-legislative ratemaking authority has been superseded; under § 3662, if the Commission decides that a rate must be

Economic concepts and “just and reasonable” rates. One difficulty in using economic concepts to give content to “just and reasonable” for purposes of implementing PAEA is that they often focus on a single price rather than on the relationships between prices for different products. In discussing “fairness,” for example, the Office of the Consumer Advocate argues²¹ that

The Commission can take advantage of allocation rules that ensure that no product is charged less than incremental cost or more than stand-alone cost. Specifically, the Commission can rely on the Postal Service’s not charging a customer (or group of customers) more than stand-alone cost, as this would risk driving customers away and reducing profits. The pre-approved ratemaking methods described above guarantee that no customer (or group of customers) pays less than incremental cost.

One may agree with this analysis as a matter of theory²², while still questioning whether it could be relied on to produce a just and reasonable rate *schedule*. OCA does, correctly, point out the price cap would, in practice, prevent pricing up to stand-alone cost.²³ There is still a substantial question whether a rate schedule comprising products A, B, C, and D (assumed to have approximately similar demand characteristics) would be “just and reasonable” if product A were priced as near to stand-alone cost as the price cap would permit, while products

changed, it will be because an interested party has alleged and demonstrated a particular statutory violation. In short, the Commission’s task in this and related areas has become more analogous to that of a court. A relatively general standard such as “just and reasonable,” not confined to purely business or economic criteria, is entirely appropriate for such a task.

²¹ OCA Comments in Response to Advance Notice of Proposed Rulemaking on Regulations Establishing a System of Ratemaking, p. 16.

²² Indeed, in the same Opinion cited above, the Commission demonstrated the “fairness” component of the requirement that all products be priced above incremental cost (i.e., that prices be subsidy-free). PRC Op. R87-1. ¶¶ 3012-3013, especially fn. 2.

²³ *Id.*, p. 8, fn. 17.

B, C, and D were priced as near to incremental cost as the Service's revenue needs could accommodate. And this would be still more true if the same pattern persisted over a substantial series of annual changes. It is for reasons of this kind that GCA's initial comments emphasized²⁴ that the new ratemaking system must provide adequate scrutiny of the relationships between rates, alongside those between individual rates and the criteria of economic analysis, if it is to succeed in fulfilling the mandate of § 3622(b)(8).

Respectfully submitted,

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May 7, 2007

²⁴ GCA Comments, pp. 5-7.