

UNITED STATES OF AMERICA  
Before the  
POSTAL REGULATORY COMMISSION  
WASHINGTON, DC 20268-0001

Regulations Establishing System  
of Ratemaking

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Docket No. RM2007-1

OFFICE OF THE CONSUMER ADVOCATE COMMENTS  
IN RESPONSE TO SUPPLEMENTAL COMMENTS OF THE  
UNITED STATES POSTAL SERVICE ON THE  
CLASSIFICATION PROCESS  
(July 3, 2007)

The Office of the Consumer Advocate (“OCA”) hereby responds to the Postal Service’s comments concerning classification authority. The Postal Service asserts<sup>1</sup>

that pricing and classification are inherently interrelated [and] the Commission’s role over classification changes in the new regime should be commensurate with its role over pricing.

Ironically, the Commission relied on a similar argument in Docket No. MC79-3, claiming that its authority over pricing should be commensurate with its authority over classification changes.<sup>2</sup> The Court of Appeals rejected this argument, even though the Governors had adopted the Commission’s recommended decision<sup>3</sup> and the Board had

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<sup>1</sup> Supplemental Comments of the United States Postal Service on the Classification Process, June 19, 2007, at 3.

<sup>2</sup> PRC Op. MC79-3, May 16, 1980, at 16, 18 (hereinafter referred to as the “Red-Tag Proceeding”).

<sup>3</sup> Decision of the Governors, Docket No. MC79-3, August 15, 1980.

set an effective date for the implementation of “Red-Tag” surcharges.<sup>4</sup> As the court stated,<sup>5</sup>

Reader’s Digest Association, Inc., asserts that *classification and rate issues invariably overlap* and that the Governors would not have approved a red-tag classification unaccompanied by rate changes. Therefore, it is argued, a reasonable construction of the PRC’s classification authority under [prior] 39 U.S.C. § 3623(b) should include the authority to recommend rate changes without a prior request from the Postal Service. This argument fails, given the clear statutory distinction between classification and ratemaking procedures . . . .

The Postal Service’s current classification arguments also fail. As the Court of Appeals has stated,<sup>6</sup>

Although . . . mail classification and postal rate issues are often intertwined, the [Postal Reorganization] Act establishes separate, though parallel, procedures for considering each of them.

If anything, the PAEA separates ratemaking and classification farther apart than did the PRA. And, if anything, rate and classification issues are even more intertwined than at the time of the Red-Tag Proceeding, in 1980. But statutory language governing classification changes under the PAEA is crystal clear:<sup>7</sup>

Upon request of the Postal Service or users of the mails, or upon its own initiative, the Postal Regulatory Commission may change the list of market-dominant products under section 3621 and the list of competitive products under section 3631 by adding new products to the lists, removing products from the lists, or transferring products between the lists.

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<sup>4</sup> Reader’s Digest Ass’n, Inc. v. USPS, 656 F.2d 786, 789 (DC Cir. 1981).

<sup>5</sup> *Id.* at 790 (emphasis added; citation omitted).

<sup>6</sup> NAGCP v. USPS, 607 F.2d 392, 412 (DC Cir. 1979); cert. denied 444 U.S. 1025 (1980).

<sup>7</sup> 39 U.S.C. § 3642(a).

The “list of . . . products” referred to in section 3642(a) is *at least* as detailed as the current DMCS. Section 3642(b)(1) refers (in the singular) to “the price of such product.” Section 3642(c) refers to “subclasses *or other subordinate units*” as entities that may be moved between “lists.” Clearly, a “product” is not equivalent to a subclass if a “subordinate unit” can be moved from one “list of . . . products” to another. The lists obviously consist of more than subclasses. More precisely, the lists consist of all “subordinate units” that might conceivably bear a separate rate.<sup>8</sup>

As a practical matter, “ ‘pricing’ and ‘classification’ are essentially two sides of the same coin,” as the Postal Service states.<sup>9</sup> However, the Postal Service eliminated this practical reality from postal ratemaking when it agreed that the decision of its own governors in the Red-Tag Case was “absolutely” illegal.<sup>10</sup> And the PAEA perpetuates the split between ratemaking and classification authority in plain language.

Once it is recognized that the lists of products that the Commission is to maintain are at least as detailed as the current DMCS, the Postal Service’s plans to usurp the Commission’s authority become moot. In its June 19 Comments, the Postal Service describes a “framework” for classification changes that essentially repeals section 3642. The Postal Service states that it would make classification changes after consulting with mailers, but not with the Commission. The only Commission review would involve verifying that a price cap had not been breached by the change.<sup>11</sup>

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<sup>8</sup> See *id.* § 102(6).

<sup>9</sup> June 19 Supplemental Comments at 2.

<sup>10</sup> 656 F.2d at 790.

<sup>11</sup> June 19 Supplemental Comments at 12.

While the Postal Service's willingness to consult with mailers about classification changes is commendable, its attempts to circumvent statutory commands are not. If the Postal Service wishes to create a new product—such as a flat-rate box for First-Class Mail—the procedure for doing so is laid out in section 3642.<sup>12</sup> The 3642 product lists are to contain every “postal service” to which the Postal Service applies a separate rate because of cost or market characteristics. And these lists are maintained and modified solely by the Postal Regulatory Commission.

Respectfully submitted,

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<sup>12</sup> The flat-rate box is used by the Postal Service as an example of a “new service” that is not a “product”—*i.e.*, not a “postal service.” *Id.* at 13, n.37. Is a flat-rate box really not a “product” in ordinary parlance? Is a flat-rate box not precisely what is described in section 102(6)—“a postal service with a distinct cost or market characteristic for which a rate or rates are, or may reasonably be, applied . . .”? Will the Postal Service *not* apply a rate to its flat-rate box non-product? The Postal Service's construction of sections 102(6) and 3642 is so strained as to be absurd.

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