

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

REGULATIONS ESTABLISHING SYSTEM
OF RATEMAKING

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Docket No. RM2007-1

**REPLY COMMENTS OF THE MCGRAW-HILL COMPANIES, INC.
IN RESPONSE TO SUPPLEMENTAL COMMENTS OF THE UNITED STATES
POSTAL SERVICE ON THE CLASSIFICATION PROCESS**

The McGraw-Hill Companies, Inc. ("McGraw-Hill") hereby replies to the Supplemental Comments of the United States Postal Service on the Classification Process ("Supplemental Comments"), filed June 18, 2007.¹ McGraw-Hill submits that the terms of the Postal Accountability and Enhancement Act ("PAEA") mandate, or at least permit, prior Commission review and approval of any major classification change (which, under PAEA, the Postal Service appears to equate with rate design changes) that would affect most volumes of a market-dominant subclass and/or contravene direct Commission precedent that goes to the foundation of the subclass. A classic example would be a proposal to zone the flat editorial pound charge that has long been a mainstay of the Outside-County Periodicals subclass.

As the Postal Service recognizes, under §3642 of PAEA,² only the Commission

¹ In this context, McGraw-Hill also addresses related comments filed by the Postal Service and other parties in this docket.

² 39 U.S.C. §3642, as enacted by §203 of PAEA. References herein to the provisions of PAEA are to those provisions as codified in Title 39 of the United States Code Annotated.

may “change the lists 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.” 39 U.S.C. §3642(a). The term “product” is broadly defined under PAEA as “a postal service with a distinct cost or market characteristic for which a rate or rates are, or may reasonably be, applied”. 39 U.S.C. §102(6). The Postal Service acknowledges that “[r]ead solely in isolation, this definition could be interpreted as stating that individual rate categories are individual ‘products’”. Supplemental Comments at 6 (footnote omitted). Indeed, by its express terms, §3642 of PAEA may apply to “subclasses *or other subordinate units of the class of mail or type of postal service involved*” 39 U.S.C. §3642(c) (emphasis supplied).

The Postal Service understandably advocates a flexible interpretation of these statutory terms such that not every classification change for market-dominant mail need be subject to prior review and approval by the Commission under §3642 before it can be implemented. While acknowledging that removing a current subclass from the list of market-dominant products and replacing it with another would require prior review and approval by the Commission under §3642 (Supplemental Comments at 6), the Postal Service otherwise asserts that the term “‘product’ is a more fluid term than the old paradigm of ‘subclasses’ and ‘rate categories’ under the [superseded Postal Reorganization Act]”³ and “should be considered gradually over time.” Supplemental Comments at 7.

Perhaps the most concrete standard offered by the Postal Service in this regard

³ Reply Comments of the United States Postal Service on the Second Advance Notice of Proposed Rulemaking, filed July 3, 2007, at 37 (quoting and summarizing Supplemental Comments).

is its view that proceedings under §3642 should be “relatively infrequent and of significant scale, and ... not be used with respect to small-scale classification changes,” particularly for new services and rate categories, that would have a “vastly smaller financial effect ... than the annual general price change under the CPI-U cap.” *Id.* at 10.⁴ However, even for classification changes that are not “small-scale”, but rather involve “substantial restructuring” or “business process redesign”, the Postal Service does not suggest that it may need to seek prior review and approval of the Commission under §3642 of PAEA, but states only that it will “publicize long-term plans” and work with customers toward a smooth implementation. *Id.* at 12 n. 35.⁵ The issue thus presented is whether under §3642 of PAEA, the Commission should review and approve at least those classification changes that involve “substantial restructuring” and “long-term plan[ning]” before they are implemented by the Postal Service.

McGraw-Hill submits that among the rules that the Commission adopts to implement the objective of PAEA to “establish and maintain a just and reasonable schedule for rates and classifications” (39 U.S.C. §3622(b)(8)) should be a rule distinguishing major mail classification changes from relatively “small-scale” classification changes, and requiring prior review and approval by the Commission of major classification changes under §3642 of PAEA. The Postal Service itself has advocated such a distinction (Supplemental Comments at 10), as have several other parties (albeit for purposes of the information to be required of the Postal Service to

⁴ The Postal Service apparently proposes to provide the Commission with at least 45 days advance notice of all classification changes for market-dominant mail, even “small-scale” changes. Supplemental Comments at 12 & n. 36, 13 & n. 40. The Postal Service also states that it intends to solicit formal customer comment prior to providing such notice to the Commission. *Id.* at 12.

⁵ The Postal Service further recognizes that any classification change for market-dominant mail is subject to retrospective challenge in a complaint proceeding. *Id.* at 13.

show compliance with the class-wide average rate cap). For example, Advo has recommended that the Commission adopt a rule to “distinguish between major and minor changes” in rate design depending on whether the change is “mandatory and affects a significant portion of the class volume”.⁶ Other parties have likewise advocated prior Commission review and approval of classification changes for market-dominant mail.⁷

McGraw-Hill urges the Commission to adopt a rule that preserves its prerogative to review in advance any proposed classification change that would affect most volumes of a market-dominant subclass and/or contravene direct Commission precedent that goes to the foundation of the subclass.⁸ A classic example would be a proposal to zone the flat editorial pound charge that has long been a bedrock of the Outside-County Periodicals subclass. Indeed, in recently recommending major classification changes for Outside-County Periodicals in Docket R2006-1, the Commission emphasized the importance of the flat editorial pound rate both in moderating the adverse rate impact for many Periodicals mailers and in promoting statutory policies (unchanged under PAEA) to encourage widespread dissemination and diversity of editorial content (the defining

⁶ See Reply Comments of Advo, Inc. in Response to Second Advance Notice of Proposed Rulemaking, filed July 3, 2007, at 2. See also Reply Comments of Pitney Bowes Inc. in Response to Second Advance Notice of Proposed Rulemaking, filed July 3, 2007, at 6 (endorsing ANM/MPA-proposed “distinction between ‘structural’ changes in rate design (e.g., Periodicals) and non-structural changes in rate design”).

⁷ See Direct Marketing Association, Inc. Reply Comments Pursuant to PRC Order No. 2, filed May 7, 2007, at 5-6; OCA Comments in Reply to Those Filed in Response to Order No. 2, filed May 7, 2007, at 1, 9.

⁸ In addition to establishing such standards, the Commission’s forthcoming rules should also permit any party to petition the Commission for a ruling that a classification change planned or proposed by the Postal Service for market-dominant mail requires prior review and approval by the Commission, in the event that the Postal Service, under a debatable interpretation of such standards, may otherwise seek to implement such change without prior review and approval by the Commission. This would allow the Commission to refine the standards triggering such review on a case-by-case basis over time.

feature of the Periodicals class).⁹

Comments have been jointly filed in this docket (on June 18, 2007) on behalf of a number of leading national journals of opinion, culture and ideas (*The Nation et al.*), urging that the classification changes adopted for Outside County Periodicals in Docket R2006-1 will nevertheless have a disproportionate adverse rate impact on such publications and thus undermine their vital role in widely disseminating diverse editorial content that is essential to strong democracy – contrary to the very purpose of a separate mail class for Periodicals. McGraw-Hill sympathizes with these concerns, although it also respects the Commission’s ratemaking and classification process in Docket R2006-1. By the same token, in the event that the Postal Service were to undertake in the future to eliminate the flat editorial pound rate, thereby exacerbating the plight of those publications, a fair regulatory process should remain available to all parties concerned.

As demonstrated above, PAEA provides the Commission with ample authority to adopt regulations providing for prior review by the Commission before any such major classification change is implemented.¹⁰ Section 3622(a) of PAEA broadly mandates that the Commission “shall ... by regulation establish ... a modern system for regulating rates and classes for market-dominant classes.” The Commission is thus both empowered and required to undertake “the formulation of policy and the making of rules to fill any gap left, explicitly or implicitly, by Congress.” *Chevron U.S.A. v. Natural*

⁹ See Docket R2006-1, ¶¶ 5608, 5681, 5700, 5771.

¹⁰ Indeed, elimination of the flat editorial pound charge could conceivably splinter the Outside-County Periodicals subclass and force many adversely affected publications to seek alternative delivery (electronic or otherwise), thus potentially transforming that portion of the subclass into a new competitive product (and/or transforming the subclass into a different product) under §3642 of PAEA. It would make no sense to withhold prior regulatory review on the mistaken assumption that any and all harm could be undone retrospectively through a complaint proceeding. A complaint remedy would operate only prospectively. Prior review could avoid unnecessary disruptions for all concerned.

Resources Defense Counsel, Inc., 467 U.S. 873, 843 (1984) (citation omitted). The Commission’s rulemaking under §3622(a) of PAEA commands judicial deference so long as it reflects “reasonable accommodation of conflicting policies that were committed to the agency’s care by the statute”. *Id.* at 845 (citation omitted). The silence of the legislative history is “consistent with the view that the [agency] should have broad discretion in implementing the policies of the [statute].” *Id.* at 862. See also *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (“a very good indicator of delegation meriting *Chevron* treatment is express Congressional authorization to engage in the process of rulemaking”).

In this light, McGraw-Hill further submits that the Commission also has authority to issue a rule requiring the Postal Service to provide notice and explanation of rate increases below the class level that exceed the class-wide average rate increase (which is subject to the annual “rate cap”) by some significant measure, as proposed by American Business Media, Newspaper Association of America and others.¹¹ Such rule would appropriately balance conflicting objectives of PAEA by fostering predictability, stability, and transparency in ratemaking – making “rate shock” less likely – while otherwise preserving broad (but not totally unfettered) flexibility in ratemaking.¹² Such rule would not require any action by the Commission, but would permit its timely intervention in unusual circumstances in order to define the upper boundary of the ratemaking “zone of reasonableness” mandated by PAEA.¹³ Recognition of this

¹¹ See Reply Comments of The McGraw-Hill Companies, Inc. Pursuant to Order No. 2, filed May 7, 2007, at 4; Reply Comments of the Newspaper Association of America, filed May 7, 2007, at 7-9, 25-28.

¹² See Valpak Reply Comments in Response to Commission Order No. 15, filed July 3, 2007, at 3-5.

¹³ See Initial Comments of the United States Postal Service, filed April 6, 2007, at 19. Legislative history cited by the Postal Service supports broad residual authority of the Commission under PAEA to apply

residual authority would make less likely the scenario envisioned by Valpak in which postal rates for journals of opinion are raised to the point that they may be increasingly forced from the mailstream.¹⁴

Respectfully submitted,

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statutory ratemaking objectives and factors under §3622(b)&(c) to the extent necessary and feasible during the 45-day review period under §3622(d)(1)(C). See Reply Comments of the United States Postal Service, filed May 7, 2007, at 5. While the latter provision mandates Commission review of compliance with the class-wide average rate cap, it does not preclude the Commission from also considering basic compliance with other statutory ratemaking objectives and factors. Rejection of proposed rates on those grounds should seldom be necessary to the extent that greater frequency of rate changes provides the Postal Service with greater latitude to avoid “rate shock”. See *id.* at 18.

¹⁴ See Valpak Reply Comments in Response to Commission Order No. 2, filed May 7, 2007, at 13-19. McGraw-Hill agrees with Time Warner that the “requirement” under §3622(c)(2) of PAEA that each class of mail or type of mail service cover its attributable costs is but one among many “factors” to be taken into account under PAEA, and that in the case of Periodicals, it should be taken into account over time. See Reply Comments of Time Warner Inc. to Initial Comments in Response to Commission Order No. 2, filed May 7, 2007, at 30-33.